



Citation: *DB v Canada Employment Insurance Commission*, 2021 SST 392

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: D. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (417518) dated March 2, 2021
(issued by Service Canada)

Tribunal member: Katherine Wallocha

Type of hearing: Teleconference

Hearing date: April 8, 2021

Hearing participants: D. B. Appellant

Decision date: April 9, 2021

File number: GE-21-417

DECISION

[1] The appeal is dismissed. The Claimant lost his job as a result of his misconduct. This means he is disqualified from receiving employment insurance (EI) benefits.

OVERVIEW

[2] The Claimant worked on the caulking crew for a window installation company. He applied for sickness benefits on March 20, 2020. He received the Canada Emergency Response Benefits (CERB). On October 3, 2020, CERB ended and all claimants were transferred to regular EI benefits.

[3] The Claimant was disqualified from receiving regular EI benefits because the Canada Employment Insurance Commission (Commission) decided the Claimant lost his job due to his own misconduct. The Claimant requested a conversion to sickness benefits and it was approved. He received 15 weeks of sickness benefits.

[4] The Claimant then applied for regular EI benefits on January 16, 2021. On February 26, 2021, he requested that the Commission reconsider its decision. The Commission maintained its decision choosing to believe the employer. The employer says that the Claimant was let go because he was repeatedly absent from work with no notification.

[5] The Claimant disagrees. He says he was laid off due to the Covid-19 pandemic. He went back to work for a week in May 2020, to help the employer because no one was able to or wanted to. The Claimant says the employer did not like him and put the wrong information on the record of employment (ROE).

WHAT I MUST DECIDE

[6] Did the Claimant lose his job because of misconduct?

REASONS FOR MY DECISION

[7] To determine if the Claimant lost his job because of misconduct, I will first decide the reason why he was no longer working. Then I will decide if the reason for the Claimant's dismissal is considered misconduct under the law.

Why did the Claimant lost his job?

[8] The Claimant lost his job because he was absent from work without notifying the employer.

[9] Initially the employer provided an ROE indicating the Claimant's last day work was March 18, 2020, and the reason for issuing was due to illness or injury. A subsequent ROE dated June 3, 2020, indicates the Claimant worked from April 8, 2020, to May 26, 2020. The reason for issuing was "quit".

[10] The Claimant was contacted by the Commission and he indicated that he was laid off due to Covid-19. He said there was no work and everyone was laid off. He stated that his ROE should say shortage of work.

[11] The Commission contacted the employer who said the Claimant's story is not accurate at all. The Claimant no showed and since he did that multiple times and they did not hear anything, they dismissed him. The employer further stated that no one was laid off due to Covid-19.

[12] The Commission informed the Claimant of the employer's statement. He said the employer is lying. There was no work, the employer does not like him and he was not being scheduled. The Commission asked the Claimant why he said everyone was being laid off when the employer said no one was laid off. The Claimant said it was only his crew that was being laid off, not the most senior employees.

[13] The Commission called the Claimant's supervisor who is the same person the Claimant said was not scheduling him. The supervisor also stated that no one had been laid off because of Covid-19. He said he dismissed the Claimant because he was a no-show. His last message to the Claimant was, "I have no choice but to let you go, you

are never on time, your attendance is terrible, and you don't even call when you don't show up." The employer said the Claimant was well aware of the rules.

[14] The employer provided their policy regarding Reporting for Work/Absenteeism. The employer's policy states,

"Any employee who is absent from work due to sickness, injury, death of family or friend, or for any other reason, or if they will be late for their scheduled shift, must phone, email or text their immediate supervisor prior to the start of the shift with the reason for their absence. If these conditions are not met, [the employer] may consider that the employee has quit, and a termination may be issued."

[15] The employer also provided the Employee Working Hour List for May 2020, showing the Claimant "No-call/No-show" on May 12, 22, 27, 28 and 29, 2020. This working hour list also shows that the Claimant's start times are inconsistent.

[16] I asked the Claimant about the employer's information. He said the employer is not credible and his information cannot be trusted. I asked why his supervisor said the same thing as the employer, that no one was laid off due to Covid-19. The Claimant responded that the employer told the supervisor to say that.

[17] I asked the Claimant if he received the text message from his supervisor which said he had no choice but to let him go because he is never on time, his attendance is terrible and he does not call when he does not show up. The Claimant told me that he did receive it, but the employer made the supervisor say that. I asked him how he knew the employer forced his supervisor to send that message. He responded that the supervisor told him he had to or the employer would fire the supervisor.

