



Citation: *KO v Canada Employment Insurance Commission*, 2022 SST 170

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

## **Decision**

**Appellant:** K. O.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (441556) dated December 2, 2021 (issued by Service Canada)

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**Tribunal member:** Charlotte McQuade

**Type of hearing:** Teleconference

**Hearing date:** January 31, 2022

**Hearing participants:** Appellant

**Decision date:** February 13, 2022

**File number:** GE-22-51

## 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 her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant worked as a registry clerk in a provincial licence and registry office since December 27, 2018. After a sick leave, the Claimant returned to work for two days and was terminated on July 7, 2021. The Claimant's employer said that she was terminated because she breached the employer's policy and provincial privacy law by removing a customer's driver's licence from the workplace to show her family the customer's picture.

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

[5] The Claimant does not dispute she removed the customer's driver's licence from the employer's premises. However, she says that her actions are not misconduct because they were not wilful. She says the incident happened on her second day back from a stress leave. She says she was on medication and was mentally exhausted and was not ready to return to work. She says her judgement was impaired when she took the licence. She says she never would have done anything like that had she been healthy as she knew it was wrong to do so.

[6] I have decided, for the reasons set out below, that the Claimant's conduct in taking the licence was not misconduct.

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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.

## **Matters I have to consider first**

### **Potential added party**

[7] The Tribunal identified the Claimant's employer as a potential added party to the appeal. A letter was sent to the employer asking if the employer wanted to be an added party. To be an added party, the employer has to show it had a direct interest in the appeal. The employer did not respond to the Tribunal's letter. As there is nothing in the appeal file to indicate the employer has a direct interest in the appeal, I have decided not to add the employer as a party.

### **I will accept documents sent in after the hearing**

[8] The Claimant testified at her hearing about a medical report she had and a list of appointments with a therapist. These documents were not on file. I asked the Claimant to submit this information to the Tribunal. The Claimant asked for an opportunity to seek some additional medical documentation from her doctor about her mental state at the time of termination. As this was potentially relevant information, I allowed the Claimant until February 4, 2022 to submit this information. The Claimant submitted all her medical information on January 31, 2022.<sup>2</sup> This was provided to the Commission with an opportunity to comment. The Commission provided supplementary submissions on February 2, 2022.<sup>3</sup> I have accepted the post-hearing documentation and the Commission's submissions.

## **Issue**

[9] Did the Claimant lose her job because of misconduct?

## **Analysis**

[10] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost

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<sup>2</sup> GD6.

<sup>3</sup> GD8.

her job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant lose her job?**

[11] I find that the Claimant lost her job because she removed a customer's driver's licence from the employer's premises in breach of the employer's policy and provincial privacy law.

[12] The employer told the Commission the Claimant lost her job because she removed a driver's licence from the premises in breach of the province's privacy law and their own policy. The Claimant and the Commission agree this is why the Claimant lost her job.

[13] The Claimant does not dispute that she removed the copy of the driver's licence from the employer's premises.

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

[14] The reason for the Claimant's dismissal isn't misconduct under the law.

[15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>6</sup>

[16] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.<sup>7</sup>

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[17] The Commission has to prove that the Claimant lost her 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 her job because of misconduct.<sup>8</sup>

[18] The employer told the Commission that the Claimant removed a copy of a customer's driver's licence from the workplace to show her family. The employer explained the Claimant handled driver's licenses. When old licenses were received, employees were supposed to shred them in front of the customer. The Claimant did not shred the licence but put it aside. She told a co-worker that she was taking the license home to show family because the customer looked like "Tupac.". The employer was able to verify this by watching video footage. The following day the Claimant confirmed that she had done this. She told the employer that she realized it was wrong so she brought it back. The employer said that the requirement to shred driver's licenses is part of Alberta law. She said that the client's breach of policy was reported to government and there was an SIU investigation that could result in charges. The employer says the Claimant was verbally terminated because in situations like this the policy is that an employee is terminated immediately for such a breach.<sup>9</sup>

[19] The Claimant told the Commission that she returned to work after being on medical leave. She said that she still wasn't thinking straight and that she should not have been back at work. She explained that she "did something really stupid". She said that her head wasn't in the right place. She said she removed a customer's driver's license around 5:00 p.m. During the rest of her shift she didn't really think about it. At the end of her shift she shredded all of the licenses from the day, except the one she took home because the customer looked like "Tupac." The Claimant said that they don't shred the licenses in front of customers. Most employees do it at the end of the day because there is only one shredder. The Claimant said as soon as she left the office, she knew that she had done something wrong. She didn't immediately go back into the office and shred the license because the office was locked with the alarm on. The

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<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> GD3-20.

