Citation: *MT v Canada Employment Insurance Commission*, 2021 SST 822

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. T.
Representative:	Timothy Young
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (424423) dated June 29, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	August 25, 2021
Hearing participants:	Appellant Appellant's Representative
Decision date:	September 3, 2021
File number:	GE-21-1275

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost his job because of misconduct. This means that the Claimant isn't 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 Alcohol and Drug policy by testing positive for drugs. The employer said that the Claimant provided two different explanations of how the substance got into his system and this made him untrustworthy. It said that he was in a safety sensitive position and there was a zero tolerance policy for violations of the A&D policies.

[4] The Claimant agrees that a substance was found in his system. However, he did not knowingly ingest the substance. The test for the substance was carried out while he was off work and he was not due to return to work until two weeks after the test. He tried to find out how the substance got into his system and offered two explanations to the company. He also does not occupy a safety sensitive position when working.

[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

The employer is not an added party to the appeal

[6] Sometimes the Tribunal sends the employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter.

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

The employer did not respond to the letter. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

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 failed a drug test. The Claimant was required to complete an annual medical to be certified to perform his job. His urine was tested for a number of prohibited substances and he was found to have levels of THC in it that were above the acceptable limits.[2]

[10] A representative of the company told the Commission that the Claimant was dismissed "with cause" for a non-negative drug test result. The Claimant was found to have a positive amount of an identifiable substance in his body. Because he was found to have no dependency for the drugs and there was no medical disorder, the employer representative said there was no duty to accommodate. The employer's representative said that the Claimant was aware that a failed test would lead to termination of employment. He said the Claimant failed to give a clear explanation as to why he had THC in his system and changed his explanation when questioned. Therefore, the employer considered the Claimant to be untrustworthy.

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[2] THC is a molecule in marijuana (cannabis).

[11] I find that the conduct that led to the Claimant's dismissal was the presence of THC in his system in an amount that was above acceptable limits in violation of the employer's policy.

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

[12] No, the reason for the Claimant's dismissal is not misconduct under the law.

[13] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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.[5]

[14] 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.[6]

[15] 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.[7]

[16] The Commission says that there was misconduct because the Claimant was aware of the company's drug policy and his requirement to produce a negative urine sample. It says the Claimant was not forthcoming with information relevant to the employer's investigation and did not demonstrate that his consumption of cannabis was accidental. The Claimant's explanation regarding his consumption of the prohibited substance was inconsistent and not supported by the facts on file. It says that the Claimant's actions following the testing were inconsistent with his explanation,

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to the court decisions that apply to the circumstances of this appeal.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.

especially his refusal to provide the employer with the numbers from his drug test, which would have, by his own admission, shown that he was just over the allowable limit. The Commission said it is not the act of taking drugs that is the cause for the dismissal, but the effects of taking drugs on the ability to fulfill the conditions of employment, that are the reason for the dismissal and the finding of misconduct.

[17] The Claimant's Representative says that there was no misconduct because the only evidence of how the claimant consumed the marijuana was when he found out that there were cookies containing that substance at the party he attended. The Claimant was reasonably convinced that he ate one of the cookies and that is how it got into his system.

[18] The Claimant's Representative submitted the Commission has the obligation to show that the Claimant consumed the TCH wilfully and the Commission has not said that the Claimant meant to consume the cookie or cookies. The Claimant's Representative submitted that the company's Alcohol and Drug Policy (A&D Policy) does not specify the acceptable limits for any substance. The company provided information on the acceptable limits to the Commission in June 2021. The limits are an addendum to the A&D Policy that the Claimant saw for the first time as part of the Reconsideration File (GD3). Because of this the Claimant could not know what the acceptable limits were.

[19] The Claimant's Representative said that the definition of fit for duty and the employer's interpretation of that term was not considered by the Commission. The company said the positive drug test meant the Claimant was unfit for duty. But, the Claimant's Representative argues that the test was administered while the Claimant was on leave from work. The Claimant was on leave from December 10 to December 31, 2020. He believes he ate the cookies on December 12, 2020. He failed the drug test on December 17, 2020. As the Claimant was not scheduled to return to work for another 16 days, his Representative argues that his positive drug test on December 17, 2021 did not mean he was unfit for work.

[20] The Claimant testified that he is a rotational worker who works 21 days on and 21 days off. He was due to fly to the work site on December 31, 2020 and resume working on January 1, 2021.

