



[TRANSLATION]

Citation: *TL v Canada Employment Insurance Commission*, 2022 SST 257

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

Decision

Appellant: T. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (437753) dated November 5, 2021 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference

Hearing date: March 10, 2022

Hearing participant: Appellant

Decision date: March 18, 2022

File number: GE-22-277

Decision

[1] The appeal is dismissed. I find that the Appellant lost his job because of misconduct.¹ This means that his disqualification from receiving Employment Insurance (EI) regular benefits from May 2, 2021, is justified.

Overview

[2] From November 25, 2019, to May 3, 2021, the Appellant worked as a “folder” for printer X (X or employer) and stopped working when the employer let him go. The employer says it dismissed the Appellant because of his absences.

[3] On May 25, 2021, he applied for EI benefits (sickness benefits). A benefit period was established from May 9, 2021.

[4] The Appellant was paid the maximum 15 weeks of sickness benefits (special benefits) from May 9, 2021, to August 21, 2021.²

[5] On October 5, 2021, the Canada Employment Insurance Commission (Commission) told the employer that it approved the reason for separation of its former employee (the Appellant). The Commission told the employer it had found that the Appellant hadn't lost his job because of misconduct.³

[6] On October 18, 2021, the employer sent a request for reconsideration of an EI decision.⁴

[7] On November 5, 2021, after this request for reconsideration, the Commission told the Appellant it had found that he had been let go because of misconduct.⁵

[8] The Appellant argues that he didn't lose his job because of misconduct. He argues that he was absent from work because of medical reasons related to a drinking

¹ See sections 29 and 30 of the Employment Insurance Act (Act).

² See GD3-22 to GD3-25 and GD4-1.

³ See GD3-28.

⁴ See GD3-29 and GD3-30.

⁵ See GD3-38 and GD3-39.

problem. The Appellant says that he was hospitalized several times during his employment because of this problem. He argues that he was absent from work on May 3, 2021, and the days after because of medical reasons related to a drinking problem. The Appellant says he was unable to work for medical reasons from May 5, 2021, to August 20, 2021, inclusive. This included a period of hospitalization from May 7 to May 13, 2021. He says his absence from work from May 3, 2021, was justified, although he made an agreement with his employer in January 2021, not to miss work without a valid reason. The Appellant claims the employer was aware of his drinking problem despite this agreement. He also argues that the reason he was absent from work also explains why he didn't provide the written proof the employer asked for, stating that his son's day care was closed on May 3, 2021. On January 18, 2022, the Appellant challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[9] I have to determine whether the Appellant lost his job because of misconduct.⁶ To decide this, I have to answer the following questions:

- Why did the Appellant lose his job?
- Is the reason for the Appellant's dismissal misconduct under the Act?

Analysis

[10] The term misconduct isn't defined in the *Employment Insurance Act* (Act). Federal Court of Appeal (Court) decisions describe the concept of misconduct.

[11] In one of its decisions, the Court says that, to be misconduct, "the act complained of must have been willful or at least of such a careless or negligent nature that one

⁶ See sections 29 and 30 of the Act.

could say the employee willfully disregarded the effects his or her actions would have on job performance.”⁷

[12] To be misconduct under the Act, the conduct has to be wilful. In other words, it must be conscious, deliberate, or intentional.⁸ Misconduct also includes conduct that is so reckless “as to approach wilfulness.” In other words, it must be almost wilful.⁹ To be misconduct under the Act, the Claimant doesn’t have to have wrongful intent. In other words, he doesn’t have to mean to be doing something wrong.¹⁰

[13] There is misconduct if a claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.¹¹

[14] To determine whether the misconduct could result in dismissal, there must be a link between the claimant’s alleged misconduct and the loss of their job. The misconduct must therefore constitute a breach of an express or implied duty resulting from the employment contract.¹²

[15] The Commission has to prove that the Claimant lost his job on a balance of probabilities.¹³ This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.¹⁴

Issue 1: Why did the Appellant lose his job?

[16] The employer says it let go the Appellant because of his absences and because he didn’t go to work from May 3, 2021, without giving the employer a reason.¹⁵

⁷ The Court established this principle in *Tucker*, A-381-85.