[18] I asked the Claimant how he was informed that he was laid off. He said it was through text message, but he no longer has that phone, so he cannot provide proof of a lay-off.

[19] I do not find the Claimant's statements and testimony to be credible. The Claimant admits he returned to work for his employer, but said it was only for one week. However, the Claimant first told the Commission that everyone was being laid off. He then told the Commission only his caulking crew were laid off. At the hearing he told me that it was not until October 2020, when he learned that everyone except two were fired. The Claimant's story has not been consistent.

[20] Both the employer and the supervisor say that no one was laid off because of the Covid-19 pandemic. The employer provided the ROE and Employee Working Hour List for May 2020, to show that the Claimant worked for a longer period than one week and that he was absent from work without notification on multiple occasions. The Claimant wants the Commission and me to believe that the employer fabricated the ROE, and the Employee Working Hour List for May 2020, because the employer did not like him. I do not find that believable.

[21] I find the employer's evidence to be more credible. The ROEs show that the Claimant was off on sick leave for three weeks at the beginning of the pandemic. He then returned to work on April 8, 2020, in the construction industry that was not expected to remain closed because of the pandemic. While the Claimant said he did not work those hours, he confirmed to me that he was paid \$726.88 in vacation pay documented on the ROE dated June 3, 2020. This ROE also identified his last day of work as May 26, 2020.

[22] Further, the Claimant brought his girlfriend to the hearing as a witness. She confirmed to me that she saw the text message from the Claimant's supervisor that told the Claimant he was let go because of absenteeism. From this, I find the Claimant was not laid off from his employment. He was dismissed from his employment on May 26, 2020, because of absenteeism.

Is the reason for the Claimant's dismissal misconduct under the law?

[23] Yes, the reason for the Claimant's dismissal is considered misconduct under the law¹.

[24] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional². Misconduct also includes conduct that is so reckless that it approaches willfulness³. The Claimant does not have to have a wrongful intent for his behaviour to be misconduct under the law⁴.

[25] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility⁵.

[26] The Commission has to prove that it is more likely than not⁶ that the Claimant lost his job because of misconduct⁷.

[27] The Commission says that there was misconduct because the Claimant breached the employment relationship and was personally responsible for this breach. The Claimant willfully chose not to go to work for his scheduled shifts and did not notify the supervisor of his reason for being absent. This was solely the choice of the Claimant knowing what the consequences of his actions may be as he was briefed during his orientation. His actions were intentional and negligent to the point of being deemed a breach of an obligation of the contract of employment. The Claimant's continued absenteeism and not calling his employer with the reason for his absence constituted misconduct because his actions were deliberate and willful and were the direct cause of

¹ Section 30 of the *Employment Insurance Act* (EI Act) disqualifies claimants from being paid benefits if they lose their employment because of misconduct.

² This is explained in the Federal Court of Appeal (FCA) decision *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ This is explained in the FCA decision *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ This is explained in the FCA decision *Attorney General of Canada v Secours*, A-352-94.

⁵ This is explained in the FCA decision *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ The Commission has to prove this on a balance of probabilities which means it is more likely than not.

⁷ This is explained in the FCA decision *The Minister of Employment and Immigration v Bartone*, A-369-88.

his dismissal. The Claimant should have reasonably known that he risked being dismissed.

[28] The Claimant denies that he was late or absent from work without notifying the employer. He told me he knew the employer's policy that he had to report to his supervisor before his shift started if he was going to be late or absent. He told me that he and his supervisor had a different deal that as long as he showed up at a reasonable hour like 8:00a.m., he did not have to report when he was going to be late. He said he could leave early if he had completed his work.

[29] Since I have already found the Claimant's statements and testimony to not be credible, I believe the employer's information that shows the Claimant was not consistent in his start times, and he was a no-call no-show on May 12, 22, 27, 28 and 29, 2020.

[30] I find the Commission has proven that there was misconduct because the Claimant breached a basic duty to the employer to attend work at the scheduled date and time. By failing to go to work and without notifying the employer, the Claimant consciously and deliberately ignored the employer's policy on absenteeism. The Claimant admitted he knew the employer's policy so, he had to know that repeated absences without notification could lead to his dismissal. This is considered misconduct under the law.

CONCLUSION

[31] The appeal is dismissed. This means the Claimant is not entitled to receive EI benefits.

K. Wallocha
Member, General Division - Employment Insurance Section