



Citation: *MM v Canada Employment Insurance Commission*, 2022 SST 609

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (461518) dated March 26, 2022
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: May 25, 2022

Hearing participants: Appellant

Decision date: June 21, 2022

File number: GE-22-1199

Decision

[1] I am allowing the Claimant's appeal.

[2] I find that the Commission did not prove that the Claimant voluntarily left his job. It did not prove that he was dismissed for misconduct either.

[3] This means that the Claimant is not disqualified for either reason from receiving unemployment insurance (EI) regular benefits.

Overview

[4] The Claimant lost his job as a security guard/concierge at a condo building after he complained about money the employer owed him in a public area of the condo. The Commission says the Claimant left voluntarily. He disagrees. He says he was dismissed.

[5] You are disqualified from receiving EI benefits if you leave your job voluntarily without just cause *or* if you are dismissed for misconduct.¹ The end result is the same.

[6] The Commission accepts the employer's statement that the Claimant voluntarily left his job based on his email asking for his Record of Employment (ROE) and saying he wanted nothing more to do with the company. So, the Commission decided that the Claimant was disqualified from receiving regular benefits. It says he cannot get these benefits after his sickness benefits ended on February 5, 2022.

[7] The Claimant says the employer dismissed him; it cancelled his shifts and did not allow him to return to work. He says he would never have quit since he has to support his family overseas, including a child with autism.

The issues I must decide

[8] Did the Claimant voluntarily leave his job? If so, did he show that he had no reasonable alternative to leaving?

[9] Or, did the employer dismiss the Claimant? If so, did the Commission prove that the reason the employer dismissed him amounts to misconduct?

¹ S 29 and s 30 of the *Employment Insurance Act* (EI Act) explain this disqualification.

Analysis

[10] To decide whether the Claimant had just cause for voluntarily leaving his employment, I have to answer two questions. First, did the Commission show that he left voluntarily? Second, if he left of his own free will, did he have just cause for doing that?

[11] To show just cause, you have to prove that, considering all the circumstances when you quit, you had no reasonable alternative to leaving at that time.

[12] If the reason a claimant's job ended is unclear, I have to decide if this was a case of voluntary leaving *or* if it was due to a dismissal. So, if I find that the Claimant did not leave his job voluntarily, I must then consider if he was dismissed for misconduct.

[13] To decide whether the Claimant lost his job because of misconduct, I have to answer two questions. First, why he was dismissed? Second, does the law consider that reason to be misconduct?

[14] To prove that it was misconduct, the Commission has to show that i) the Claimant's actions were conscious and wilful; ii) he was dismissed for failing to fulfil his duty to his employer; and iii) he knew, or should have known, that he would be dismissed.²

[15] I will first look at the issue of voluntary leaving.

The Claimant did not leave voluntarily

[16] I find, on a balance of probabilities, that the Claimant did not voluntarily leave his job. To decide this, I considered whether he had a choice to stay or to leave.

[17] I find that the Claimant had no choice since the employer was filming him on his last day. It had already decided before any review that he had violated company policy.

[18] It is up to the Commission to prove that the Claimant left voluntarily. If it can do this, then the burden of proof shifts to the Claimant to show just cause.³

² *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ *Canada (Attorney General) v White*, 2011 FCA 190.

[19] The Commission accepted the employer's statement that the Claimant quit his job based on the angry email he sent on his last day of work. The Commission says this email shows that he quit.

[20] The Claimant disputes that he sent the employer that email. He says he could not have sent it since employees were not allowed to use their phones to send emails while on duty. He says anything he sent was after the employer had already dismissed him.

[21] The Claimant says the staff person he argued with at the front desk told him he would be dismissed. The Claimant says she threatened that he might not get the pay he was owed for training and orientation days. He says he was dismissed later that day.

[22] There is evidence of an email from the Claimant to his employer sent at 12.52pm that day. So, I find it more likely than not that he sent this message. It included the following wording:

"I expect the ROE PRONTO & THE WAGES THAT I EARNED...
MY FAMILY AND I DO NOT WANT ANY PART OF YOUR COMPANY (*sic*)."⁴

[23] The evidence also shows that the employer sent the Claimant an email on that same day—January 22, 2022—at 2.50pm. The employer's email said:

"Please be informed your shifts are canceled until we can figure out about your pay situation.

I can not have you raising your voice at the front desk in front of residents and you have also violated the privacy policy by sharing company emails and conversations with other colleagues, your employment is currently being reviewed (*sic*).

You are not required to come to work until further notice."⁵

[24] This sequence of emails shows that the Claimant's message to the employer was sent before the employer's email to him. His first message seems to show that he quit before the employer cancelled his shifts. He sent a similar angry email at 3.01pm.

