



Citation: *RB v Canada Employment Insurance Commission*, 2022 SST 939

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

Decision

Appellant: R. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458439) dated February 24, 2022 (issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: May 31, 2022

Hearing participant: Appellant

Decision date: August 22, 2022

File number: GE-22-1256

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he violated its Alcohol and Drug policy by failing multiple drug tests. He also failed to meet the conditions of his continued employment agreement by not following up with the employer's Substance Abuse Professional.

[4] Even though the Claimant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. The Claimant says that the employer actually let him go because of his absenteeism. Further, he says he was wrongfully dismissed for drug use because he is prescribed medical marijuana, and other employees also use marijuana.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matter I have to consider first

Potential added party

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

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

Analysis

[8] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[9] I find that the Claimant lost his job because he violated the conditions of his continued employment agreement

[10] The Claimant and the Commission don't agree on why the Claimant lost his job.

[11] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant violated the employer's Alcohol and Drug policy. He was offered a return to work as long as he met three conditions of his continued employment. However, he breached two of the conditions by failing a subsequent drug test and by not following up with the Substance Abuse Professional (SAP).

[12] The Claimant disagrees. The Claimant says that the real reason he lost his job is because of his absenteeism. He says that he missed a lot of work because of his family situation. He was involved in an ongoing absenteeism program at work. This involved stages of the program which increased with his absences. The Claimant said that he was close to be dismissed for his absences several times but was able to improve his attendance so that he was not terminated.

[13] The Claimant said that the employer used his marijuana use as an excuse to terminate him. He says that other employees and managers use marijuana and no one else has been dismissed, so it is not likely that the Claimant's marijuana use was the real cause of his dismissal.

[14] The Claimant testified that his employer targeted him for dismissal. He recounted that he had previously worked for the employer and had been dismissed when he complained about asbestos in the workplace. Then, when he was called back to work, the employer deliberately scheduled him for shifts that conflicted with his school schedule. After that, he said his employer was always threatening to fire him because of his attendance issues.

[15] The Claimant said he had meetings with the employer on his attendance "when COVID first started." I take this to mean that the meetings were in the spring of 2020, when the COVID-19 pandemic was declared globally. He said that he had a lot of personal issues and called in sick quite often. So, his employer met with him.

[16] The Claimant says that he uses medical marijuana to treat several mental and physical health conditions. He has a prescription for his marijuana use, though he sometimes bought marijuana from non-medical sources because it was cheaper.

[17] The Claimant said that he never hid his marijuana use. Even though he never told his employer directly about his marijuana use, he felt that his managers would have been aware of it because he's used it for a long time. He told the Commission that he was sent home from work for smelling like marijuana six years ago, but hadn't had any further discipline since then.

[18] On April 27, 2021, the Claimant was given a drug test at work. He had attended work at 7:00 AM. Then, at 8:30 AM, his employer had brought him into the office and said that he had been reported for smelling like marijuana. He tested positive for marijuana on his drug test.

[19] In May 2021, the Claimant was assessed by a Substance Abuse Professional (SAP). He told the SAP that he uses medical marijuana for health reasons. The

Claimant said the SAP advised him to take time off work, so the Claimant went to the doctor and took a medical leave of absence until the end of June 2021. The employer said that he was suspended from April 27, 2021, to May 28, 2021, for violating the company's Drug and Alcohol Policy.

[20] On May 27, 2021, the Claimant met with the employer. The employer offered him a return to work agreement. It said that he could return to work if he met three conditions:

- The Claimant needed to undergo a return to duty test.
- He had to pass the return to duty test. In other words, he had to test under the threshold of being positive for marijuana.
- He had to make a follow-up appointment with the SAP.

[21] The Claimant agreed to the conditions of his continued employment. He did a return to work drug test and tested positive for marijuana again. He saw the SAP shortly after that test. He says the SAP told him that he could continue using marijuana, but he should stop smoking 12 hours before his shifts, to ensure he wouldn't test positive on drug tests.

[22] The Claimant said that he took another drug test and passed it. He was allowed to return to work. He was given another test on his first day back to work, and he passed that test as well. However, the following week, he was given another test and failed it. He said that he had not used marijuana for over 70 hours and that he tested barely above the threshold.

