



Citation: *RT v Canada Employment Insurance Commission*, 2022 SST 479

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

Decision

Appellant: R. T.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (457395) dated February 18, 2022
(issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Teleconference
Hearing date: May 12, 2022
Hearing participant: Appellant
Decision date: May 16, 2022
File number: GE-22-1083

Decision

[1] I am allowing the appeal. I agree with the Claimant.

[2] The Commission failed to provide sufficient evidence to prove that the Claimant lost his job due to misconduct. This means the Claimant is not disqualified from receiving regular Employment Insurance (EI) benefits for this reason.

Overview

[3] The Claimant stopped working on November 26, 2021. He applied for regular EI benefits and established a claim effective November 28, 2021.

[4] The Commission look at the reasons why the Claimant stopped working. It determined that the Claimant voluntarily left his job, without just cause. The Commission imposed an indefinite stop payment (disqualification). This means he is not entitled to regular EI benefits.

[5] Upon reconsideration, the Commission changed their decision. It decided that the Claimant lost his job due to misconduct and maintained the disqualification.

[6] The Claimant appeals to the Social Security Tribunal (Tribunal). He says he lost his job after he arranged to take two days off for vacation. He had to take the days off to straighten out his finances after his employer failed to pay him for Remembrance Day.

Matter I have to consider first

[7] The Tribunal identified the Claimant's employer as a potential added party to the appeal. It sent a letter to the employer asking if it wanted to be an added party.¹ To be an added party, the employer has to show it had a direct interest in the appeal. The employer did not respond to the Tribunal's letter. As there is nothing in the appeal file to indicate the employer has a direct interest in the appeal, I have decided not to add it as a party to this appeal.

¹ See the GD5-1 to GD5-4.

Issues

[8] Did the Claimant voluntarily leave or did the employer dismiss him?

[9] Did the Claimant's conduct lead to his loss of employment?

[10] If so, does that conduct constitute misconduct?

Analysis

[11] In some cases, the evidence may make it unclear as to the cause of a Claimant's unemployment. This said the law has established that what I must deal with is the decision that the Commission made, not that which it might and perhaps, in an exercise of common sense, should have made.²

[12] In this case, the Commission considered how the Claimant's job ended and imposed a disqualification. Initially, the Commission disqualified the Claimant from receiving EI benefits because it determined that he voluntarily left his job without just cause. Upon reconsideration, it maintained the disqualification but determined his employer dismissed him due to misconduct. So, the issue I must determine is whether the Claimant is disqualified from receiving regular EI benefits.

[13] Parliament linked disqualifications for voluntary leaving and misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act). So if I interpret the facts in a slightly different manner, to conclude that the case is one of dismissal rather than one of quitting (voluntary leaving), I don't stray from the subject matter I am called upon to consider, which is a disqualification.³

² See *Hamilton v. Canada (Attorney General)*, A-175-87.

³ See *Canada (Attorney General) v. Easson*, A-1598-92.

Did the Claimant voluntarily leave or did the employer dismiss him?

[14] The law states that when determining whether a claimant voluntarily left their employment, the question to be asked is whether the claimant had a choice to stay or to leave.⁴

[15] In this case, I find that the employer dismissed the Claimant. This is because the Claimant didn't have a choice to stay employed.

[16] The parties agree that on November 26, 2021, the employer told the Claimant that he was issuing the Record of Employment (ROE). He also told him to remove his toolbox. This was in response to the Claimant's text message stating that he had just let his supervisor (B.) know that he wasn't going to be at work on Monday and Tuesday because he had a cash job.⁵

[17] The Claimant says that he always planned to return to work as soon as he finished the cash job. This is why he asked for two days' vacation. But right after he received the text message saying he had to remove his toolbox, the owner called his supervisor. He asked to speak with the owner. He says the owner was "hot-headed" and was "really upset." He asked the owner what his text message meant. The owner said that he no longer had a job because he wasn't coming to work when scheduled.

