



Citation: *X v Canada Employment Insurance Commission and SR*, 2024 SST 1634

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: X

Respondent: Canada Employment Insurance Commission

Added Party: S. R.

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (681908) dated October 2, 2024
(issued by Service Canada)

Tribunal member: Katherine Parker

Type of hearing: Videoconference

Hearing date: December 13, 2024

Hearing participant: Appellant (the employer)
Claimant (S. R.)

Decision date: December 27, 2024

File number: GE-24-3688

Decision

[1] The appeal is allowed. The General Division agrees with the employer (Appellant).

[2] The employer 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).

[3] This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[4] The Claimant lost his job. The Claimant's employer (who is the Appellant in this appeal) said that he was let go because he was insubordinate, took too much time for breaks and lunch, and took home the company vehicle without permission. When the Claimant was told to return the vehicle and stop using it to drive back and forth to work, he refused.

[5] The Claimant disputes this happened, he says that he was tardy like anyone else, and that he had permission to take the vehicle home. He said that the employer didn't give him a chance to improve his performance or respond to the allegations. The Claimant says that the employer actually let him go without just cause and that he didn't willfully do anything wrong. He said there wasn't any progressive discipline, and he didn't know that he did anything to cause his termination.

[6] The Commission accepted the Claimant's reason for the dismissal. It decided that the Claimant didn't lose his job because of misconduct. Because of this, the Commission decided that the Appellant wasn't disqualified from receiving EI benefits.

[7] The employer requested a reconsideration and appealed the decision to allow the Claimant benefits.

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

Matter I have to consider first

The Appellant presented evidence during the hearing that wasn't in the file

[8] The employer presented evidence at the hearing that wasn't in the appeal file. The Appellant presented two written warnings and a letter written by the job supervisor outlining the issues that led up to the Claimant's termination. The Appellant sent these documents to me after the hearing, and I accepted them.² They are relevant to the appeal and the Appellant said he sent these documents to the Commission during the reconsideration stage.

[9] Accepting these documents causes no prejudice to any party and are important to the Appellant's appeal.

Issue

[10] Did the Appellant lose his job because of misconduct?

Analysis

[11] 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?

[12] I find that the Claimant lost his job because he was insubordinate and took the company vehicle home after being told not to.

[13] The Claimant and the Appellant (the employer) don't agree on why the Claimant lost his job. The employer says that the Claimant was defiant and refused to stop taking the company vehicle home. It said that the Claimant had been abusing company time

² See GD7.

by taking extra long lunch breaks, cigarette breaks and water breaks. It said he had been leaving job sites early, and once he didn't show up to work and didn't call.

[14] The employer provided written warnings in GD7. One warning was for abuse of time, and the second warning was for being absent without calling. It also provided a written summary of incidents from the supervisor outlining issues of insubordination.

– **The Final Incident—refusal to stop taking the company vehicle home**

[15] The Claimant was given permission from the head office to take the vehicle home on April 24, 2024, because the job site was close to his residence. The Claimant continued taking the vehicle home at night even when the job site changed without his supervisor's knowledge. The supervisor found out about this on May 9, 2024, when the Claimant called in sick, and the employer was missing the vehicle.

[16] The Claimant was told by his supervisor around May 9, 2024, to stop taking the vehicle home every night. The Claimant refused and said no one (at head office) told him to stop taking it so he would continue.

[17] The Claimant continued using the vehicle and taking it home at night. No one discovered this because the Claimant and his supervisor worked different hours and in different locations. The Claimant was trusted by his employer to work his hours and respect the policy about using company vehicles.

[18] The Claimant was told he was going to work at the Villa on Monday, May 27, 2024. He was told to leave the vehicle at the office on Friday, May 24, 2024 because his colleague needed the vehicle for his job site on Monday. The Claimant refused and took the vehicle home. This was the final incident that resulted in his termination.

– **What the Claimant says**

[19] The Claimant disagrees. The Claimant says that the real reason he lost his job is that he talked to a colleague about lay-offs.³ He said that the employer was illegally

³ See GD4-2. The Claimant said in the hearing that the employer illegally discussed lay-offs. However, he couldn't say what law was being broken or how it was illegal.

discussing lay-offs. He spoke to a colleague about it and believed the employer wanted him gone.

[20] The Claimant said that he only received one warning on May 9, 2024, because he didn't call in when he was sick.⁴ He said he forgot to call.

[21] The Claimant denies he got a warning letter on February 1, 2024, about being taking too many breaks and excessive use of his personal phone. This warning is on GD7-2, and it was discussed at the hearing. The February 1, 2024, warning indicates that termination was possible if the behaviours continued.

[22] The evidence provides a clear indication that the Claimant received the warning on February 1, 2024. Even though he refused to sign it, the employer documented the warning and put it on his file. I accept the employer's evidence that the Claimant received two warnings. The Claimant's testimony about his disciplinary track record isn't credible.

