



Citation: *ML v Canada Employment Insurance Commission*, 2021 SST 385

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

Decision

Appellant: M. L.
Representative: Colleen Evans

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (410703) dated January 11, 2021
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference
Hearing date: June 7, 2021
Hearing participants: Appellant
Appellant's representatives

Decision date: June 15, 2021
File number: GE-21-253

Decision

[1] I am dismissing the appeal. The Canada Employment Insurance Commission (the Commission) has proven that the Claimant lost his job because of misconduct. In other words, 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

[2] The Claimant lost his job on October 8, 2020. His employer says he was involved in workplace violence that breached their no violence policy. The Commission considered the information before them and initially decided that the Claimant did not lose his employment due to misconduct. The Commission started paying the Claimant regular EI benefits as of October 4, 2020.

[3] The Commission notified the employer of their decision. The employer requested reconsideration and submitted a video and documents to the Commission. The Commission conducted a review and changed their decision. They determined the employer had proven the Claimant lost his job due to misconduct. The Commission imposed a retroactive disqualification. This results in the Claimant having a \$6,213.00 overpayment of EI benefits.

[4] The Claimant appeals the reconsideration decision to the Social Security Tribunal (Tribunal). He says he did not have a chance to dispute the employer's accounting of the events. He has a learning disability so he cannot understand forms or processes. He says that employer requested reconsideration in bad faith because of his history with Worksafe BC.

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

Matter I have to consider first

Potential Added Party

[5] The Tribunal identified the Claimant's former employer as a potential added party to this appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and whether they wanted to be added as a party. The employer responded by stating that their company has an interest in the appeal.

[6] I have decided not to add the employer as a party to this appeal. There is nothing in the file indicating that my decision in this appeal will affect the employer's legal rights or will impose any additional legal obligations upon them.² Being interested or concerned about the effect of a decision differs from having a direct interest.³ Accordingly, the employer is not a party to this appeal.

Issues

[7] Did the Claimant lose his job due to 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 was involved in a physical altercation with a co-worker while at work. Engaging in a physical altercation at work is a breach of the employer's Non-Discrimination: Respectful Workplace Policy. This physical altercation occurred on October 8, 2020, while the Claimant was involved in his work duties.

² R. v N.T.C. Smokehouse Ltd., CA011962 (1991) (BCCA).

³ *University of B.C. Faculty Assn. v University of B.C.*, 2008 BCCA 376.

[10] The Claimant readily admits that he shoved his co-worker by placing his open hand on his co-worker's face shield and pushing him. He says his co-worker provoked him and his actions were an automatic reaction. He says he cannot recall the exact date that this altercation occurred but does remember that his employer told him to go home and wait for them to call him on Friday. He says that he knew as soon as he was told to go home that he was being fired. His supervisor called him the next day and told him he was fired.

[11] The Commission states the employer told them they dismissed the Claimant due to his involvement in a physical altercation with a co-worker, as captured on their surveillance video.⁴ The employer also told them that they have a zero tolerance policy for violence in the workplace.⁵

[12] I do not accept the Claimant's assertion that, if his physical altercation is determined to be misconduct then it is not the reason for his dismissal. I acknowledge that the Claimant had positive employee performance reviews and no prior disciplinary record. However, this does not change the fact that he lost his job on October 8, 2020, because he was involved in a physical altercation while at work, in breach of his employer's Non-Discrimination: Respectful Workplace Policy.

[13] The Claimant argues that the employer dismissed him because of his July 2020 claims for Worker's Compensation Benefits (WCB).⁶ He says he was off work for two weeks due to his injuries and returned on a graduated return to work at the end of August 2020. He states that WCB conducted an on-site risk evaluation on September 29, 2020, and he reached the threshold for long-term WCB on October 5, 2020.

[14] The Claimant speculates that based on his WCB claim, it was easier for the employer to dismiss him. He surmises that by firing him the employer no longer had to accommodate him or his reduced productivity and he would be less likely to pursue his

⁴ See the video labelled as GD03A.

⁵ A copy of the employer's Non-Discrimination: Respectful Workplace Policy is provided at GD3-40 to GD3-47, listing a release date of 10/16/2018. See also the Supplementary Record of Claim of the Commission's telephone conversation with the employer at page GD3-26.