[18] Based on the evidence, as set out above, I find the employer dismissed the Claimant. I must now determine whether there is sufficiently detailed evidence to know whether the Claimant acted in the manner that he is accused of. If the Claimant acted in this manner, then I will make a determination whether, in these circumstances, this behaviour is considered misconduct.⁶

⁴ See *Canada (Attorney General) v. Peace*, 2004 FCA 56.

⁵ See pages GD2-11 and GD3-27.

⁶ See *Joseph v Canada (Attorney General)*, A-636-85.

Did the Claimant's conduct lead to his loss of employment?

[19] I don't have to determine whether the dismissal was justified. My role is solely to determine whether the Claimant committed the action he is accused of, and whether that action amounts to misconduct within the meaning of the Act.⁷

[20] The parties agree that the Claimant sent a text message to the owner on November 26, 2021. This message states that the Claimant let B. (his supervisor) know that his pay is 8 hours short. So he's not going to be in Monday and Tuesday because he was getting cash work.

[21] The Commission states that the Claimant didn't request time off, he simply told his employer he wouldn't be in. The Commission relies on the owner's statement that they were all booked up, weeks in advance. The employer determined it wasn't right that the Claimant said he wasn't coming in because he had other work lined up. So he arranged to issue his ROE and told him to remove his toolbox.

[22] At the hearing, the Claimant explained in detail how, just before payday, he heard a rumour from the finance person that he wasn't going to be paid for Remembrance Day. He spoke with B., his supervisor, about his concerns. The supervisor spoke with the owner the day before payday. The owner said they didn't have to pay him for this day because it isn't a statutory holiday in his province.

[23] The Claimant says it was a huge surprise that his employer wasn't going to pay him for Remembrance Day. He was expecting to be paid because the shop was closed on Thursday, November 11, 2021. He says his employer paid him for this holiday in 2020 but didn't tell him he wouldn't be paid for it in 2021.

[24] The Claimant says that no one gave him notice that he wasn't going to be paid for Remembrance Day. He didn't learn about this until a day or two before payday. If his employer gave him notice about this, he would have asked to work extra time or found some weekend work to ensure he received a full pay cheque.

⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[25] When the Claimant learned that his pay was going to be short eight hours, he had to figure out how he was going to pay his rent and bills that were due the following week. He says he had claimed bankruptcy a year and a half earlier so he couldn't miss any of his payments. This is why he arranged to do some work for cash on Monday and Tuesday, (November 29 and 30, 2021). He spoke with his supervisor, B., about taking these two days off as holidays. The supervisor said, "yes, do what you got to do" and told him to send a message to the owners.

[26] The Claimant says that in the past when he needed vacation time he would just speak to his supervisor about it. If they had jobs scheduled then one of the owners would come in and cover his shifts. So this time when his supervisor said yes, he sent a message to the payroll person to give her the heads up that he was going to need vacation pay for the Monday and Tuesday. He also sent the owner the message to let him know he needed to take two days' vacation.

[27] The Claimant disputes the Commission's statement that he could have asked to work more hours for the employer to make up for the day he wasn't paid. He says that if he did the extra work for the employer he wouldn't get paid until two weeks later on his next pay cheque. His rent and bills were due the following Tuesday, on November 30, 2021, so he needed to be paid right away. This is why he accepted the cash job.

[28] I found the Claimant's detailed description of what occurred on November 26, 2021, to be credible and probable given the circumstances he presented during the hearing. I believe him when he said that he never anticipated his employer would fire him for taking these two days off as vacation. If he had known that, he says he would have called in sick to avoid losing his job.

[29] The Claimant was forthright and admitted that he realizes now how his text message might have upset the owner. In hindsight, he says that he would have worded the message differently to explain his situation better.

[30] I will now determine whether the Claimant's actions of telling the owner he wasn't going to be into work on Monday and Tuesday, constitutes misconduct.

Does the Claimant's conduct constitute misconduct?

[31] No. I find the Commission failed to provide sufficient evidence to prove the Claimant's conduct constitutes misconduct.

