



[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and PL*, 2022 SST 1088

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

Decision

Appellant: X

Respondent: Canada Employment Insurance Commission

Added party: P. L.

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458859) dated March 4, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference

Hearing date: September 15, 2022

Hearing participants: Appellant (Employer)
Added party (Claimant)

Decision date: October 7, 2022

File name: GE-22-1048

Decision

[1] The Employer's appeal is dismissed. I find that the Employer hasn't shown that the Claimant lost his job because of misconduct.¹ This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.

Overview

[2] From April 26, 2021, to September 16, 2021, inclusive, the Claimant worked as a painter for the employer X (Employer).

[3] On January 4, 2022, the Canada Employment Insurance Commission (Commission) told the Claimant that he wasn't entitled to EI regular benefits from September 12, 2021, because he had voluntarily stopped working for the Employer on September 16, 2021, without good cause under the *Employment Insurance Act* (Act).²

[4] On February 14, 2022, the Claimant asked the Commission to reconsider that decision.³

[5] On March 4, 2022, after reconsideration, the Commission told the Claimant that it had reconsidered its position in his favour. It told him that it had rescinded its January 4, 2022, decision that he had voluntarily left his job without good cause under the Act.⁴

[6] On March 4, 2022, the Commission told the Employer that it had approved the reason for separation of its former employee (Claimant). It told the Employer that the reasons he had lost his job weren't misconduct under the Act.⁵

[7] On March 16, 2022, the Employer challenged the Commission's reconsideration decision before the Tribunal.⁶ That decision is now being appealed to the Tribunal.

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

² See GD3-41 and GD3-42.

³ See GD3-43 and GD3-44.

⁴ See GD3-48 and GD3-49.

⁵ See GD2-10, GD3-50, and GD3-51.

⁶ See GD2-1 to GD2-10.

[8] The Employer says it didn't let the Claimant go; he voluntarily left his job. It says that the Claimant had many days of unexcused absences during his last weeks of work and got several warnings about them. The Employer says that, on September 16, 2021, while the Claimant was already late for work on top of having been absent the previous day, he sent it a text message saying he had a job interview that day. The Employer says that it concluded that the Claimant was resigning. The Employer then sent him exit paperwork about the end of his employment.

[9] The Claimant says he didn't voluntarily leave his job; the Employer let him go. He says that he didn't mean to send it the September 16, 2021, text message saying that he had a job interview with another employer that day. He says that the text message was for his mother. He argues that he never told the Employer that he was resigning and didn't send it any message saying so. He also argues that, if he had wanted to voluntarily leave his job, he would not have told the employer that way. He says that he would have made sure he found another job first and would have given the Employer notice before quitting.

Issues

[10] In this case, I have to decide whether the Claimant lost his job because of misconduct.⁷ To decide this, I have to answer the following questions:

- Why did the Claimant lose his job?
- If he was let go, is the reason he was let go misconduct under the Act?

Analysis

[11] The Act doesn't define the term "misconduct." Federal Court of Appeal (Court) decisions set out the characteristics that describe the notion of misconduct.

⁷ See sections 29 and 30 of the Act.

[12] In one of its decisions, the Court said that, to be misconduct, “the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance.”⁸

[13] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless that it “approach[es] wilfulness.”¹⁰ For his behaviour 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.¹¹

[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.¹²

[15] To determine whether the misconduct can result in dismissal, there has to be a link between the Claimant’s misconduct and the loss of his job. So, the misconduct has to be a breach of an express or implied duty resulting from the contract of employment.¹³

[16] It is up to the Employer or Commission, as the case may be, to prove that the Claimant lost his job because of misconduct.¹⁴ This means that the Commission or the Employer has to show that it is more likely than not that the Claimant lost his job because of misconduct.¹⁵

⁸ The Federal Court of Appeal (Court) established this principle in *Tucker*, A-381-85.

⁹ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

¹⁰ The Court established this principle in *McKay-Eden*, A-402-96.

¹¹ The Court established this principle in *Secours*, A-352-94.

¹² The Court established this principle in *Mishibinijima*, 2007 FCA 36.

¹³ The Court established this principle in *Lemire*, 2010 FCA 314.

¹⁴ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

¹⁵ The Court established this principle in *Bartone*, A-369-88.

Issue 1: Why did the Claimant lose his job?

[17] In this case, the Claimant's job ended after he sent a text message to his Employer on September 16, 2021, saying that he had a job interview that day. The message he sent the Employer said: [translation] "I have a job interview today."¹⁶

[18] The Employer responded by telling him that it considered the message as a resignation and told him that the paperwork would be mailed to him.¹⁷

[19] The Employer's testimony and statements indicate the following:

- a) The Claimant voluntarily left his job. The Employer didn't let him go and didn't tell him he was being fired, like he claims.¹⁸ The Employer says that it issued a Record of Employment saying that the Claimant quit.¹⁹
- b) Since this is a case of voluntary leaving, the Commission's analysis should not focus on misconduct. The Employer argues that it never said the Claimant had lost his job because of misconduct.²⁰
- c) The Claimant was absent from work several times in August 2021. He said he was absent for health reasons.²¹
- d) As of August 30, 2021, the Claimant's absences were unexcused. He didn't answer when the Employer called or texted him to find out why he was absent. He would come back to work the day after he was absent, without any more details.²²

¹⁶ See GD3-46.

