



Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1257

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

**Decision**

**Appellant:** A. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (456076) dated February 17, 2022  
(issued by Service Canada)

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**Tribunal member:** Teresa M. Day

**Type of hearing:** Videoconference

**Hearing date:** July 13, 2022

**Hearing participant:** Appellant

**Decision date:** July 25, 2022

**File number:** GE-22-871

## Decision

[1] The appeal is dismissed, with modifications to the reason for the disqualification imposed on this claim *and* the period of the disqualification.

[2] The Appellant has proven his entitlement to employment insurance (EI) benefits for the time he was legitimately laid off due to a shortage of work.

[3] But he is not entitled to EI benefits after he took an unauthorized leave of absence from his employment and lost his job due to his own misconduct.

## Overview

[4] The Appellant received a lay-off notice from his employer, X (X), on January 21, 2021. He applied for regular EI benefits the same day. The Respondent (Commission) started his claim as of January 17, 2021 and paid him 46 weeks of EI benefits, up to December 11, 2021.

[5] After the employer amended the Appellant's Record of Employment (ROE) to change the reason for issuing the ROE from "Shortage of Work"<sup>1</sup> to "Quit"<sup>2</sup>, the Commission investigated the reason for the Appellant's separation from employment<sup>3</sup>. But he did not respond to their enquiries.

[6] On December 31, 2021, the Commission decided that the Appellant was not entitled to any EI benefits because he voluntarily left his employment with X on January 21, 2021 without just cause<sup>4</sup>. A retroactive disqualification was imposed on his claim, starting from January 17, 2021<sup>5</sup>. This caused a \$23,000 overpayment of EI benefits on his claim<sup>6</sup>.

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<sup>1</sup> See ROE issued February 25, 2021 (at GD3-17), which utilized the A code for "Shortage of work / End of contract or season".

<sup>2</sup> See Amended ROE issued October 6, 2021 (at GD3-19).

<sup>3</sup> See Supplementary Record of Claim at GD3-210.

<sup>4</sup> See decision letter at GD3-22.

<sup>5</sup> By imposing an indefinite disqualification as of January 17, 2021, the Commission said the Appellant was not entitled to *any* of the EI benefits he had been paid on this claim.

<sup>6</sup> See Notice of Debt at GD3-24.

[7] The Appellant asked the Commission to reconsider. He denied quitting his job. He said he was laid off due to the Covid-19 pandemic, and attached a copy of his layoff notice<sup>7</sup>.

[8] The employer confirmed that the Appellant was initially laid off in January 2021. But the employer also said that the Appellant was later offered a recall and declined to return to work. The Appellant told the employer he could not return to work right away and could not provide a date when he would return to work. The employer gave the Appellant some time to take care of whatever he needed to deal with, and then contacted him again. When the Appellant still didn't know if or when he could come back to work, the employer considered the Appellant to have abandoned his job and amended his ROE to "Quit".

[9] The Commission maintained the disqualification on the Appellant's claim, and he appealed to the Social Security Tribunal (Tribunal).

[10] I must decide whether the Commission's decision is correct, namely whether the Appellant should be disqualified from EI benefits as of January 17, 2021 because he voluntarily left his job without just cause.

[11] The Appellant denies that he quit or abandoned his job. He said the employer never contacted him about returning to work.

[12] The Commission says the Appellant declined an offer of recall – **twice** – and could not advise the employer when he would be available to return to work. X was not able to hold the Appellant's position without knowing when he would be coming back to work, so after the second refusal, the employer considered the Appellant to have abandoned his job. The Commission says the Appellant is disqualified from EI benefits because he voluntarily left his employment without just cause when he refused to accept X's offer of recall.

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<sup>7</sup> See GD3-27.

[13] I agree with the Commission that the Appellant is not entitled to all of the EI benefits he was paid on this claim.

[14] But my reasons are different from the Commission's.

[15] I find that there was a period of 5 weeks at the start of the Appellant's claim when he was legitimately laid off due to a shortage of work, so he is entitled to EI benefits for that time.

[16] But I find that the Appellant is not entitled to EI benefits after he took an unauthorized leave of absence from his employment and lost his job due to his own misconduct.

[17] This means I am dismissing the appeal, but modifying the reason why the Appellant cannot receive EI benefits *and* the period of the disqualification.

[18] These are the reasons for my decision.

## Issues

[19] Is the Appellant disqualified from receiving EI benefits as of January 17, 2021 because he voluntarily left his job at X without just cause?<sup>8</sup>

[20] To answer this, I will first look at whether the Appellant voluntarily left his job.

[21] If he did not voluntarily leave his job, but was separated from his employment because he took an unauthorized leave of absence, then I must consider whether he is disqualified from EI benefits because he lost his job due to his own misconduct<sup>9</sup>.

