



[TRANSLATION]

Citation: *AA v Canada Employment Insurance Commission*, 2022 SST 910

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

## Decision

**Appellant:** A. A.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (459375) dated March 17, 2022 (issued by Service Canada)

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**Tribunal member:** Manon Sauvé

**Type of hearing:** Teleconference

**Hearing date:** June 29, 2022

**Hearing participant:** Appellant

**Decision date:** July 19, 2022

**File number:** GE-22-1218

## Decision

[1] The appeal is dismissed. The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct. This means that he is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[2] For over 15 years, the Claimant worked as a machine operator. On October 22, 2021, he was let go for refusing his employer's assignment to another position.

[3] The Claimant applied for EI benefits.

[4] The Commission denied the Claimant EI benefits because he had lost his job due to his misconduct. He had to have known that he would be let go after not accepting another position.

[5] The Claimant disagrees with the Commission. The employer found an excuse to let him go. Nobody wants to work at the position he was assigned to. Also, he could have performed operator tasks in another position in his department.

## Issue

[6] Did the Claimant lose his job because of misconduct?

## Analysis

[7] 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.

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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.

[8] To do so, I have to answer three questions: What actions does the employer say the Claimant committed? Did he commit the actions? Are they misconduct under the *Employment Insurance Act*?

### **What actions does the employer say the Claimant committed?**

[9] The Claimant is a coupon machine operator. The collective agreement says that the employer can assign an employee to another position when there is a shortage of work.

[10] On October 22, 2021, the employer held a meeting with the Claimant about disciplinary actions for refusing work, among other things.

[11] That same day, the employer told the Claimant that there was no work in his department. He had to go work in the grinding department. He refused the assignment and went home. That wasn't the first time the Claimant had refused an assignment to another position.

[12] On October 25, 2021, a meeting was held with the Claimant to review disciplinary infractions. The employer suspended the Claimant indefinitely to make a decision about his case. Finally, the employer let the Claimant go because he didn't want to work following company rules.

[13] The Claimant acknowledges that those are the actions the employer says he committed.

[14] I find that these are indeed the actions the employer says he committed.

### **Did he commit the actions the employer says he did?**

[15] I find that the Claimant committed the actions the employer says he did. He admitted that he refused to go to the grinding station. The employer told him to work in the grinding department or to go home. He went home.

## **Are the actions the employer says the Claimant committed misconduct?**

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have wrongful intent for his behaviour to be misconduct under the law.<sup>4</sup>

[17] 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.<sup>5</sup>

[18] The Commission has to prove that the Claimant lost his job because of misconduct. It 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.<sup>6</sup>

[19] The Commission says that, since the Claimant refused to work in another department right after being told he would be let go if he refused again, he wilfully acted in a way to lose his job.

[20] The employer had the right to transfer the Claimant to another department when there was a shortage of work.<sup>7</sup> The Claimant kept his benefits even if the position he was assigned to paid less.

[21] The Commission also says that the Claimant got several disciplinary warnings for insubordination related to refusing to work.

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

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

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>7</sup> Section 7.04(a) of the Collective Agreement says that the employer can assign any employee from a given shift who is able to carry out the work. The employee gets paid the highest rate between the position they are re-assigned to or the one they usually have (GD3-28 and GD3-82).

[22] The Claimant, on the other hand, says he didn't know he would be let go by refusing to work in another department. He had gotten several warnings that he could be let go, but he had never been let go. So, he didn't think he could be let go after having refused to change departments.

[23] He also says that the employer was looking for an excuse to let him go. The grinding department is very physically demanding. Employees don't want to go work in that department.

[24] The Claimant also says that he could have performed the tasks of a colleague who works in the same department. The employer didn't show that he could not perform the tasks of this colleague, who is allegedly less experienced. He says that he has the skills to perform the tasks.

[25] After reviewing the file, listening to the Claimant, and taking into account the parties' arguments, I am of the view that the Claimant lost his job because of misconduct. The Claimant knew or should have known he would be let go by refusing to work in the grinding department because there were no tasks to perform in his department.

[26] Over the years, the Claimant got several disciplinary reports and warnings, notably for insubordination. His employer held a meeting on October 22, 2021, where it told him that refusing to work again would lead to his dismissal. He was given verbal and written warnings that he would be let go if he refused the next assignment.

[27] On October 25, 2021, he refused the assignment again. The employer suspended the Claimant to make a decision. Finally, it let the Claimant go.

[28] In this context, I find that the Commission has met its burden of proof; it showed that the Claimant lost his job because of misconduct.

[29] My role isn't to decide whether letting the Claimant go is justified or whether it is an appropriate measure. I have to decide whether the act constitutes misconduct. So,

by refusing to work in a department because there wasn't any work in his department, the Claimant was insubordinate.

[30] I don't have to consider whether the employer acted correctly,<sup>8</sup> but were the actions the Claimant committed misconduct? I am of the view that by refusing to work in another department, when the employer has the right to do so, the Claimant was insubordinate. He should have expected to be let go because he was told on October 25, 2021, what the consequences would be if he refused again. I am taking into account that the Claimant got several warnings and disciplinary reports for insubordination or refusing to work.

[31] The Claimant claims that the employer hasn't shown that he could not work in his department and replace his colleague. It didn't show that his colleague had the skills to take on the duties of the second position. So, the Claimant could have taken his position.

[32] According to the information the Commission obtained from the union and the employer, the Claimant would not have been able to take on the position because he isn't trained in programming.

[33] In any case, that is a management decision for the employer. The Claimant has the means of disputing a decision made by the employer with his union. I understand that several grievances have been filed, but my role isn't to decide whether the employer was justified in proceeding like it did.

[34] I have to consider the Claimant's behaviour. My role isn't to decide whether the dismissal was justified or not.

[35] I find that the Commission has proven that there was misconduct, which led to the Claimant's dismissal.

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<sup>8</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *Canada (Attorney General) v Marion*, 2002 FCA 185.

**Did the Claimant lose his job because of misconduct?**

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

**Conclusion**

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

[38] This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section