[23] I find that the Claimant was terminated for insubordination.

- The Claimant had demonstrated poor behaviour while working and abused his hours of work by taking too many breaks, leaving early, and using his phone excessively. He received a disciplinary warning dated February 1, 2024.
- The Claimant didn't show up for work and didn't call in which left the employer without a vehicle and a worker. He received another disciplinary warning dated May 9, 2024.
- The Claimant was given permission to take the company vehicle home for one night because the job site was close to his home. He continued taking the vehicle home without permission. When he was told by his supervisor to stop, he said no because it didn't come from head office.

⁴ See GD7-3.

- The Claimant's behaviour of leaving work early, and taking too many breaks continued. He was asked to report to the Villa for work on May 27, 2024, and leave the company vehicle at the office for a colleague who would need it. He refused and took the vehicle home on May 24, 2024, in direct defiance of an order.
- A colleague had to pick up the vehicle on a Sunday so he would have it for the work the next day.

[24] After a careful review of the evidence, the Claimant was terminated for insubordination that followed months of warnings about abuse of time, and refusals to follow direction. The final incident was the refusal to leave the company vehicle for a colleague. This breached the trust between employer and employee. The employer decided that the final incident was serious enough it could no longer employ the Claimant.

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

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

[26] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[27] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of performing his duties toward his employer and that there was a real possibility of being let go because of that.⁸

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

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[28] The Appellant has to prove that the Claimant lost his job because of misconduct. The Appellant 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.⁹

[29] The Appellant says that there was misconduct because the Claimant received two warnings before the final incident when he breached the trust of the employer. The first warning on February 1, 2024, indicated that continued behaviour could result in termination. The Claimant was told not to take the vehicle home on May 24, 2024.

[30] The Claimant says that there was no misconduct because he never received progressive discipline. He denies that he received a warning on February 1, 2024. He said he had permission to take the vehicle home and he told the Commission that his employer accused him of stealing the vehicle.

[31] There is no requirement that I must accept or reject the evidence of a person in its entirety. None or part of a person's evidence may be accepted, and different weight may be attached to various parts of the testimony.¹⁰

[32] There are, certain principles and tools that have emerged from the law that can assist me when assessing credibility:¹¹

- The ability to consider inconsistencies and weaknesses in the person's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the person's testimony and the testimony of others.
- The ability to review independent evidence that confirms or contradicts the person's testimony.
- The ability to assess whether the person's testimony is plausible.¹²

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ *R. v. D.R.*, 1996 CanLII 207 at para. 93 and *R. v. J.H.* (2005), 2005 CanLII 253 (ON CA), at para. 44).

¹¹ *Novak Estate (Re)*, 2008 NSSC 283, at para. 36.

¹² *Faryna v. Chorny*, 1951 CanLII 252 (BC CA).

- It is possible to rely upon the behaviour of the person, including their sincerity and use of language, and it should be done with caution.¹³
- Special consideration must be given to the testimony of people who are parties to proceedings; it is important to consider the motive that people may have to fabricate evidence.¹⁴

[33] I find that the Appellant has proven that there was misconduct, because it provided evidence of the warnings, and a letter from the Claimant's supervisor outlining a history of issues and insubordination.¹⁵

- The Claimant provided contradictory testimony about the warnings he received. However, the evidence shows that the employer disciplined the Claimant, and, in all probability, the Claimant isn't telling the truth. I give more weight to the employer's evidence.
- The Claimant told the Commission that his employer accused him of stealing the company vehicle. This isn't true. I see no evidence of this allegation and the employer testified that it never said the Claimant stole the vehicle. The Claimant exaggerated the truth to convince the Commission that he was wrongly terminated. This weakens the Claimant's testimony, and it is another reason I give less weight to his story.
- The Claimant got a warning letter on February 1, 2024, it said that termination was possible. Although the Claimant said he didn't get this letter, but the employer provided proof of this letter in GD7.
- The Claimant received a second disciplinary warning on May 9, 2024.

¹³ *R. v. Mah*, 2002 NSCA 99, paras. 70-75).

¹⁴ *R. v. J.H.*, 2005 CanLII 253 (ON CA), paras. 51-56.

¹⁵ See GD7.

- The Claimant continued to defy orders even after he was warned and he abused the time he got paid to work by taking extra breaks and leaving early. He knew he could be terminated but he continued anyway.

[34] The Claimant didn't tell the truth during the hearing. about the warnings he received. Therefore, I give more weight to the employer's testimony and evidence. The Claimant breached the employer and employee trust when he took the company vehicle home without permission, and he was terminated as a result.

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

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

Conclusion

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

[37] This means that the appeal is allowed.

Katherine Parker
Member, General Division—Employment Insurance Section