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<sup>8</sup> This is the first question I must consider because this is the reconsideration decision the Appellant has appealed.

<sup>9</sup> Section 30 of the Employment Insurance Act (EI Act) provides for disqualification on 2 related grounds: if a claimant voluntarily leaves their job without just cause or if they lose their job because of their own misconduct. The court has said these grounds are linked in a way that requires me to consider whether a disqualification under section 30 of the EI Act is warranted on either of the 2 related grounds: see *Attorney General of Canada v. Easson*, A-1598-92, and *Borden* 2004 FCA 176.

## Analysis

### Issue 1: Did the Appellant voluntarily leave his job at X?

[22] No, he did not.

[23] The law says that a claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can prove they had just cause for leaving<sup>10</sup>.

[24] To decide if the Appellant should be disqualified on this basis, I must first look at whether he, in fact, voluntarily left - or quit - his job.

[25] The first X representative that spoke with the Commission said the Appellant was “a no call, no show”<sup>11</sup>.

[26] The second employer representative, who was the HR Manager for X, told the Commission that the Appellant was initially laid off in January 2021. But when the Appellant was subsequently offered a recall, he told the employer he could not return to work right way – and could not give a date for when he was going to return to work. The HR Manager gave the Appellant some time to take care of whatever he needed to deal with, and then contacted the Appellant again. But the Appellant still did not know if – or when – he could return to work. The employer could not hold the Appellant’s position for him without knowing when he would be coming back to work. This is why X considered the Appellant to have quit.

[27] On October 6, 2021, the employer amended the Appellant’s ROE to a “Quit”.

[28] The Appellant relies on the layoff notice from X, which was issued on January 21, 2021 and reads as follows:

“This correspondence is intended to confirm our conversation today regarding our changing business needs which has resulted in a reduction of the workforce.

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<sup>10</sup> Section 30 of the EI Act. To prove just cause, a claimant must show they had no reasonable alternative but to leave the employment when they did.

<sup>11</sup> Both of the Commission’s conversations with the employer’s representatives are documented at GD3-29.

As a result, we are giving notice of your layoff from work effective as of January 21, 2021 in accordance with Article 15 of the Collective Agreement.” (GD3-27)

[29] At the hearing, the Appellant testified that:

- He was given a layoff notice in January 2021. But he was never given a time when he was supposed to return to work after that.
- The employer never gave him “a schedule” which said “that month, come back”.
- No one from X contacted him about returning to work.
- He wants to see the “proof” that they talked to him about returning to work. He says that what the employer told the Commission at GD3-29 “never happened”.
- He never spoke to “anyone from X”.
- When he was laid off in January 2021, he was in the process of trying to bring his family to Canada as refugees from Somalia<sup>12</sup>. He was living alone and renting a room.
- In March 2021, he was notified by ‘Immigration’ that his family “will arrive soon”, probably in June 2021. So he went out and rented a house for his family.
- He moved to the new house in March 2021.
- His phone number stayed the same, but he was getting a lot of “scam calling” and had to “reset” his phone. This deleted a lot of his contacts. After doing this, he didn’t get any calls unless they were from a number found in his contacts. That’s why he can say he didn’t get any phone calls from X.

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<sup>12</sup> The Appellant testified that his family first got a VISA to come to Canada in April 2020. But then all the airports were shut down and the borders were closed because of the Covid-19 pandemic.

- Starting in March 2021, he was busy helping his family get their VISAs and preparing for their arrival in Canada in June 2021.
- Unfortunately, his family didn't get permission to fly to Canada from Kenya in June 2021. They were told they needed additional immigration paperwork<sup>13</sup>. He was involved in sorting all of that out.
- His family finally arrived in Canada on November 24, 2021.
- He had to pay \$1,700/month for rent on the house from March 2021 until his family came in November 2021.
- He had a lot of stress at that time. He was alone, and "the government of Canada they don't support me."
- How he is supposed to repay \$23,000?
- He worked at X since 2017. His manager will verify that he was a good employee, and never skipped a day of work even if he was sick.
- In 2021, he was "full of stress", and "this thing with the \$23,000 just happened".

[30] I asked the Appellant if he ever contacted X to ask the employer when he would be recalled to work? He answered, "No". He said it was a very stressful time for him while he was trying to get his family to Canada. He said he had "a lot of things to care about in my family", and that's why he "didn't contact anyone at X".

[31] I find that the Appellant did not voluntarily leave his job at X. He is adamant that he never quit, and I believe him. There is no evidence he resigned or took steps to sever the employment relationship by quitting. And I cannot ignore the layoff notice, which clearly states that the Appellant was laid off from his employment effective

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<sup>13</sup> The Appellant referred to this as the second time his family was delayed in coming to Canada.

January 21, 2021, or the ROE that was issued on February 25, 2021 for the shortage of work.

