



[TRANSLATION]

Citation: *RP v Canada Employment Insurance Commission*, 2022 SST 1413

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

## Decision

**Appellant:** R. P.  
**Representative:** L. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (336708) dated May 15, 2019 (issued by Service Canada)

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**Tribunal member:** Charline Bourque

**Type of hearing:** Teleconference  
**Hearing date:** December 14, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** December 21, 2022  
**File number:** GE-22-2886

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he smoked in the mine, near explosives, contrary to the employer's policy.

[4] The Claimant says that he didn't smoke near explosives and wasn't caught smoking. He says that he had been in conflict with his supervisor since going back to work after an injury.

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

## Matter I have to consider first

### Return of Tribunal's Appeal Division

[6] This appeal was first addressed by a decision of the Tribunal's General Division on July 31, 2019. The Claimant appealed that decision to the Appeal Division, which determined on October 23, 2019, that the file should be returned to the General Division for a new hearing.

[7] Due to an administrative error by the Tribunal, there was a lengthy delay before the file was returned to the General Division. So, it was only in September 2022 that the

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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.

file was returned to the General Division for a new hearing. The hearing was held on December 14, 2022.

## **Issue**

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

## **Analysis**

[9] 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.

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

[10] I find that the Claimant lost his job because he smoked in the mine when the employer's policy prohibited it.

[11] The Claimant raises several contradictions in the facts presented by the employer. He says that his work evaluations and several non-compliance reports are false, since he wasn't aware of them and wasn't the one who signed them. He compares his work schedule to the time that indicates an absence at the time when his signature was placed on these various reports.

[12] Without listing them all, I give the following example. The Claimant says that he can't have signed the May 27, 2016, non-compliance report,<sup>2</sup> since his timesheet shows that he was absent on that date.<sup>3</sup> The Claimant details several such errors.

[13] The Claimant then said that he had been in conflict with a supervisor since going back to work after an injury.<sup>4</sup>

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<sup>2</sup> See the non-compliance report (Warning) dated May 27, 2016 (GD3-49).

<sup>3</sup> See the weekly timesheet for the week of May 22, 2016 (AD1-49).

<sup>4</sup> See the opinion of the member of the medical evaluation office (GD3-23 to GD3-34).

[14] The employer says that the Claimant was caught smoking on a wagon full of explosives. It says that employees aren't allowed to smoke underground and that the Claimant was underground in the mine. The employer says that it was the Claimant's supervisor who saw him smoking on the wagon. The supervisor asked him to throw away his cigarette, and the worker continued smoking, then threw his cigarette on the ground. He was underground at the time, near explosives. This is a very serious action, which endangers the health and safety of the worker, but also of all the employees in the mine. The employer confirms that there was no graduation of penalties because of the seriousness of the action and that this resulted in immediate dismissal.<sup>5</sup>

[15] The Claimant says that he didn't smoke close to dynamite but that he was smoking where employees smoked and that he should have first been given a verbal warning.<sup>6</sup> He says that he wasn't immediately let go because he finished his work day.

[16] At the hearing, the Claimant denied having smoked while he was in the mine. He said that he didn't have a cigarette. He also added that he would not have risked his life by smoking near explosives. The Claimant confirmed that the employer had a policy prohibiting smoking in the mine. But he said that several colleagues, including his supervisors, smoked in the mine.

[17] However, when confronted with the version he confirmed he had written with his spouse, the Claimant said that he might have contradicted himself.

[18] The written version says that, on the day of his dismissal, he was smoking a cigarette with two coworkers that his friend had given him because he had forgotten his in his locker. They saw a light, and his two friends put out their cigarettes, while he didn't think of doing so. The supervisor saw him and told him that he deserved a warning. He was let go at the end of his shift.<sup>7</sup>

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<sup>5</sup> See the Commission's supplementary information (GD3-87/88).

<sup>6</sup> See the Claimant's first statement to the Commission (GD3-21).

<sup>7</sup> See the Claimant's written letter with the help of his spouse (GD3-106 to GD3-119).

[19] In my view, the Claimant's credibility is greatly affected by this contradiction. When I asked him whether he had smoked in the mine, the Claimant clearly said "no." He even explained that he wasn't a regular smoker because he didn't have cigarettes. When confronted with his written version, he also added that he may have made a mistake but that no one had caught him smoking. But the Claimant's written version says that he was smoking with coworkers, that he was caught by his supervisor, and that he had cigarettes but had left them in his locker.

[20] I understand that there was a considerable delay between the incident and the hearing but, since this is the central incident of the Claimant's dismissal, I am of the opinion that he can't have forgotten everything about it, especially since he remembers whether he signed the various warnings he received.

[21] So, despite the fact that the Claimant received numerous warnings for different situations and says that he was in conflict with his supervisor, I find that the main reason for his dismissal remains the fact that he smoked in the mine.

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

[22] The reason for the Claimant's dismissal is misconduct under the law.

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional<sup>8</sup>. Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>9</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>10</sup>

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<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>10</sup> See *Attorney General v Secours*, A-352-94.

[24] 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>11</sup>

[25] The Commission has to prove that the Claimant lost his 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 his job because of misconduct.<sup>12</sup>

[26] The Commission says that there was misconduct because smoking a cigarette in an underground mine near explosives constitutes an act of misconduct under the Act because the Claimant, who had been working for the employer for several years, knew very well that smoking was prohibited underground, but he decided to ignore the consequences.

[27] The Claimant says that there was no misconduct because, first, he said that he hadn't smoked or been caught smoking. He also says that he was certainly not smoking on a wagon full of explosives, or even close to explosives, as the warnings indicate.<sup>13</sup>

[28] The Claimant says that he knew that smoking in the mine was prohibited.

[29] The employer provided part of its policy and the no smoking sign at the entrance to the mine.<sup>14</sup>

[30] I have already established that the Claimant's credibility was greatly affected by having clearly stated that he hadn't smoked, when he had written the opposite.

[31] I have also determined that, despite the fact that the Claimant says he was subject to false warnings and was in conflict with his supervisor because of his gradual return to work, [these] aren't the main reasons for his dismissal.

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<sup>11</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>12</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>13</sup> See the warnings (GD3-83 and GD3-85).

<sup>14</sup> See the employer's policy (GD3-94) and a photo of the no smoking sign (GD3-102).

[32] In my view, smoking near or far from explosives has no impact on the finding of misconduct. The Claimant knew that smoking was prohibited in the mine. He smoked. Being near or far from explosives doesn't change this situation. He was in breach of the policy, even though I agree that he posed a greater risk to his safety and that of his coworkers if he smoked near explosives.

[33] The Claimant also said in his letter that he was caught by his supervisor.

[34] I consider the fact that the Claimant wasn't subject to gradual penalties as he would have expected.

[35] But it isn't for me to determine whether the dismissal or the penalty imposed by the employer was justified. I have to determine whether the Claimant lost his job because of misconduct.<sup>15</sup>

[36] I find that the Commission has proven that there was misconduct because the Claimant said he was aware of the employer's policy prohibiting smoking in the mine. The Claimant confirmed in writing that he had smoked, that his supervisor had caught him smoking, and that he had been let go for that reason.

[37] The Claimant knew or should have known that he was acting contrary to the employer's policy by smoking in the mine and that, as a result, he might be let go.

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

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

## **Conclusion**

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

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<sup>15</sup> See *Canada (Attorney General) v Secours*, A-352-94; *Canada (Attorney General) v Namaro*, A-834-82; and *Canada (Attorney General) v Macdonald*, A-152-96.

[40] This means that the appeal is dismissed.

Charline Bourque  
Member, General Division – Employment Insurance Section