[21] The Claimant explained the circumstances which he believes caused him to test positive for THC. The Claimant testified that he was at a house party on December 12, 2020 where food was brought by the guests and available for everyone. About thirty or forty people were at the party, he did not know many of the people because the hosts were his girlfriend's friends. He drank beer at home before he went to the party and also drank beer at the party. He said some people were smoking marijuana in an outbuilding located on the property and he was in an open doorway while people were smoking. The Claimant testified that he ate the food that was brought to the party and the food that was laid out in the kitchen. By 11:00 p.m. after eating some of the food he started to feel ill, so he and his girlfriend went home.

[22] The Claimant was aware before he ended his work rotation that he would be taking an annual medical on December 17, 2020. The medical was during his scheduled days off. The medical is needed to recertify the Claimant for work. It includes a physical exam, blood work, eye exam, and a urine test. The Claimant was told that his urine tested positive for THC on December 23, 2020. He was suspended without pay pending investigation on December 23, 2020.

[23] The Claimant testified that he does not do drugs. He said he had no idea about how the THC got in his system. He thought the THC might have got in his system through the second hand smoke from the people smoking marijuana at the party he attended on December 12, 2020. The Claimant later found out that there were marijuana-laced cookies at the party. The cookies were not labeled, had been stored in a cupboard, were brought down from that cupboard and placed on the counter. He had been drinking beer and thinks he may have eaten some of the cookies and this may have been how the THC might have gotten into his system. The Claimant gave both of these explanations to the company.

[24] The Claimant testified that he was emailed a copy of the employer's A&D Policy when he started work. The Claimant's Representative noted that the policy provided by the employer to the Commission had changed since the Claimant was hired. However, the Claimant said that he did sign an Acknowledgement Form similar to the one attached to the current policy. The Acknowledgement Form says the signatory agrees that, among other things, they have read and understand the policy, compliance with the policy is a condition of employment, they will comply with the policy and if they fail to comply with the policy they may be subject to corrective action up to and including dismissal.

[25] The Claimant testified that he signed a consent for the medical at the clinic where the medicals take place. He was examined by a doctor. He was called by the clinic and told that his levels were over. Two tests were conducted on the same urine sample and both showed he was over. The Claimant testified that he has not seen any of the reports of the results of the urine test. He did not want to share the results of the medical with his employer because it is a complete medical and he considered it to be personal information.

[26] After the Claimant tested positive, he was referred to another doctor for a drug dependency assessment. He consented to the assessment. The Claimant submitted a copy of the assessment with his appeal. The assessment was undertaken on January 14, 2021 and involved a discussion of the Claimant testing positive for marijuana metabolite on December 17, 2020. The physician noted that the question of the source of the marijuana metabolite remained unanswered. The physician was not convinced that second hand marijuana smoke would result in the level of marijuana metabolite in the Claimant's test. The physician wrote "It is more likely than not that the positive test is due to editable *(sic)* marijuana which again could not be proved."

[27] The physician who conducted the assessment concluded, in part:

> In my opinion, [Claimant name] does not meet the criteria for substance use disorder for marijuana or alcohol. … I could not verify the source of the marijuana metabolite in his urine screen test neither could he but random testing

> for the next six months is warranted. I felt after the assessment that there are no safety concerns for him to return back to work.

[28] The Claimant testified that the doctor who examined him at the clinic in December 2020 was the one who arranged for him to see the second doctor for the assessment. The second doctor's report was addressed to the clinic's doctor. On January 20, 2021, the Claimant was seen at the clinic by the same doctor he had seen in December 2020. That physician issued a "Memorandum to the Employer" stating that the Claimant was fit to RTW (return to work) immediately. The Claimant agreed to the release of the Memorandum to the company.

[29] The Claimant was dismissed from his employment on February 23, 2021.

[30] The employer's representative told the Commission that it did not know what levels of THC were found in the Claimant's urine sample. He explained that there are two tests done on the same sample. The first test is a screening which indicates a presence. If the screening is non-negative the sample goes to a laboratory for a more detailed analysis. The analysis confirmed that the readings were above the acceptable limit.

[31] The employer's representative told the Commission that the Claimant was not forthcoming during the investigation. He said the Claimant told them about the second hand smoke on December 23, 2020. Then on January 5, 2021, the information about the cookies came through from the Claimant. The employer's representative said that the Claimant told him that he was just over the limit but the Claimant refused to sign a release for the doctor to release that number to the employer. The employer's representative said to the Commission that if it was going to help the Claimant's case why wouldn't the Claimant have signed the release? The employer's representative said that he asked the Claimant if he used any form of THC such as spray, edibles, smoke. He told the Commission, the Claimant refused to answer and told the employer's representative to contact his lawyer.