[32] Since the Appellant did not voluntarily leave his employment at X, he cannot be disqualified from receiving EI benefits for doing so.

## **Issue 2: Did the Appellant take a leave of absence from his job?**

[33] Yes, he did. But not at first.

[34] At first, the Appellant was legitimately laid off.

[35] He received a written notice from the employer that he was being laid off as of January 21, 2021. And the employer still considered him to be laid off on February 25, 2021, when it issued the first ROE because of a shortage of work. I therefore find that for the 5 weeks between January 21, 2021 and February 25, 2021, the Appellant was laid off due to a shortage of work and separated from his employment through no fault of his own. This means he has proven his entitlement to EI benefits between January 21, 2021 and February 25, 2021, and the Commission must rescind the disqualification for this period of time.

[36] But at some point after February 25, 2021, the Appellant transitioned to a leave of absence.

[37] This leave of absence began as an **authorized** leave when the HR Manager contacted the Appellant with an offer of recall and instead agreed to give the Appellant time off work to take care of whatever he needed to deal with.

[38] It turned into an **unauthorized** leave when the HR Manager got back in touch with the Appellant and the Appellant said he *still* didn't know if or when he could come back to work. At that point, the Appellant's leave was no longer authorized. When the Appellant refused to return to work or provide a return to work date *the second time*, the employer considered that he had elected to quit rather than be recalled to work after the layoff. The employer amended the Appellant's ROE to reflect the "Quit" in order to bring



the Appellant's employment to an end. This is the same thing as being dismissed for job abandonment.

[39] In coming to this conclusion, I give greatest weight to the employer's statements to the Commission at GD3-29. This is because the employer's statements about offering the recall and agreeing instead to give the Appellant time off to take care of whatever he needed to deal with – correspond to precisely what the Appellant testified he was doing at that time, namely dealing with immigration matters and preparing for his family's arrival as refugees in Canada. The Appellant testified that he had worked for X since 2017 and was a valued employee at X. It makes sense that the employer would agree to defer the Appellant's recall and allow him to take time off from work to deal with these personal matters – especially in light of the fact that he'd been waiting for his family to come to Canada since March 2020.

[40] I give less weight to the Appellant's testimony denying that he was ever contacted by X about returning to work. It seems highly unlikely that X somehow lost track of the Appellant after recall and then spontaneously decided to amend his ROE to say that he Quit. Especially when the Appellant had worked there for 4 years and was a valued employee, as he testified. Rather, this is the kind of thing that an employer does when an offer of recall or a request to return to work is declined by an employee. Additionally, the Appellant took no steps to reach out to the employer or make any enquiries about the potential for recall – even though he had worked at X for 4 years and presumably need to work to support his family who were expected to arrive in Canada imminently. His failure to be in touch with X is also consistent with being on an authorized leave of absence.

[41] I therefore find that the Appellant was on an authorized leave of absence that started after February 25, 2021 and continued until October 6, 2021, when the Appellant declined to return to work and the employer considered this a quit and amended his ROE to reflect the "Quit".

[42] Since the Appellant did not voluntarily leave his employment at any point between February 25, 2021 and October 6, 2021, he cannot be disqualified from EI benefits during this time for doing so.

[43] **But this does not mean the Appellant has proven his entitlement to EI benefits between February 25, 2021 and October 6, 2021.**

[44] The law says that an employee who voluntarily takes an approved leave of absence, that is a leave which is authorized by the employer and for which the parties have agreed on a return to work date (either before or during the leave) – without just cause, is disentitled to EI benefits<sup>14</sup>.

[45] The disentitlement continues until one of the following things happen:

- a) the employee resumes the employment,
- b) the employee loses or voluntarily leaves the employment,
- c) or the employee accumulates a sufficient number of hours of insurable employment with another employer to qualify for EI benefits<sup>15</sup>.

[46] The Commission must now decide if the Appellant is disentitled to EI benefits between February 25, 2021 and October 6, 2021 for voluntarily taking a leave of absence without just cause.

[47] As this question has not yet been reconsidered, it is not before me on this appeal.

[48] The issues I have jurisdiction over are the Appellant's separation from employment and the disqualification imposed on his claim pursuant to section 30 of the *Employment Insurance Act* (EI Act)<sup>16</sup>.

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<sup>14</sup> Section 32(1) of the EI Act.

<sup>15</sup> Section 32(2) of the EI Act.

<sup>16</sup> See footnote 9 above.

[49] For the reasons set out under Issue 1 and 2 above, I find that the Appellant was dismissed on October 6, 2021 for taking an unauthorized leave of absence instead of returning to work as requested. His conduct in taking this unauthorized leave of absence is what caused him to lose his job.

### **Issue 3: Did the Appellant lose his job due to his own misconduct?**

[50] Yes, he did.