⁸ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁹ The Court established this principle in *McKay-Eden*, A-402-96.

¹⁰ The Court established this principle in *Secours*, A-352-94.

¹¹ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

¹² The Court established this principle in *Lemire*, 2010 FCA 314.

¹³ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

¹⁴ The Court established this principle in *Bartone*, A-369-88.

¹⁵ See GD3-29 to GD3-31, GD3-34, and GD3-35.

[17] The employer's statements to the Commission indicate the following:

- a) The Appellant often missed work without giving a reason. He has substance abuse issues.
- b) The employer has a policy where employees must justify their absences.
- c) The Appellant got several warnings for his unjustified absences. The employer gave the Appellant a last warning that it would not accept any more absences because of substance abuse issues. That warning was his [translation] "last chance."
- d) Missing work on May 3, 2021, was the last event that led the employer to let the Appellant go. That day, he told the employer that he had to stay home because his son's day care was closed.
- e) The employer asked the Appellant to give it proof or supporting documents for that absence. The Appellant didn't give the employer proof and didn't show up to work the days after.
- f) The employer terminated the Appellant's job when it found that he would not return to work.
- g) The Appellant's termination of employment could be considered leaving, since he didn't return to work. However, it could also be considered a dismissal, since he missed work without a reason on May 3, 2021, and was let go as a result.¹⁶

[18] In a letter to the Appellant (subject: Termination of employment) from May 8, 2021, the employer told the Appellant that it was letting him go for the following reasons:

¹⁶ See GD3-29 and GD3-31.

- a) On August 14, 2020, the employer sent the Appellant a notice about his absences.
- b) In September 2020, the employer supported him in his personal efforts to get better.
- c) On January 28, 2021, the employer and the Appellant signed an agreement to reinstate him to his duties after going through addiction treatment.
- d) On May 3, 2021, the Appellant told the employer he had to miss work because he didn't have childcare for his son.
- e) The employer hadn't gotten any news from the Appellant since May 4, 2021. It tried to contact the Appellant and left him a message, but he didn't call back.¹⁷

[19] The employer sent the Commission a copy of a document called [translation] "Reinstatement agreement following addiction treatment."¹⁸ This document, signed by the employer and the Appellant, dated January 28, 2021, has the following information: For 24 months, the Appellant agreed [translation] "[n]ot to miss work without a valid reason, the validity of which will be at the discretion of the employer."¹⁹ This document also specifies that [translation] "[...] any failure to meet the commitments made in the present agreement will result in the immediate dismissal of the employee [the Appellant]."²⁰

[20] The Appellant says that he missed work from May 3, 2021. He specified that this absence was justified because of medical reasons related to his drinking problem.²¹

¹⁷ See GD3-35.

¹⁸ See GD3-36 and GD3-37.

¹⁹ See GD3-36.

²⁰ See GD3-37.

²¹ See GD3-32 and GD3-33.

[21] Even though he said in his notice of appeal and in his statements to the Commission that he left his job, the Appellant specified during the hearing that he had been let go by the employer. I consider that he was let go.²²

[22] I find that the Appellant lost his job because of his absence from work from May 3, 2021, without giving the employer a reason, as requested.

[23] I now have to determine whether the Appellant's alleged act constitutes misconduct under the Act.

Issue 2: Is the reason for the Appellant's dismissal misconduct under the Act?

[24] I find that the Appellant acted to deliberately lose his job. The evidence on file shows that his alleged act amounts to misconduct under the Act.

[25] The Appellant's testimony and statements indicate the following:

- a) The Appellant says he has a drinking problem. He says alcohol use disorder is listed as an illness in the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders).
- b) He was hospitalized several times as a result of his drinking problem. While he worked for the employer, he was hospitalized for this reason from August 8 to August 25, 2020, and from January 11 to January 15, 2021. He was also hospitalized for the same reason from May 7 to May 13, 2021, and from August 3 to August 8, 2021.²³ In his October 27, 2021, statement to the Commission he said he wasn't hospitalized in May 2021.²⁴

²² See GD2-4, GD3-22 to GD3-25, GD3-32, and GD3-33.