⁶ See the Claimant's chronological list of events Exhibit C document at pages GD13-10 to GD13-12.

WCB claim once off the job site. He argues that the employer dismissed him after they took on a hostile and antagonistic attitude towards him when failing to provide adequate supervision on the factory floor, properly accommodating his injuries, and by appealing his WCB and EI claims. I disagree.

[15] I find that the evidence, as set out below, supports a finding that the Claimant lost his job because he was involved in a physical altercation with a co-worker on October 8, 2020, in breach of the employer's Non-Discrimination: Respectful Workplace Policy. The Claimant readily admits that the physical altercation does not relate to his WCB claims. He also admits that the employer sent him home the day of the incident. The Claimant says that he could tell by the tone of his supervisor's voice that when he was sending him home they were firing him. This is consistent with the employer's policy and zero tolerance for violence in the workplace. I must now determine whether the Claimant's behaviour is misconduct.⁷

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

[16] Yes. I find that the reason for the Claimant's dismissal is misconduct under the law. My reasons are set out below.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.⁹ 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.¹⁰

[18] 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 fired because of that.¹¹

⁷ See *Joseph v Canada (Attorney General)*, A-636-85.

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

⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁰ See *Attorney General of Canada v Secours*, A-352-94.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[19] 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 it has to show that it is more likely than not that the Claimant lost his job because of misconduct.¹²

[20] I find that the Commission has proven that there was misconduct. This is because the video evidence clearly shows the Claimant deliberately walking over to his co-worker to continue engaging with him, instead of leaving the work area and reporting his co-worker's actions to his supervisor. The Claimant made a conscious choice to remain engaged with his co-worker, which resulted in a physical altercation during working hours. The Claimant's actions of physically pushing his co-worker on his face shield, with enough force to cause his co-worker's head to bend backwards and lose his footing, is a physical attack and violence in the workplace. This is a clear breach of the employer's Non-Discrimination: Respectful Workplace Policy, constituting misconduct.

[21] The Commission says that there was misconduct because the Claimant was involved in an unnecessary aggressive act when forcefully shoving his co-worker backwards from the face. They say the Claimant knew or ought to have known that his actions were an act of violence. The Commission states that the Claimant acknowledged, on three separate occasions, that he was aware of the employer's policy on workplace violence.¹³

[22] The Commission concedes that the Claimant was undoubtedly frustrated, upset, and angered by his co-worker's actions. However, this does not absolve the Claimant of his actions.¹⁴ I agree.

[23] The Commission submits the following documentary and video evidence in support of their determination that the Claimant's actions constitute misconduct.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹³ See the Supplementary Records of Claim at pages GD3-11, GD3-25, and GD3-48, which document the Commission's conversations with the Claimant.

¹⁴ See the last paragraph on page GD14-1.

- The employer’s “Non-Discrimination: Respectful Workplace Policy.”¹⁵
- Three copies of the employer’s “Corporate Ethics Policy Acknowledgement of Compliance.”¹⁶
- The employer’s surveillance video displaying the fight (physical altercation) between the Claimant and his co-worker. This occurs while they are performing their duties at work.
- A copy of the notes from the employer’s investigation interview.

[24] The employer’s Respectful Workplace Policy defines harassment¹⁷, violence¹⁸, and physical attacks.¹⁹ It states that breaches of this policy will not be tolerated.²⁰ The policy says that employees must report any suspicious or harassing behaviour.²¹ The Manager will then determine the resources to use to investigate, report and follow-up.²² When an investigation has found that respectful workplace violation has occurred, corrective action may range from a verbal warning to termination, depending on the severity of the incident.²³

[25] Each copy of the employer’s Corporate Ethics Policy Acknowledgement of Compliance document states that the employee who signs the document acknowledges they have received the training that accompanies the employer’s Ethics Policy and the Respect in the Workplace Policy Statement. It also acknowledges that the employee has been advised of the company’s expectations; they agree to support these policies,

¹⁵ See pages GD3-40 to GD3-47.

¹⁶ See pages GD3-37 to GD3-39.

¹⁷ Harassment includes prohibited conduct which may be verbal, nonverbal, physical, deliberate or unintended, unsolicited or unwelcome, as determined by a reasonable person. It may be one incident or a series of incidents, depending on the context. Harassment refers to upsetting behaviour or comments that ought to reasonably be known as offensive or unwelcome (the second last paragraph at page GD3-40).