Claimant explained that the license never left her purse because she realized what she had done was wrong. She said that her plan was to take it in the next day and shred it as soon as she got in. However, when she arrived at work, the employer called her into the office because the employer already knew.<sup>10</sup>

[20] The Claimant told the Commission that she was aware that removing the license could result in termination. She said it was drilled into them that they could be terminated. She said she knew she didn't follow protocol. She said that she suffers from PTSD.<sup>11</sup> She said that she was not in the right frame of mind and it was only after leaving that she realized she risked termination.<sup>12</sup>

[21] The Commission says that there was misconduct because the Claimant's actions were wilful. The Commission says the Claimant knew, or ought to have known, her actions would result in her dismissal. The Claimant works with the private information of customers for her employer. The Commission says the Claimant voluntarily removed a copy of a customer's driver's license from the workplace for her personal use, which was a direct breach of the employer's privacy policy and the provincial privacy law. The Commission says the Claimant was aware of the employer's policies and would have known breaching this policy could lead to dismissal.

[22] The Commission points out that although an investigation by the Special Investigations Unit concluded no enforcement action would be taken against the claimant, the Claimant confirmed she had taken the licence from the workplace.

[23] The Commission argues there is no medical documentation that supports the Claimant's position that she was unable to make moral decisions at the workplace. The Commission states that the medical reports only note the opinions of the Claimant about her judgement and not that of the doctor.

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<sup>10</sup> GD3-32.

<sup>11</sup> GD3-32.

<sup>12</sup> GD3-34.

[24] The Claimant says that there was no misconduct because she says her actions were not wilful. She says her medical condition impaired her judgment at the moment she took the licence.

[25] The Claimant explained in her Notice of Appeal that on May 7, 2021 she was put on medical leave due to stress and has since been diagnosed with PTSD. She returned to work on July 5 and July 6, 2021 and was dismissed on July 7, 2021. She says she was not ready to return to work as she was still very stressed and unwell. She says after the weeks of being away from her job and under the effects of her condition she was not thinking clearly. She relates that if she had an awareness that she was doing something that was wrong, that would jeopardize her job and her family's only source of income, she would not have done it. The Claimant points out that she was investigated by the SIU and no enforcement was taken against her.

[26] The Claimant testified that the entire time she had worked as a registry agent, she never had a problem. She received many letters from clients about her outstanding service. The Claimant explained she is a single parent and never would have done anything to jeopardize her job. After being on a medical leave, she wanted to do her best to feed her family.

[27] The Claimant explained how the incident occurred. She said on July 6, 2021, at the end of the day, a man came to her station. She says she bantered with him and told him he looked like "Tupac", who was someone who was supposed to have passed away. She completed his service and then thought no more of it. She did not keep the licence at that time. She put it in a drawer with all the other licences to be shred at the end of the day. She says, unlike what the employer told the Commission, licences were not shred immediately because there was only one shredder. The licences were kept in a drawer and the shredding was done at the end of the day.

[28] The Claimant said, while she was shredding licences just before leaving, she saw the licence of the man who looked like "Tupac". The Claimant says she thought she would show it to someone. She then showed the licence to her co-worker. The co-worker made a comment about "Tupac" still being alive. She then put the licence in her

side pocket. She says at that moment she did not think she had done something wrong. She says the co-worker did not stop her. The Claimant says if this had not happened at the end of the day, she would have time to reason through she shouldn't be doing this and put it back. However, after putting it in her pocket, she and co-worker left and the alarm was set. She realized what she had done, once in her truck, but could not go back in to return the licence as the building was locked and alarm on. She kept the licence in her purse all night with the plan to return it in the morning and shred it. However, when she returned the next morning, when she went in, she was asked for the licence and her keys.

[29] The Claimant said she knew she was not supposed to remove licences. She was trained on this. She said she had never done anything like this before. However, at that moment, she was not thinking. She says if this had been lunch hour, she would have been able to put it back.

[30] The Claimant stated that the SIU did an investigation of her but, after she explained the situation, closed the investigation and there was no consequence. She provided a letter dated December 7, 2021 from the SIU that says the investigation was completed and there would be no enforcement action against the Claimant.<sup>13</sup>

[31] The Claimant testified about her medical leave. She explained she had been on a stress leave. She had many things she was dealing with. She had been working during Covid-19 conditions. She has three children. Her oldest daughter suffers with addiction issues. Her younger child is autistic. She says when she returned to work she was taking anxiety medication. She was having online counselling as well and provided a list of her appointments. After not being at work a few months, she found some things had changed. The employer did not ask her if she was feeling okay on her return or review anything with her. She had no time to read all of the material. She said she had to hit the ground running and she was struggling. She said she was mentally exhausted. The Claimant explained she had not wanted to go back to work but she felt like she had to. She was under a lot of stress and was not thinking straight. She says in hindsight,

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<sup>13</sup> GD2-10.



she should not have gone back to work. After the termination, she got a PTSD diagnosis. She says she had mental health issues for a number of years but it was compounded in last few years. The Claimant says she never would have done anything like this that would jeopardize her income if she had been thinking properly.