²³ See GD2-4, GD3-22 to GD3-25, GD3-32, and GD3-33.

²⁴ See GD3-32 and GD3-33.

- c) The Appellant says that medical reports show that he is [translation] “bordering on having generalized anxiety disorder” and that the stress caused by his work for the employer would cause him to “relapse.”
- d) On January 28, 2021, the Appellant met with the employer to discuss his absences due to a drinking problem. The employer talked to him about the problems caused by his absences without notice. The employer asked the Appellant how it could help him. The Appellant told it that he found working for the employer to be very stressful, since there are a lot of standards to follow when carrying out his tasks. The employer asked him what guarantees he could give it regarding his drinking problem. The Appellant told the employer he could not give it any guarantees. The employer found him to be a good, competent employee who had a lot of potential when it came to how he worked. On January 28, 2021, the Appellant signed the document called [translation] “Reinstatement agreement following addiction treatment.”²⁵ He argues he had no other choice but to sign the document; if he didn’t, he would have been let go. He was under pressure.
- e) All of his absences before signing this agreement were justified. He was transparent with the employer by providing all supporting documents about the treatment he was receiving and the programs he participated in (example: medical documents, hospital stays). Everything was justified.
- f) The Appellant says he disagrees with his dismissal. He argues that, despite the agreement he made with the employer on January 28, 2021, the employer was [translation] “well aware” of his substance abuse or drinking problem. The employer was aware he could not guarantee how long he would remain sober. The employer was also aware that the stress the Appellant felt caused him to [translation] “relapse.”²⁶

²⁵ See GD3-36 and GD3-37.

²⁶ See GD2-4, GD3-22 to GD3-25.

- g) On May 3, 2021, he didn't go to work. His son's day care was closed that day. He didn't provide the proof the employer asked for showing that the day care was closed on May 3, 2021, because he had "relapsed" and begun drinking again. He says he told the employer that he could not go to work that day because the day care was closed, which was the case. But, he says that he gave the employer that reason to avoid being let go, since he had gotten a final warning that his absences related to substance abuse would no longer be tolerated.²⁷
- h) He says that even if he had given the proof the employer asked for, he would have been unable to get to work, drive a vehicle, or operate machinery in the days following May 3, 2021, because he was going through a "relapse." He says he found it "excessive" that the employer asked him to provide this proof.²⁸
- i) The Appellant says he was sick when he was let go (that is, depressed, having suicidal thoughts, generalized anxiety disorder). His doctor told him he should be off work so he could take charge of his substance abuse issues. The Appellant says he has gone through complicated withdrawal periods before.²⁹
- j) After his dismissal, the employer told the Appellant that the [translation] "door was open" for him. Despite the employer's message, he didn't return to work for it. His doctor advised against doing so. The Appellant says that he can no longer work there, since it is too stressful for him, and that [translation] "sooner or later" it would cause him to "relapse."³⁰

²⁷ See GD3-32 and GD3-33.

²⁸ See GD3-32 and GD3-33.

²⁹ See GD3-32 and GD3-33.

³⁰ See GD2-4, GD3-32, and GD3-33.

[26] The Appellant sent the Commission or Tribunal a copy of the following documents:

- a) A document entitled “Medical Certificate for Employment Insurance Sickness Benefits,” filled out on June 21, 2021, showing that the Appellant was unable to work from May 5, 2021, to December 31, 2021, because of his health. This document says that the Appellant needed seven months to attend therapy for his drinking problem and to [translation] “adjust medication.”³¹
- b) A medical certificate filled out on September 28, 2021, showing that the Appellant was able to return to work full-time from August 21, 2021.³²
- c) A medical certificate filled out on November 18, 2021, showing that the Appellant was [translation] “partially off work” and that he had started a three-month rehabilitation program.³³

[27] In this case, and based on the evidence presented, I find that the circumstances related to the Appellant’s dismissal show that he deliberately chose to lose his job. His dismissal was the result of a wilful act on his part.

[28] I am of the view that the Appellant could foresee that his absence from work from May 3, 2021, would lead to his dismissal.