⁴ See GD3-20 to GD3-21. He repeated some of his wording in the second email he sent at 3.01pm that day.

⁵ See GD3-26.

[25] However, I accept the Claimant's sworn testimony that he was dismissed before the employer sent the email formally cancelling his shifts. I have given weight to his testimony that he was told he was dismissed while he was still at work. So, his first angry email was, more likely than not, in response to his dismissal; he did not provoke the dismissal.

[26] I find that this sequence of events is supported by the employer's comment that it put "Quit" on the ROE to keep the Claimant's employment record "spotless," as if it was doing him a favour.⁶ The Claimant argues that there would be no point in the employer making this comment unless it had actually dismissed him. I agree.

[27] It was up to the Commission to prove that the Claimant left voluntarily but I find that it did not meet its burden of proof.

[28] Since I find that the Claimant did not quit voluntarily, I do not need to consider whether he had just cause for leaving his employment. So, I will now consider whether he was dismissed for misconduct.

The Claimant was not dismissed for misconduct

[29] I agree with the Claimant that he was, more likely than not, dismissed because of his vocal argument at the front desk over money he says the company owed him.

[30] The employer told the Commission that the Claimant had raised his voice in front of the condo's residents. The employer says it has witnesses and video footage of the dispute to prove this. I agree such conduct would not be suitable given his job duties but the extent of his outburst or even whether he was provoked is not clear.

[31] The Claimant says he did not raise his voice. He says his usual voice is loud and there was an echo. The employer denies there was an echo. I cannot decide this point.

[32] However, from the tenor of his testimony at the hearing, I find that the Claimant's natural speaking voice does appear to be loud. If he also became agitated, the employer might well have felt that he was being too noisy and rowdy. The Claimant confirms that he was upset at the time of the dispute since he needs the money he was owed urgently.

⁶ See GD3-30.

[33] Based on the evidence, I find that the Claimant was dismissed because of the way he handled his complaint over his late pay cheque in front of the condo's residents.

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

[34] The reason for the Claimant's dismissal is not misconduct under the law.

[35] To be misconduct, the conduct has to be wilful. This means that it was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless it is almost wilful.⁸ The Claimant does not have to have wrongful intent (in other words, he does not have to intend to do something wrong) for his behaviour to be considered misconduct under the law.⁹

[36] There is misconduct if the Claimant knew or should have known that his conduct could prevent him carrying out his duties according to the company's policies. There is misconduct if there was a real possibility that he would be dismissed because of this.¹⁰

[37] The Commission has to prove that the Claimant lost his job due to misconduct. It has to prove this on a balance of probabilities. This means it must show it is more likely than not that the Claimant lost his job due to misconduct.¹¹ But the Commission only considered voluntary leaving. It not make any submissions about misconduct.

[38] Since disqualification for misconduct is such a harsh sanction, I need clear evidence that the Claimant's actions amounted to misconduct. The Commission did not submit this evidence so it cannot prove that there was misconduct.

[39] For example, the Commission did not request or submit the employer's video footage and witness statements. So, I cannot tell whether the Claimant's actions amounted to misconduct. I acknowledge that his naturally loud voice may have alarmed the condo residents who heard him arguing. This might have made him unsuitable for his job. But, even if his voice was loud, this was not conscious or deliberate behaviour.

⁷ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima*, above.

¹¹ *Minister of Employment and Immigration v Bartone*, A-369-88.

[40] The Commission did not obtain or submit the employer's privacy policies so it cannot show that the Claimant breached them. The Commission did not question the employer's statement that it had its cameras tracking the Claimant on his last day of work. It says the footage shows him sharing confidential emails and discussing confidential matters with other employees. I doubt that the employer's cameras could have captured what he was saying or sharing from his emails.

[41] As well, the Commission did not request or submit the company's disciplinary policies. This weakens the Commission's argument that the employer cancelling the Claimant's shifts and telling him not to return only meant that he was under review.

[42] The Commission did not prove that the Claimant had seen or signed any company policies. So, the Commission has not shown that the Claimant, a new employee, should have known that he would be dismissed.

Did the Claimant's job end because he left voluntarily or because he was dismissed due to misconduct?

[43] Based on my findings above, I find that the Claimant did not voluntarily leave his job. I find that he was dismissed, but the reason for his dismissal does not amount to misconduct.

Conclusion

[44] The Commission has not proved that the Claimant voluntarily left his job. It has not proved that he was dismissed for misconduct either.

[45] So, the Claimant is not disqualified from receiving EI regular benefits.

[46] This means that I am allowing the Claimant's appeal.

Lilian Klein
Member, General Division – Employment Insurance Section