¹⁸ Violence is The attempted or actual exercise by a person, of any physical force to cause injury to a worker; and includes any threatening statement or behavior which gives a worker reasonable cause to believe that the worker is at risk of injury (the first paragraph on page GD3-41).

¹⁹ A physical attack is when a person attacks another (with or without a weapon) with the intention of bodily harm or intimidation (third paragraph on page GD3-41).

²⁰ At section 1 (1.1) on page GD3-41.

²¹ See section 3(3.2) on page GD3-42.

²² See section 4(4.3) on page GD3-42.

²³ See section 4.14(4.14.1) and 5(5.3) on page GD3-43.

and to take no action that would be in violation of the Ethics or Respectful Workplace Policies. The Claimant signed these acknowledgement documents on January 24, 2019, February 26, and September 30.

[26] The video of the incident shows four workers in the working area. The Claimant told me that he is wearing a black shirt, his co-worker who was involved in the altercation is wearing a blue shirt, the Claimant's friend is wearing a white shirt, and the fourth worker is wearing a grey shirt. All the workers are wearing face shields with respirators.

[27] The video shows the Claimant and co-worker working about 25 feet apart, at different workstations. The co-worker walks over to the Claimant, pulls something away from the Claimant's hand and tosses it onto the floor. This co-worker then walks over to a box and pushes it onto the floor before going back to his workstation. The Claimant walks over to his friend in the white shirt, raises his face shield to talk, as they walk towards the box on the floor. His friend picks up the box from the floor and the Claimant bends down and picks up his tools.

[28] The Claimant continues walking towards his co-worker. The Claimant lifts his face shield, leans toward his co-worker, and says something. The Claimant stands straight, grabs a box that is in a tray in front of his co-worker, and lifts the box. The co-worker places his hand on the box so it sits back in place. The Claimant turns and starts walking away. He then stops approximately ten feet away from the co-worker, turns back, lifts his right hand a little, and walks back towards his co-worker. The Claimant lifts his face shield with his right hand as he is speaking. He leans in closer towards his co-worker. As the Claimant continues to speak, the co-worker taps the left side of the Claimant's hardhat with his right hand, nudging the Claimant's head. As they continue talking, the co-worker pushes the Claimant's right arm with his left hand, causing the Claimant to move back and adjust his stance.

[29] The two continue talking and the co-worker taps the left side of the Claimant's hardhat again. The Claimant immediately responds, pushing the palm of his right hand directly onto the co-worker's face shield with enough force that his co-workers head is

jolted far enough back to cause his co-worker to lose his footing. The co-worker hops and regains his stance as the Claimant backs away. The co-worker runs towards the Claimant and pushes him with his left hand on the Claimant's back and his right hand on the Claimant's hardhat, pushing the hardhat off the Claimant's head. At the same time, the Claimant is pushing his co-worker back with his right hand.

[30] The Claimant then walks towards the co-worker, they continue to bat hands. The co-worker grabs the Claimant's right forearm with his left hand, and the Claimant breaks free while slapping his tools (held in his left hand) on his co-worker's right forearm. They continue to speak as the co-worker is pointing his left index finger towards the Claimant. The Claimant swats at the co-worker's finger with his tools (held in his left hand), walks back to his work area, throws down his tools and walks out of the work area. The co-worker stands still and does not follow the Claimant. The video ends.

[31] The Claimant said he then left his workstation to report the incident to his supervisor. He says his supervisor only spoke with him for about 4 minutes before telling the Claimant to go home and stay there until they call him on Friday. The Claimant provides contradictory statements as to whether he tried to contact a union representative. Initially he said he didn't try to contact his union because he didn't have their phone number. Then he said he did have the number and left a message about the incident, but no one called him back.

[32] The Claimant argues that there was no misconduct because his actions were not wilful, deliberate, intentional, or so reckless to conceive as being intentional. He asserts that he could not have foreseen that his actions would result in his dismissal because he has a learning disability and can't read past a grade six level. He says he also suffers from anxiety. He states his involvement in the altercation was an automatic reaction to "multiple provocative and incendiary actions initiated by his co-worker."