[23] The Claimant said that he contacted the SAP and asked the counsellor to put in writing that he was advised to stop using marijuana 12 hours before a test in order to be in compliance. The SAP refused to provide that in writing. The Claimant felt the counsellor wasn't trustworthy after that. So, he refused to book the follow-up appointment that was required by his return to work agreement.

[24] The employer dismissed the Claimant on July 28, 2021. In its termination letter it stated that the Claimant had agreed to the conditions of his continued employment. He tested positive for drugs on July 16, 2021, which shows that he has violated the company's Drug and Alcohol policy again. Further, he has failed to schedule a follow-up appointment with the SAP, which was one of the agreed-upon conditions of his employment.

[25] I find the Claimant was dismissed for violating the conditions of his continued employment agreement.

[26] Both the employer and the Claimant acknowledged that he had issues with attendance during his employment, but there is no evidence to support that the employer dismissed the Claimant for this reason.

[27] The Claimant testified that the employer warned him several times that he would be fired for missing work. However, the last time the Claimant was warned about his absenteeism was in spring 2020. He wasn't dismissed from his job until more than one year later.

[28] Further, the continued employment agreement indicates that the issue the employer had with the Claimant's job performance wasn't absenteeism, but the fact that he tested positive for marijuana while on duty.

[29] The continued work agreement didn't require the Claimant to be absent from work less. It didn't address the Claimant's work attendance at all. If the employer was concerned about the Claimant's absenteeism, this would have been a reasonable place to address it. The absence of any consideration to the Claimant's attendance in the continued employment agreement supports that this was not the conduct that caused the Claimant to be suspended and later fired.

[30] I find the timing of the Claimant's dismissal supports that he was terminated because he breached the conditions of his continued employment agreement. The Claimant signed the continued employment agreement on May 27, 2021, and confirmed his intention to abide by the conditions set out in the agreement on June 8, 2021. When

he tested positive for drugs on a subsequent drug test on July 16, 2021, and then refused to schedule a follow-up appointment with the SAP following that positive drug test, he was dismissed.

[31] I'm not satisfied that the Claimant has shown there was a connection between his absenteeism and his dismissal. The evidence before me supports that the Claimant failing several drug tests and not attending a follow-up appointment with the employer's SAP is the conduct that led to his dismissal. I find it is more likely that this was the real reason for his dismissal, and not an excuse.

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

[32] The reason for the Claimant's dismissal is misconduct under the law.

[33] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁴

[34] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.⁵

[35] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁶

[36] The Claimant says that there was no misconduct because his marijuana use was for medical reasons. He tried to reduce his marijuana use so that he wouldn't test

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

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

positive on his return to work drug tests, but even when he went 70 hours without using his prescribed marijuana, he still tested positive.

[37] I find that the Commission has proven that there was misconduct.

[38] The Claimant's testimony shows that he was trying to reduce his marijuana use to comply with the continued employment agreement. I put weight on his testimony that he tested barely above the threshold during his last drug tests.

[39] However, the Claimant willfully refused to schedule a follow up appointment with the SAP counsellor. This refusal was intentional, because he felt the counsellor wasn't trustworthy.

[40] But, the Claimant's return to work agreement required him to schedule a follow up appointment. If the Claimant felt he couldn't schedule a follow up because of his feelings towards the counsellor, he could have raised this issue with the employer and asked to be exempted from that condition of the agreement. He could have asked to be assigned to a different counsellor. The Claimant didn't do this. Instead, he chose not to comply with the requirements of his return to work agreement by not scheduling another appointment with the counsellor.

[41] It is clear from the evidence that the Claimant chose not to comply with the employer's return to work agreement. The Claimant knew that this was a condition of his continued employment. He needed to meet these conditions in order to continue working. Regardless, he intentionally chose not to comply with one of the stated conditions of scheduling a follow-up appointment with the SAP counsellor.

So, did the Claimant lose his job because of misconduct?

[42] Based on my findings above, I find that the Claimant lost his job because of misconduct.

Conclusion

[43] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[44] This means that the appeal is dismissed.

Catherine Shaw

Member, General Division – Employment Insurance Section