[32] The employer's representative told the Commission that they gave the claimant "every opportunity to come clean." He said, "if someone opened up and said that they had done it and didn't realize he had that much, then they could have worked with it." The employer representative said that it questions the Claimant's credibility. The company dealt with a lawyer who said it was okay to include that in the termination letter.

[33] The employer's representative told the Commission that the Claimant is in a risk sensitive position and not a safety sensitive position. The employer representative said the doctor did not write a report. The employer's representative said that his interpretation of what the doctor said, in the employer's representative's words, was that the numbers were high enough that it was not just a one off situation and that he [meaning the Claimant] had to be engaged in that activity. The employer's representative told the Commission that the company's definition of fit for duty was different from the medical service provider. He said, "They [meaning the medical service provider] thought that since the Claimant did not have a dependency he was fit for work. However, he was not fit for work based on the testing."

[34] I find that the Commission hasn't proven that there was misconduct, because the Commission has failed to establish that the Claimant violated the company's A&D Policy. I also find there is no evidence that the Claimant's consumption of the marijuana was wilful or so reckless as to be wilful.

The Claimant did not violate the Alcohol and Drug Policy

[35] The employer provided the Commission with a copy of its A&D Policy and the addendum to the policy containing the acceptable limits of various substances.

[36] The A&D policy states, in part:

> This policy shall apply to all employees … performing work on behalf of the company …. In addition to the obligations set out in this policy all employees and persons performing Company business or visiting the Company premises must

comply with any additional client, site specific, collective agreement and contractual requirements.

[37] The A& D Policy has the following definitions:

Drug means any substance or chemical agent, whether legal or illegal, including prescription and non-prescription medications, the consumption of which acts primarily on the central nervous system and has the potential to temporarily change or adversely affect the way a person thinks, feels or acts and causes cognitive and/or psychomotor impairment.

Fit for Duty means the ability to safely and acceptably perform assigned duties without any limitations due to the use, side-effects or after-effect of alcohol, cannabis, drugs, non-medical and medical medications, or other impairing or mood altering substance or medication.

Metabolites means the intermediate products produced from metabolic reactions when the body processes a particular drug.

Reasonable cause, includes, but is not limited to, the following single events, or observed patterns of behaviour on a single occasion:

> i. Direct visual observation of or credible information from one or more eyewitnesses about the apparent possession of or consumption of alcohol, cannabis, drugs … by an identifiable individual(s), in circumstances that appear to be in violation of this policy
>
> ii. Discovery of alcohol … unprescribed drugs … while on Company business or at Company premises;
>
> iii. Direct visual observation of or credible information from one or more eyewitnesses about any of the physical or behavioural signs when an individual is on Company business or at Company premises: [list of 6 items follows]

> **Under the Influence** is a term used to describe a state of intoxication through the consumption of alcohol and/or the use of drugs.

[38] The A&D Policy states “Accordingly, being under the influence of alcohol, cannabis, drugs, non-medicinal and medicinal medications, or other impairing or mood altering substance which interferes with an employee’s safe and proper performance of their job while at the workplace is prohibited.”

[39] The A&D Policy goes on to state, “Failure to comply with this policy could result in disciplinary measures up to and including termination of employment.”

[40] Under the heading “Requirements and Prohibitions” the A&D Policy states “In order to minimize the risk of impaired performance due to substance use and/or abuse, the following are strictly prohibited for all employees while on Company business or at Company premises:” There follows a list of 9 items. Among them, “Reporting to work, working and/or reporting for and participating in testing with a breath alcohol level and/or presence in the body of drug levels at or in excess of Company, client, site or contractual policies procedures and requirements.” The list also prohibits the use of cannabis, the presence in the body of non-medicinal medication or their metabolites, reporting to work or being at work while not fit for duty due to the use, side-effects or after effects of cannabis and the consumption of cannabis while on duty including during meals or breaks.[8]

[41] The A&D Policy states that employees must comply with a list of 10 requirements. Among them to report fit for duty and remain fit for duty while at work, report for testing and participate in testing as requires, when designated as “on call” to remain fit for work, when asked to provide consent through the acknowledgement form for drug and alcohol testing, and participate fully in any investigation under the policy when requested.[9]

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[8] I have paraphrased the list to reflect the Claimant’s circumstances
[9] I have paraphrased the policy to reflect the Claimant’s circumstances.