[29] During his employment period, the Appellant missed work several times because of a drinking problem.

[30] On January 28, 2021, after participating in a treatment program, he made an agreement with his employer to reinstate him to his duties with certain conditions.³⁴

³¹ See GD3-21.

³² See GD3-26.

³³ See GD2-10.

³⁴ See GD3-36 and GD3-37.

[31] By signing this agreement, the Appellant agreed, among other things, not to miss work without a valid reason, the validity of which was at the employer's discretion.³⁵ The agreement also said that any failure to meet the commitments made in the agreement would lead to the Appellant's immediate dismissal.³⁶

[32] I find that by missing work from May 3, 2021, the Appellant didn't respect the terms of the agreement.

[33] Even though the Appellant argues that he had no choice but to sign the document because he would otherwise have been let go, I find that he knowingly made the agreement to be able to keep working. He could have avoided dismissal by respecting the terms of the agreement.

[34] Although the Appellant also argues that the employer was aware that he had a drinking problem and knew that he could not guarantee how long he would remain sober, he still made a very specific agreement related to his absences from work.

[35] I find that the Appellant 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 by missing work from May 3, 2021, without giving the employer a valid reason according to the January 28, 2021., agreement.

[36] Even though the Appellant was unable to work for medical reasons related to his drinking problem, among other occasions from May 5, 2021, to August 20, 2021, inclusive,³⁷ he can't qualify for EI regular benefits.

[37] The fact is that the Appellant consciously chose to ignore the standards of behaviour that the employer had the right to ask of him by missing work from May 3, 2021, without giving it a valid reason. The Appellant ignored a fundamental requirement of his job.

³⁵ See GD3-36.

³⁶ See GD3-37.

³⁷ See GD3-21 and GD3-26.

[38] The Court specified the following in one of its decisions:

[...] It was an error of law for the Umpire to conclude that the respondent's absence from work was not wilful because of his drug addiction. The consumption of drugs by the respondent, even though attractive or irresistible, was voluntary in the sense that his acts were conscious and that he was aware of the effects of that consumption and the consequences which could or would result.³⁸

[39] In this decision, the Court also specified:

[...] It would be fundamentally altering the nature and principles of the employment insurance scheme and Act if employees, who lose their employment as a result of abusing impairing substances such as alcohol or drugs, could be entitled to receive regular unemployment benefits.³⁹

[40] In short, I find that the Appellant acted in a way that was conscious, deliberate, or intentional and can be considered misconduct by missing work from May 3, 2021, without giving the employer a valid reason.

[41] I find that the Appellant was let go because of an act that was wilful and deliberate.

[42] I am of the view that the Commission met its burden of proof of showing that the Appellant's act constitutes misconduct.

[43] The Court tells us that the Commission has to establish the existence of proof showing a claimant's misconduct.⁴⁰

[44] The Commission has shown that the Appellant intentionally lost his job.

[45] I find that the proof gathered by the Commission shows that the Appellant didn't respect the agreement he made with the employer by missing work from May 3, 2021,

³⁸ See the Court's decision in *Wasylka*, 2004 FCA 219 (paragraph 4).

³⁹ See the Court's decision in *Wasylka*, 2004 FCA 219 (paragraph 5).

⁴⁰ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

without giving it a reason. The Appellant could have kept his job by respecting the terms he agreed to in the agreement.

[46] The Court also tells us that it must be established that a claimant was let go because of misconduct.⁴¹

[47] I find that the link between the Appellant's act and his dismissal has been shown.

[48] The evidence shows that the fact that the Appellant missed work from May 3, 2021, without giving the employer a valid reason was the real cause of his dismissal. The employer says it let the Appellant go for this reason. The Appellant indicates he was let go for the same reason.

[49] Under the Act, the reason for the Appellant's dismissal was misconduct.

Conclusion

[50] I find that the Appellant lost his job because of misconduct.

[51] As a result, the Commission's decision to disqualify him from receiving EI regular benefits from May 2, 2021, is justified.

[52] This means that the appeal is dismissed.

Normand Morin

Member of the General Division, Employment Insurance Section

⁴¹ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485; *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; and *Joseph*, A-636-85.