[33] The law says that the Claimant does not have to have a wrongful intent, or mean to do something wrong, for his behaviour to be misconduct under the law.²⁴ The

²⁴ *Canada (Attorney General) v Secours*, A-352-94.

Claimant says he wouldn't have reported this incident to his supervisor if he knew he was going to be fired. He says he only approached his co-worker to try to resolve the issue. He admits that he got mad and went to grab the box in front of his co-worker to prove a point. He says he regrets it.

[34] The Claimant told me during the hearing that he was aware of the employer's Respectful Workplace Policy. Although he says he has trouble reading and didn't really understand the written policy, he admits that the employer explained the policy to him. Upon further clarification he says the employer, "tried" to explain it to him. The Claimant clarified that it is, "common sense" because you, "don't just go up and hit someone." He says he didn't deserve to be fired because he "didn't start it."

[35] I asked the Claimant why he didn't leave the area to report the incident to his supervisor, before it escalated to the point of him pushing his co-worker in the face shield. The Claimant replied that he wanted to resolve the situation himself. He did not want to get anyone into trouble. He also says he felt attacked and admits that he got mad.

[36] When reviewing the law relating to misconduct, I gave the Claimant and his representatives an opportunity to make submissions on the following definitions for "reckless." Oxford defines reckless as an adjective of a person and their actions, without thinking or caring about the consequences of an action.²⁵ Black's Law Dictionary defines reckless as a term that means to be careless and indifferent to the welfare of other people.²⁶

[37] The representatives did not dispute these definitions. Rather, they argued that there are ranges of recklessness that test breaking points, allowing the employer to offer different remedies. They surmise that the employer did not conduct a proper or full investigation. They say the employer ought to have had a more thorough discussion with the Claimant, after receiving the initial report of the incident. They assert that

²⁵ Oxford Languages obtain from Google. Copyright 2021, Oxford University Press.

²⁶ The Law Dictionary featuring Black's Law Dictionary Free Online Legal dictionary 2nd edition. URL: <https://thelawdictionary.org/reckless/>

dismissal was not the only option in this case. The employer could have suspended the Claimant instead of dismissing him.

[38] The law states I must consider the Claimant's conduct when determining whether they are disqualified from receiving EI benefits, not the employer's conduct.²⁷ This said I recognize that the Claimant argues that the employer did not conduct a proper investigation, based on the representatives' own experience with investigations. They note that the Commission states the employer's investigation notes are illegible, as evidence of an inadequate investigation.²⁸ I disagree because the fact that notes are illegible is not evidence that the employer failed to conduct a proper investigation.

[39] I accept that the employer's notes are evidence that they documented the incident and spoke the Claimant who was involved. Although the handwriting may be difficult to read for some, I can read several words on this document. At the top of the employer's notes, it lists, Oct 8, 2020, Interview of [Claimant's first and last name]. I note that it also states "[the co-worker's name] – I quit," on the fifth line on the right-hand side. I find that these notes support the employer's statement to the Commission that they conducted an investigation and the other employee quit.²⁹

[40] I agree that the employer's Non-Discrimination: Respectful Workplace Policy provides that when a workplace violation has occurred, the corrective action may range from a verbal warning to termination, depending on the severity of the incident.³⁰ This policy further supports that the employer has a zero tolerance for workplace violence when it states that the work environment will be free from any form of harassment, discrimination, intimidation, bullying or violence.³¹ Given the severity of the physical altercation in this case, the employer determined that the remedy in this case was termination.

²⁷ See section 30 of the EI Act.

²⁸ See page GD3-34.

²⁹ See the Supplementary Record of Claim at page GD3-26.

³⁰ Section 4.14.1 of the employer's Non-Discrimination: Respectful Workplace Policy on page GD3-43.

³¹ See the first paragraph on page GD3-46.

[41] I do not accept the Claimant's assertion that senior co-workers ought to have intervened before the incident accelerated to a physical altercation. Rather, it was the Claimant's responsibility to "back out of harm's way and contact a Supervisor or Manager."³² The Claimant says that his supervisor was not working in his area at the time of the altercation. This means the supervisor would not have seen the altercation when it happened.