[42] The A&D Policy states that failure and/or refusal to submit to a test as required under this policy is grounds for disciplinary action up to an including dismissal. The Policy provides for an investigation procedure in the case of Unfit for Duty Situations and suspected presence of drugs on company premises.

[43] Under the heading “Consequences of a Policy Violation” the A&D Policy states that in all situations an investigation will be conducted to verify that a policy violation has occurred, that after any confirmed positive drug test an employee may be referred for a substance abuse assessment, failure to participate in that assessment is a violation of the policy, and should the company determine that employment will be continued after a violation of the policy the employee will be required to enter into return to work agreement governing their continued employment.

[44] Under the heading Responsibilities, the A&D Policy says, in part, employees are to perform their jobs safely, abide by the policy, report fit for duty and remain fit for duty while on Company business and Company premises or worksites, ensure their own behaviour and work performance is not affected by drugs while engaged in company activities and cooperate as required with an investigation including any request to participate in testing.

[45] The letter of termination says that the results of the Claimant’s recurrent medical on December 17, 2020, indicated levels of THC that are above the acceptable limit, resulting in him being in an unfit for duty condition and therefore in violation of both the employer’s and the client’s policies. The letter states that throughout the investigation the Claimant was not forthcoming in providing information in relation to the failed test. It says the Claimant’s explanation for the test result was different on at least two occasions and he continued to deny that he participates in the consumption of THC, Marijuana, its metabolites or similar, relevant substances. The letter goes on to state that the Claimant’s role is a safety sensitive role and the company has a zero tolerance for violations of A&D polices and for personnel being deemed to be in an unfit for duty condition. The letter says as a result of the findings of the investigation, including but

not limited to the information provided in the letter, the Claimant's employment was terminated, for cause.

[46] I note that although the letter states that the Claimant violated the company's A&D Policy and that of the company's client there is no evidence in the file of the client's policy. Consequently, there is no evidence of how the client's policy was violated.

[47] The letter states that the levels of THC above the acceptable limits resulted in the Claimant being in an unfit for duty condition and therefore he was in violation of the A&D Policy.

[48] I note the A&D policy defines Fit for Duty as the ability to safely and acceptably perform assigned duties without any limitations due to the use, side-effects or after-effect of alcohol, cannabis, drugs, non-medical and medical medications, or other impairing or mood altering substance or medication (emphasis added). The Claimant believes that he consumed the THC at a party on December 12, 2020. He was tested on December 17, 2020. He was scheduled to resume his duties on January 1, 2021. There is no evidence to indicate that the Claimant was unable to safely and acceptably perform his assigned duties on that date.

[49] The A&D Policy has a number of "Requirements and Prohibitions" which are listed under a preamble that states "In order to minimize the risk of impaired performance due to substance use and/or abuse, the following are strictly prohibited while on Company business or at Company premises." One requirement / prohibition is "reporting to work, working and/or reporting for and participating in testing with a breath alcohol level and/or presence in the body of drug levels at or in excess of Company, client, site or contractual policies procedures and requirements."

[50] The Claimant does not dispute that there was THC in the urine sample that he provided to the clinic. There is no evidence to suggest that the urine sample was below the acceptable limits. However, I do not think that the presence of THC in the Claimant's urine, although above acceptable limits, is a violation of this part of the policy. The requirement / prohibition is one of nine that are in place "In order to

minimize the risk of impaired performance due to substance abuse … while on Company business or at Company premises." At the time of the test the Claimant was on his off days and not performing any work for his employer. He testified that he was not on call while he was on his days off. He was not expected to return to work until some two weeks later. There is no evidence that the presence of THC in a sample taken while the Claimant was on his off days and was not due to return to duty until two weeks later would impair his performance.

[51] The letter of termination states that the Claimant was not forthcoming in providing information in relation to the failed drug test, his explanation for the failed drug test was different on two occasions and he continued to deny that he participated in the consumption of THC, Marijuana, its metabolites or similar, relevant substances. The employer representative said that the Claimant initially said that the THC may have come from second hand smoke, and later that it may have come from cookies containing marijuana.

[52] The A&D Policy states that an employee must cooperate as required with an investigation including any request to participate in testing. I think that the Claimant did cooperate and was forthcoming in the investigation. The investigation started once a positive test result was received. The employer did not request any further testing. In my opinion, the inability of the Claimant to confirm how the THC got into his system does not mean that he was not forthcoming. Nor is it a violation of the company's policy.