[32] The Claimant provided a medical report from her family doctor dated January 20, 2022.<sup>14</sup> It provides that the Claimant “has been struggling with mental health recently and she feels this has affected her judgement. She has been asked to payback EI, which she tells me at the moment she can not afford.” The letter goes on to say this is causing the Claimant significant stress and anxiety, and as a result she would appreciate any leniency or deferral that can be offered. The report says the Claimant is due to see a social worker for additional support.

[33] The Claimant provided a second medical report from her family doctor dated January 31, 2022.<sup>15</sup> The letter noted the Claimant has been having mental health issues and as a result was placed on sick leave from May 7, 2021 to July 3, 2021. The report says the Claimant was not reassessed at the expiry of the sick leave. The report provides that the Claimant returned to work shortly after the expiry of her sick leave as she was hopeful to be able to return back to work successfully but her employer released her from work on July 7, 2021. The report goes on to say that the Claimant feels in hindsight that she returned to work sooner than she should have and her mental health disease affected her judgment causing her to return to work sooner that she was ready. The doctor asks that the Claimant be provided any support or leniency where able as she is having significant mental distress and financial hardship at present.

[34] The Claimant also provided a letter from a mental health agency confirming the appointments she attended from June 10, 2021 to January 4, 2022.<sup>16</sup>

[35] I find that the Commission hasn't proven that there was misconduct.

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<sup>14</sup> GD6-4.

<sup>15</sup> GD6-3

<sup>16</sup> GD6-2.

[36] I agree with the Commission that the SIU's findings are not relevant to whether there is misconduct under the Act.

[37] The Federal Court of Appeal has considered what type of evidence may support a conclusion that an action is not wilful. The Court said there must be sufficient evidence regarding a claimant's inability to make a conscious or deliberate decision, which evidence would likely include medical evidence.<sup>17</sup>

[38] I also agree with the Commission that the medical reports do not provide the doctor's opinion that the Claimant's judgment was impaired, only that the Claimant's opinion that her mental health condition impaired her judgment. However, the medical reports do confirm that the Claimant was having mental health issues and as a result was placed on sick leave from May 7, 2021 to July 3, 2021.

[39] I found the Claimant to be credible. Her testimony was consistent with what she told the Commission. I accept the Claimant's testimony that she was struggling with the return to work and was mentally exhausted.

[40] I also accept the Claimant's explanation that at the moment she took the licence, she was not thinking clearly enough to know that her conduct could result in termination. The incident happened a mere two days after her return to work from a lengthy sick leave.

[41] I find that the Claimant's actions are explained by the combination of the stress of the return to work and the fact she had not fully recovered from her illness. In that regard, the Claimant was still in counselling with the mental health agency and she continued to take medication. I note she had three appointments in June 2021 before her return and continued to have appointments after her return. I also note that the Claimant's actions are inconsistent with the fact she had worked with this agency without issue since December 2018.

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<sup>17</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII),

[42] While the Claimant's doctor provides no opinion on her ability to make a judgment at the time, the doctor did not see the Claimant upon her return to work. So, I do not make a negative inference from the lack of an opinion on that point from the doctor. I find there is sufficient medical evidence on file to conclude the Claimant's actions were not wilful at the time she took the licence. In particular, I place significant weight on the fact the Claimant was on an authorized medical leave until July 3, 2021 because she could not work. So, only three days before the incident she was medically unable to work at all. Further, the medical evidence confirms the Claimant had a mental health condition and was participating in ongoing counselling before and after her return to work. Considering the medical evidence as a whole, in context with when the incident occurred, I am satisfied the Claimant's actions were not wilful.

[43] The Claimant testified that had she been thinking clearly she would not have taken the licence as she understood, when she was thinking clearly, that such action could result in termination. I find it unlikely that the Claimant would wilfully engage in taking a licence, having just returned to work from a medical leave and having a need to support her family, if she were aware of the consequences.

[44] It is true that shortly after the incident, the Claimant realized what she had done, while in her truck. However, at issue is her wilfulness at the moment she took the licence, not after. The fact she realized shortly after the incident, the potential impact of her conduct does not necessarily mean at the moment she engaged in that conduct it was wilful.

[45] There is no doubt that had the Claimant had acted in a conscious, deliberate or intentional manner or even in a manner so reckless to amount to wilfulness in taking the licence that her actions would amount to misconduct. However, for the reasons explained above, I am not satisfied that the Commission has proven it is more likely than not that the Claimant's actions were wilful. I am not satisfied that she acted in a conscious, deliberate, or intentional manner when she took the licence or that her actions were reckless to the point of wilfulness.

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

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

**Conclusion**

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

[48] This means that the appeal is allowed.

Charlotte McQuade  
Member, General Division – Employment Insurance Section