[42] The law states that factors such as good performance records, no prior disciplinary actions, being provoked or acting spontaneously are not relevant to determining whether there was misconduct.³³ Although the video clearly shows the Claimant's co-worker initiating the altercation, it also shows that the Claimant had two opportunities to walk away before it escalated to the point of physical violence.

[43] After careful consideration of the evidence before me, I find that the Claimant's conduct was conscious, deliberate, and so reckless as to be wilful. The Claimant intentionally walked towards his co-worker to continue the interaction, instead of leaving the work area and reporting his co-worker's behaviour to his supervisor, as soon as his co-worker started the interaction by pulling the tool out of the Claimant's hand. The Claimant had a second opportunity to walk away and report the incident shortly after he tips the box at his co-worker's workstation and backs away but he chose to walk towards his co-worker and continued to engage with him until it turned into a physical altercation. These actions are a direct breach of the employer's Non-Discrimination: Respectful Workplace Policy. The Claimant confirmed receiving training about this policy. The Claimant admits that he made the choice not to walk away because he was mad, he felt attacked, and he wanted to resolve this situation.

[44] The Claimant admits that he lost his job immediately after he was involved in a physical altercation with his co-worker while at work. Although he states he can only read at a grade six level, he admits that the employer "tried" to explain their Non-Discrimination: Respectful Workplace Policy to him and he signed three

³² See the employer's Non-Discrimination: Respectful Workplace Policy section 1.7 at page GD3-41.

³³ *Canada (Attorney General) v Kaba*, 2013 FCA 208.

acknowledgements that state that he understood this policy. He also told me that he did not ask questions about the policy and did not tell the employer he did not understand. Rather, he said that he knows it is common sense not to just go up and hit someone. Accordingly, I find the Claimant knew or should have known that his conduct on October 8, 2020, would result in his dismissal.

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

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

Other Matters

[46] The law states that the Commission may reconsider a claim for benefits within 36 months after they paid a claimant EI benefits.³⁴

[47] A claimant is liable (responsible) to repay EI benefits they are not entitled to receive.³⁵

[48] I do not agree that the information the Commission considered when first allowing the claim for EI benefits was the same during the reconsideration process. The Commission made their initial decision to pay the Claimant EI benefits based on opposing statements from the Claimant and employer.

[49] The Claimant initially told the Commission that he acted in self-defence, pushing his co-worker to get him out of his space, and he did not punch him.³⁶ The employer told the Commission they dismissed the Claimant because he caused a physical altercation, he punched his co-worker in the face, and they had a zero tolerance for violence in the workplace.³⁷ It appears that without having documentary evidence to support one

³⁴ See section 52(1) of the EI Act.

³⁵ See section 43 of the EI Act.

³⁶ See the Supplementary Record of Claim at page GD3-25.

³⁷ See the Supplementary Record of Claim at page GD3-26.

version over the other, the Commission gave the benefit of the doubt to the Claimant when they initially approved his EI claim.³⁸

[50] The employer was notified of the Commission's decision to pay the Claimant EI benefits. In response, they submitted a reconsideration request with documentary evidence and a video of the altercation. After consideration of this evidence, the Commission determined the Claimant had lost his job due to misconduct, as set out above.

[51] The Commission reconsidered the claims and issued their reconsideration decision on January 11, 2021, three months after they paid the Claimant EI benefits. This was completed within the required time limit.³⁹ The Commission imposed a retroactive disqualification resulting in the \$6,213.00 overpayment of EI benefits.

[52] I am sympathetic to the Claimant's circumstances. I recognize he would prefer that the Commission's reconsideration decision would not have resulted in an overpayment of EI benefits.

[53] I note there is nothing in my decision that prevents the Claimant from contacting the Commission directly to ask if they will reduce or write-off this debt. If he is not satisfied with the Commission's answer, he may appeal to the Federal Court of Canada.⁴⁰

³⁸ Section 49(2) of the EI Act states that the Commission shall give the benefit of the doubt to a claimant if the evidence on each side of the issue is equally balanced.

³⁹ See section 52(1) of the EI Act.

⁴⁰ *Steel v Canada (Attorney General)*, 2011 FCA 153; *Bernatchez v Canada (Attorney General)*, 2013 FC 111.

Conclusion

[54] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits as of October 4, 2020.

[55] This means I am dismissing the appeal.

Linda Bell
Member, General Division – Employment Insurance Section