[53] The Claimant testified that he does not do drugs and he did not know the drug got into his system. He believed it may have been through second hand smoke or cookies that he ate and provided both of those explanations to the employer. I accept this testimony because it was given to me directly under affirmation and it is consistent with the information he provided to his employer, the Commission and in his appeal to the Tribunal. The physician who conducted the independent medical assessment could not confirm the source of marijuana or the metabolites but thought it more likely that it came from edibles. The Claimant was able to verify that there were un-labeled

marijuana cookies at the party he attended. He said he was eating the food that was made available at the party and he might have eaten the cookies. The employer representative said that they gave the Claimant "every opportunity to come clean." He said, "if someone opened up and said that they had done it and didn't realize he had that much, then they could have worked with it." These statements demonstrate that the employer was predisposed to believe that the Claimant had willingly or knowingly ingested the marijuana and was refusing to admit he had done so. But, in my opinion, the Claimant did come clean, by telling the employer how he thought the drugs got into his system. That the employer did not view those explanations as plausible is not a violation of the policy.

[54] The termination letter said that the Claimant was in a safety sensitive position. The employer representative later told the Commission that was not the case and said the Claimant occupied a risk sensitive position. The Claimant testified that he was not in a safety sensitive position and that he had never heard or saw the term risk sensitive used to describe his position. There is no evidence of what a risk sensitive position entails and whether an employee who occupies a risk sensitive position owes a higher duty of care in the performance of his duties.

[55] Finally, the letter of termination states that the employer has a "zero tolerance policy for violations of A&D policies and for personnel being deemed to be in an unfit for duty condition." A "zero tolerance policy" implies that there is a set disciplinary action for every violation and that there is no discretion in applying those actions. In my opinion, the A&D Policy does not support this statement and, further, there is no evidence of the employer's policy regarding those who are deemed to be unfit for duty. The A&D Policy says that failure to comply with the policy could result in disciplinary measures, up to and including termination of employment. Failure or refusal to submit to a test as required by the policy is grounds for disciplinary action up and including termination. The company may also determine that an employee could return to work after a violation of the policy provided the employee entered into a Return to Work Agreement. These statements mean that the employer had some discretion in deciding whether to terminate the Claimant. In making that finding, I am mindful that it is not my

role to determine whether terminating the Claimant's employment was the appropriate response. I am, instead, finding that the employer's statements about zero tolerance are not borne out by the evidence in the file.

The Claimant's conduct was not misconduct

[56] As noted above, to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also includes conduct that is so reckless that it is almost wilful.[11] 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.[12]

[57] I find that the Claimant's conduct was not conscious, deliberate or intentional, nor was it so reckless as to be wilful.

[58] The Claimant was aware of the employer's A&D Policy. He knew that he could be dismissed if drugs were found in his system. I have accepted the Claimant's testimony that he does not know how he ingested the THC that was found in his system. The physician who conducted the substance abuse assessment said that it was more likely than not that the positive test was due to edible marijuana. In my opinion, eating cookies at a party that are not labeled as containing marijuana, means that the Claimant did not knowingly ingest marijuana. As a result, I find that the Claimant's ingestion of marijuana was not conscious, deliberate or intentional. This means that the Claimant's conduct does not meet the requirements to be considered misconduct in accordance with the EI Act and the case law set out above.

[59] Additionally, Oxford Languages defines "reckless" as an adjective (of a person and their actions) without thinking or caring about the consequences of an action.[13] Black's Law Dictionary defines reckless as a term that means to be careless and

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[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] Oxford Languages. Copyright 2021, Oxford University Press.

indifferent to the welfare of other people.[14] To be a reckless action the Claimant would have to have some awareness of what he was doing. This means the Claimant would have to know that the cookies he was eating contained marijuana. He did not. As a result, I find that the Claimant's eating of cookies that were not labeled as containing marijuana is not reckless and is not misconduct within the meaning of the EI Act and case law set out above.

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

[60] Based on my findings above, I find that the Claimant didn't lose job because of misconduct.

Conclusion

[61] The Commission hasn't proven that the Claimant lost his job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[62] This means that the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

[14] The Law Dictionary featuring Black's Law Dictionary Free Online Legal Dictionary 2nd ed. URL: https://thelawdictionary.org/reckless/