



Citation: *NB v Canada Employment Insurance Commission*, 2022 SST 152

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

# **Decision**

**Appellant:** N. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (443013) dated December 8, 2021 (issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Type of hearing:** Videoconference

**Hearing date:** February 1, 2022

**Hearing participant:** Appellant

**Decision date:** February 2, 2022

**File number:** GE-21-2578

## Decision

[1] The appeal is dismissed.

[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.<sup>1</sup>

## Overview

[3] The Claimant worked as a security guard and lost his job. The Claimant's employer said that he was let go because he fell asleep on the job.

[4] 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.

[5] The Claimant says that while he did fall asleep on the job, it was his fifth night of working a twelve hour shift, it was not intentional, it was only for a few seconds, and other employees did the same thing but were not fired, only suspended.

[6] The Claimant also says that the employer did not like him and so used this incident as an excuse to get rid of him.

## 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

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

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 fell asleep on duty.

[10] The Claimant says he argued hard to make sure workers had good working conditions and to address what he saw as deficiencies in the employer's treatment of the workers, having even raised issues directly with the CEO.

[11] The Claimant says his speaking out about issues bothered his employer, so, even though he agrees he fell asleep, he says it was only for a few seconds and they used it as an excuse to get rid of him.

[12] The Claimant also says that his supervisor did not like him, and lied about how long he was asleep, even telling other people that were around to be quiet to make sure they did not wake the Claimant up to allow the manager to say the Claimant was asleep for a long time and make him look bad.

[13] I find the Claimant has not provided sufficient evidence to support that he was fired for a reason other than falling asleep on duty.

[14] Perhaps the Claimant's supervisor did not like him, perhaps the Claimant's employer did not like him; however, I find the evidence the Claimant was fired for falling asleep on duty is far more compelling. That evidence being:

- The Claimant agreeing he fell asleep on duty.
- His employer told the Commission the Claimant fell asleep on duty and that is why he was fired;<sup>2</sup> and

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<sup>2</sup> GD03-28

- The termination letter provided by the employer says the Claimant was terminated for sleeping on duty.<sup>3</sup>

[15] Further, I note the policy of the employer says that an employee can be immediately fired for falling asleep on duty,<sup>4</sup> which supports the Claimant was fired for falling asleep, rather than some ulterior reason, as being fired was distinctly within the realm of possible outcomes for the Claimant's actions of falling asleep on duty.

[16] I find the Claimant's testimony he has zero disciplinary history with his employer further supports the Claimant was fired for falling asleep on duty, as his disciplinary record supports he was a good employee and not an irritant to his employer.

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

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

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

[19] 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 there was a real possibility of being let go because of that.<sup>8</sup>

[20] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has

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<sup>3</sup> GD03-30

<sup>4</sup> GD03-31

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

to show that it is more likely than not that the Claimant lost his job because of misconduct.<sup>9</sup>

[21] The Commission says the Claimant sleeping on the job was a dereliction of duty as cited in the employer's policy and is misconduct as the Claimant knew, or ought to have known, that sleeping on the job would lead to termination.<sup>10</sup>

[22] The Claimant says that while he did fall asleep, he did not do so on purpose.

[23] The Claimant says he was on his fifth twelve hour shift, going from nights to days, so his sleep cycle was all messed up and he was tired and he fell sleep for a few seconds, just as the supervisor was walking by.

[24] The Claimant says that he was not given a break on that shift by his employer and he had been working for four hours straight.

[25] The Claimant says in order to get a break he would have had to call his supervisor and wait for his supervisor to drive down and cover for him. The Claimant says he never called his supervisor to ask for a break.

[26] The Claimant says his supervisor is out to get him. The supervisor lied about how long he was asleep, as the Claimant says his eyes were closed for a few seconds at best.

[27] The Claimant says his supervisor also told the other people in his area to be quiet so they would not wake the Claimant to allow the supervisor to say the Claimant was asleep for a long time and make him look bad.

[28] The Claimant says that there is no harm from the few seconds he was asleep as no one can get into the airport unless he lets them in. Also, he says that he is allowed to leave for a bathroom break, so there is problem if he fell asleep for a few seconds, it is the exact same thing.

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

<sup>10</sup> GD04-3

[29] The Claimant says he was aware of the company policy regarding sleeping on the job.

[30] The Claimant says he should not have been fired as other employees fell asleep on the job and were not fired, merely suspended.

[31] I note the Claimant's employer told the Commission that if someone comes to the airport, and the employee is gone on a bathroom break, that person will wait for the employee to come back and let them in. However, the employer noted that in the Claimant's case, he did not close down the entryway, like if he was away on a break or at the bathroom, he simply fell asleep on the job.<sup>11</sup>

[32] I can understand the Claimant's argument that if he is allowed to leave his post to go to the bathroom, that there is no difference in the security of the situation if he falls asleep for a second.

[33] However, I am not here to judge whether the employer should change their rules or policies regarding reasons for dismissal.

[34] Neither am I here to determine if the Claimant's firing was justified, or whether that was the appropriate punishment. What I need to determine is whether the Claimant's conduct amounts to misconduct under the law.<sup>12</sup>

[35] I can accept the Claimant's actions were not intentionally, as in he did not decide that he was purposely going to sleep on the job; however, I find the Claimant committed the conduct he was dismissed for and that his conduct was so reckless it is almost wilful.

[36] The Claimant says he fell asleep on the job, he does not dispute that.

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<sup>11</sup> GD03-45

<sup>12</sup> *Canada (Attorney General) v Caul*, 2006 FCA 251

[37] The Claimant also says he knew about his employer's policy regarding sleeping on the job and that the policy says he could be immediately terminated for doing so,<sup>13</sup> although he argues they should not have done that to him.

[38] The Claimant says he was feeling tired as his sleep schedule was all messed up going from night shift to day shift and being on his fifth twelve hour shift.

[39] Yet, he took no action to try and remedy that situation, like having asked for his break as he said he could, or reported his inability to continue working to his employer, despite knowing that if he fell asleep he could be immediately terminated. I find this shows his actions were so reckless as to be wilful as he was well aware falling asleep was a real possibility in his state, which could lead to termination, yet he did not take some reasonable actions to try and prevent it from happening.

[40] I further find his actions constitute misconduct as he says that he was aware of his employer's policy about sleeping on the job, and that policy clearly says that he could be immediately terminated for sleeping on duty, so he ought to have known he could lose his job if he fell asleep on the job.

[41] I note the Claimant has argued that he fell asleep for a very short time and that his supervisor was lying about how long it was, but regardless, there is no distinction in the employer's policy about the length of time an employee needs to be asleep in order to be terminated.

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

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

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<sup>13</sup> GD03-31

## **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.

Gary Conrad

Member, General Division – Employment Insurance Section