[51] The Appellant's refusal to return to work or provide a return to work date as requested by the employer – after X's HR Manager had allowed him time to attend to his personal matters, is misconduct for purposes of receiving EI benefits.

[52] The law says a claimant is disqualified from receiving EI benefits if they lost their job due to their own misconduct<sup>17</sup>.

[53] To be misconduct under the law, the conduct that caused the job loss has to be wilful. This means the conduct was conscious, deliberate, or intentional<sup>18</sup>, or conduct that is so reckless that it is almost wilful<sup>19</sup>. A claimant doesn't have to have wrongful intent (in other words, they don't have to mean to be doing something wrong) for the behaviour to be misconduct under the law<sup>20</sup>. But there is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties to the employer and that there was a real possibility of being dismissed because of it.

[54] Having found that the Appellant lost his job because he took an unauthorized leave of absence instead of returning to work, I must now consider whether this conduct constitutes misconduct for purposes of EI benefits.

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<sup>17</sup> Section 30 of the EI Act.

<sup>18</sup> See *Mishinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>19</sup> See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

<sup>20</sup> See *Attorney General of Canada v. Secours*, A-352-94.

[55] The employer's statements to the Commission are summarized and discussed under Issues 1 and 2 above<sup>21</sup>.

[56] The Appellant denies that he quit his job and says the employer never contacted him about recall to work after he was laid off. For the reasons set out under Issues 1 and 2 above, I prefer the evidence obtained from the employer on the issue of the Appellant's recall. I find that the Appellant declined the employer's offer of recall and refused to return to work when he was asked to do so the second time he was contacted by X after being laid off. By refusing to provide the employer with a return to work date, the Appellant's leave went from an authorized leave of absence to an unauthorized leave of absence.

[57] The Appellant made a deliberate choice not to comply with the employer's attendance requirements. I acknowledge that he was preoccupied with immigration matters and preparing for his family's arrival in Canada as refugees from Somalia. But the employer was entitled to ask him to return to work and to set its own attendance policies. The courts have said that failing to attend work as required without the consent of the employer is misconduct<sup>22</sup>. The courts have also said that the Tribunal does not have the authority to rule on the validity of policies and procedures adopted by employers<sup>23</sup>. This power rests with grievance arbitrators, the bodies responsible for enforcing labour standards or, in some cases, provincial human rights tribunals.

[58] I find the Appellant's actions in taking an unauthorized leave of absence starting on October 6, 2021 were so reckless as to be wilful.

[59] I also find that he ought to have known that such conduct could lead to his dismissal from employment for job abandonment. The Appellant's appears to think he could continue to remain off work without giving the employer any indication of when he

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<sup>21</sup> The Commission must prove that the Appellant lost his job because of misconduct. This has to be proved on a balance of probabilities, which means the Commission must show it is more likely than not that the Appellant lost his job because of misconduct (see *Minister of Employment and Immigration v. Bartone*, A-369-88). They do this with evidence obtained from the employer.

<sup>22</sup> See *Canada (AG) v. Jamieson*, 2011 FCA 204.

<sup>23</sup> See *Canada (AG) v. Lemire*, 2010 FCA 314.

would be available to return to work – and that at some future, unspecified date, he would be allowed to return to his duties when he felt ready to do so. This defies logic and common sense. As the employer told the Commission, X could not hold his position open indefinitely. The Appellant ought to have known that dismissal was a likely consequence of such behaviour.

[60] Based on these findings, the Appellant's conduct in taking an unauthorized leave of absence as of October 6, 2021 constitutes misconduct for purposes of EI benefits. This means he is disqualified from receiving EI benefits starting from October 6, 2021 and continuing from that point until the end of his claim.

## Conclusion

[61] The Appellant is not disentitled to EI benefits between January 21, 2021 and February 25, 2021 because he was legitimately laid off from his job due to a shortage of work during this period. He has proven his entitlement to EI benefits between January 21, 2021 and February 25, 2021 and the Commission must rescind the disqualification on his claim for this period.

[62] The Appellant started an authorized leave of absence after February 25, 2021. It continued until October 6, 2021, when the Appellant declined to return to work and lost his employment. But the Appellant has not proven his entitlement to EI benefits during this period. The Commission must now decide if the Appellant should be disentitled to benefits between February 25, 2021 and October 6, 2021 because he voluntarily took a leave of absence without just cause<sup>24</sup>.

[63] The Appellant lost his job on October 6, 2021 due to his own misconduct. This means he is disqualified from EI benefits starting from October 6, 2021 until the end of his claim<sup>25</sup>.

[64] The appeal is dismissed, with modifications to the reason for the disqualification imposed on his claim and the period of the disqualification.

**Teresa M. Day**  
**Member, General Division – Employment Insurance Section**

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<sup>24</sup> Pursuant to section 32 of the EI Act.

<sup>25</sup> Pursuant to section 30 of the EI Act.