¹⁷ See GD3-32 and GD3-46.

¹⁸ See GD2-5 and GD3-47.

¹⁹ See GD3-22 and GD3-23.

²⁰ See GD2-5.

²¹ See GD3-25, GD3-27, GD3-28, and GD3-36 to GD3-39.

²² See GD3-27.

- e) On September 8 and 9, 2021, the Claimant was absent for health reasons but didn't provide medical evidence, as requested.²³
- f) At 7:50 a.m. on September 15, 2021, the Claimant—whose work day started at 7 a.m.—told the Employer that he would be absent for health reasons.²⁴ He didn't provide medical evidence for that absence either.
- g) On September 15, 2021, the Claimant got a disciplinary warning for [translation] “multiple unexcused absences.”²⁵ By September 15, 2021, he had been absent from work for almost three weeks in total (he was absent for two weeks and four days).²⁶ The Employer says it had no choice but to use this disciplinary action.
- h) At 7:39 a.m. on September 16, 2021, the Employer got a text message from the Claimant saying that he had a job interview with another employer that day.²⁷ The Employer replied that it considered that he didn't want to go back to work and that he was resigning.²⁸ He replied that he had been thinking of giving it two weeks' notice of resignation.²⁹ The text message conversation continued with the Claimant saying he wanted his salary adjusted, since he found it wasn't enough.³⁰ That was the Employer's last conversation with the Claimant before his job ended.
- i) The Claimant didn't say that he was resigning in his September 16, 2021, text message.³¹

²³ See GD3-25 and GD3-27.

²⁴ See GD3-33.

²⁵ See the document entitled [translation] “Disciplinary measures – Warning for unexcused absence – Written Warning #1.” This document says that the next step for an unexcused absence is suspension without pay for two days—GD3-26.

²⁶ See GD3-25.

²⁷ See GD3-25 and GD3-46.

²⁸ See GD3-25, GD3-32, and GD3-46.

²⁹ See GD3-32 and GD3-46.

³⁰ See GD3-29 to GD3-32 and GD3-46.

³¹ See GD3-47.

- j) When the Employer got that text message, it concluded that the Claimant was voluntarily leaving his job because of his absences from the previous weeks.³² The Employer says that, when this message was sent, the Claimant was already almost an hour late for work and hadn't shown up to work the day before either. The Employer assumed that the Claimant was going to start working somewhere else. The Employer says it considered that the Claimant no longer wanted to work for it because of his absences and the fact that he hadn't gone to work in two days.
- k) The Claimant's September 16, 2021, text message is the last thing that happened before his job ended. The Employer didn't get any other message from him saying he was resigning (for example, a letter of resignation). The Employer didn't contact the Claimant after their September 16, 2021, text message conversation.³³
- l) When the Claimant was hired, he signed a document with the Employer's rules and policies, including those about absences (for example, giving the Employer 48 hours' notice for a medical appointment). The Employer's rules and policies describe a progressive discipline process for unexcused absences, but it wasn't applied in the Claimant's case. A disciplinary warning is the first step in the progressive discipline process. The process goes like this: An employee is first given a warning. The next step is a two-day suspension without pay. Dismissal may be the fourth or fifth step in this process.
- m) The September 15, 2021, disciplinary warning addressed to the Claimant came after many discussions and text message conversations with him to warn him about his absences and to explain that he needed to give notice if he had to be absent. When the Claimant was warned verbally, he was told that disciplinary measures would be used. There was no talk about being at

³² See GD2-5 and GD3-47.

³³ See GD3-47.

risk of losing his job or that he would be let go for his absences. The goal of the discussions with him was to remind him that it was important to show up and be on time to work. The disciplinary warning on September 15, 2021, was given to the Claimant when the Employer sent him his exit paperwork on or around September 21, 2021.³⁴

- n) If the Claimant hadn't sent it the September 16, 2021, text message, the Employer would have given him a disciplinary warning, and the next step, if it happened again, would have been suspension. But once it considered that the Claimant had voluntarily left, he would not have been able to get his job back.³⁵

[20] The Claimant's testimony and statements indicate the following:

- a) Contrary to what the Employer says, the Claimant didn't resign or voluntarily leave his job. The Employer let him go.³⁶
- b) The Claimant's September 16, 2021, text message to the Employer saying that he had a job interview with another employer wasn't for the Employer. He says that it was for his mother. The Employer got it by mistake.³⁷
- c) After reading that text message, the Employer replied that it considered that he was resigning or voluntarily leaving his job.³⁸ The Claimant says that, in that text message, he never told the Employer that he was resigning.³⁹ He only said that he had a job interview with another employer. The Employer told him that it was [translation] "giving him the boot." The Claimant says that

³⁴ See GD3-25.