[32] The definition or construction of the word misconduct is a question of law.⁸ However, whether the Claimant's actions or omissions are of such a nature as to fall within the purview of misconduct is a question of fact.⁹

[33] The law states that the misconduct must be the reason for the dismissal and not an excuse for the dismissal.¹⁰ It is not necessary that there be wrongful intent for behaviour to amount to misconduct under the Act.¹¹ However, in order for a disqualification from EI benefits to be imposed, misconduct requires proof of a mental element of wilfulness, or conduct so reckless as to approach wilfulness.¹²

[34] There will be misconduct where the conduct of a claimant was wilful, in the sense that the acts, which led to the dismissal, were conscious, deliberate or intentional. Put another way, there will be misconduct where, the Claimant knew or ought to have known there was a real possibility that his conduct would result in dismissal.¹³

[35] I disagree with the Commission when it states that the Claimant had a reasonable alternative to discuss the situation with his employer or that his actions constituted misconduct. This is because the Claimant had discussed the situation with his supervisor, B., as stated in his text message. I believe the Claimant when he said that B. said do what he had to do and make sure to send a message to the owner.

[36] There is no dispute that the employer didn't pay the Claimant for Remembrance Day in 2021. The owner told the Commission this during their December 30, 2021,

⁸ See *Canada (Attorney General) v Tucker*, A-381-85.

⁹ See *Canada (Attorney General) v Bedell*, (1984) 60 N.R. 115.

¹⁰ See *Davlut v. Canada (Attorney General of Canada)* A-241-82.

¹¹ See *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Tucker*, A-381-85.

¹² See *Canada (Attorney General) v Tucker*, A-381-85.

¹³ See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

telephone conversation.¹⁴ But, there is no evidence that the Commission clarified whether the employer failed to give the Claimant notice that they wouldn't be paying him for this holiday day, as they had done in the past.

[37] Instead, the Commission focused on the fact that the Claimant sent a text to the owner on Friday saying he wouldn't be in on Monday and Tuesday. It says this is misconduct because an employee is expected to show up for work unless they are authorized to be off. But the Commission failed to recognize that the Claimant had spoken to his supervisor B., as stated in the text message.

[38] If I had determined this was a case of voluntary leaving, which I have not, I still would have found in the Claimant's favour. This is because an employer and employee have a duty to each other. In this case, the employer breached that duty first when he closed the shop on Remembrance Day and didn't tell the Claimant he wouldn't be paid for this day, as he had been in 2020. This left the Claimant with a pay cheque that was short eight hours pay. So he had to scramble to figure out a way to meet his financial obligations that were due on November 30, 2021. By acting unilaterally without notice to the Claimant, the employer altered the terms of employment, as they had existed previously, which would constitute just cause.¹⁵

[39] I find that the Claimant could not reasonably foresee that his employer would dismiss him for these actions. I believe him when he said he didn't know he would be fired when he arranged to take two vacation days on Monday and Tuesday, after learning his pay cheque was short eight hours' pay.

[40] The Claimant spoke with his supervisor, B., and explained how he needed the money to pay his bills. He arranged to do some work for cash so he asked for vacation. B. told him to do what he needed to do and send a message to the owner, which he did. He also sent a text to the payroll person to alert her that he would be claiming two

¹⁴ See page GD3-18.

¹⁵ See CUBs 18009 and 33370.

vacation days on his timesheet. He asked to speak with the owner when he called B. He tried to clarify his situation but the owner was too upset and had already fired him.

[41] Based on the evidence, as set out above, I find that the Claimant's actions lack the mental element of wilfulness. I accept that in these circumstances the Claimant didn't know, or ought not to have known, that his actions of arranging two days' vacation would result in his dismissal. Therefore, the Claimant's conduct doesn't constitute misconduct. Accordingly, the Claimant is not disqualified from regular EI benefits, for this reason.

Conclusion

[42] The appeal is allowed.

Linda Bell
Member, General Division – Employment Insurance Section