³⁵ See GD3-47.

³⁶ See GD3-10, GD3-11, GD3-24, and GD3-43 to GD3-45.

³⁷ See GD3-24, GD3-40, and GD3-43 to GD3-46.

³⁸ See GD3-24, GD3-43, and GD3-44.

³⁹ See GD3-45.

this is what the Employer wanted to do; it was waiting for the chance to do so.⁴⁰

- d) Concerning the absences the Employer alleges, the Claimant says those were due to medical reasons. The Employer didn't tell him that he could lose his job if he kept being absent or failing to follow his work schedule.⁴¹
- e) The Claimant wasn't happy in his job and was looking elsewhere. But he didn't send the Employer a text message saying he was leaving. If he had wanted to tell the Employer that he was leaving his job, he would not have done it that way. He would have waited until he had another job and would have given the Employer two weeks' notice.⁴²
- f) The Claimant didn't contact the Employer after September 16, 2021, since he had been let go. He didn't try to keep that job.⁴³

[21] In this case, I find that the Claimant's job ended because of the text message he sent to the Employer on September 16, 2021, saying that he had a job interview with another employer that day.

[22] I find that the content of that text message doesn't show that the Claimant told the Employer that he was voluntarily leaving his job or that he was resigning.

[23] The Claimant's statements are consistent on this point. He says that the text message was for his mother and not the Employer. He says he didn't send a resignation message to his Employer. He argues that, if he had wanted to tell the Employer he was leaving his job, he would have first made sure he found another job. He also says that he would have given his Employer notice to tell it he was going to stop working for it.

⁴⁰ See GD3-40 and GD3-45.

⁴¹ See GD3-45.

⁴² See GD3-40 and GD3-43 to GD3-45.

⁴³ See GD3-45.

[24] I find that it was the Employer who took the initiative of ending the Claimant's employment after concluding that he had voluntarily left or that he had resigned.

[25] Even though the Employer had reason to believe the Claimant wanted to quit because of his many unexcused absences, I find that he lost his job from being let go.

[26] I also agree with the Commission's finding that the evidence on file shows that the Claimant was let go.⁴⁴

[27] I now have to determine whether the Claimant was let go because of misconduct under the Act.

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

[28] I find that the circumstances relating to the Claimant's dismissal don't show that he deliberately set himself up to lose his job by sending a text message to the Employer saying that he had a job interview with another employer. His dismissal isn't the result of wilful actions on his part.

[29] I understand from the Claimant's explanations that his September 16, 2021, text message wasn't meant to tell his Employer he was leaving his job or resigning and that the message wasn't for the Employer.

[30] The Employer hasn't shown that what the Claimant did is misconduct under the Act.

[31] Even though the Employer argues that, because of his many absences over his last few weeks, it concluded the text message meant the Claimant was leaving his job or resigning; this wasn't the case.

⁴⁴ See GD4-4.

[32] Concerning the Claimant's absences, the Employer recognizes that it didn't use progressive discipline with him. It also recognizes that, in its warnings to the Claimant, there was no talk of him being at risk of losing his job or being let go for his absences.

[33] The Commission, in turn, argues that, when the Claimant sent his September 16, 2021, text message, this wasn't a wilful or deliberate act, since he sent it to the wrong recipient.⁴⁵

[34] The Commission also argues that the Employer didn't follow the progressive discipline policy and that it made a [translation] "spontaneous decision" in letting the Claimant go.⁴⁶

[35] The Commission says that the Claimant didn't lose his job due to his own misconduct because the wilfulness of the act leading to the dismissal hasn't been proven.⁴⁷

[36] I agree with the Commission's conclusions on these points.

[37] I find that, by sending a text message to the Employer saying that he had a job interview with another employer, the Claimant didn't act to deliberately lose his job.

[38] I find that the Claimant could not have known that there was a real possibility he could be let go after sending that text message.

[39] In summary, I find that the Employer hasn't shown that the Claimant committed a conscious, deliberate, or intentional act that can be considered misconduct. It hasn't proven that the Claimant intentionally lost his job.

[40] I am of the view that, in this case, the Employer hasn't met its burden of proving that the Claimant's act amounts to misconduct.

⁴⁵ See GD4-5.

⁴⁶ See GD4-5.

⁴⁷ See GD4-5.

[41] The Court tells us that it has to be established that the Claimant was let go because of misconduct.⁴⁸

[42] I find that the Claimant wasn't let go because of an act he committed wilfully and deliberately.

[43] The reason for the Claimant's dismissal isn't misconduct under the Act.

Conclusion

[44] I find that the Employer hasn't proven that the Claimant lost his job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[45] This means that the Employer's appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section

⁴⁸ The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.