



Citation: *JR v Canada Employment Insurance Commission*, 2022 SST 1038

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

Decision

Appellant: J. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (459641) dated February 28, 2022 (issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Teleconference

Hearing date: September 1, 2022

Hearing participants: Appellant

Decision date: October 4, 2022

File number: GE-22-893

Decision

[1] The appeal is dismissed with modification. The Tribunal agrees with the Canada Employment Insurance Commission (Commission) but has changed the start date of the disentitlement.

[2] The Commission has proven that the Appellant (Claimant) was suspended from his job because of misconduct (in other words, because he did something that caused him to stop working for a time). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.

[3] The disentitlement starts on September 25, 2021, not September 20, 2021.

Overview

[4] The Claimant works as a seasonal truck driver.

[5] The Claimant's driver's licence was administratively suspended on September 18, 2021. The Claimant is appealing the licence suspension. His court date is in April 2023. He wants to clear his driving record.

[6] The Claimant's last day of work was September 24, 2021. The employer laid off the Claimant because it didn't have any work he could do without a driver's licence.¹

[7] The Canada Employment Insurance Commission (Commission) determined that the Claimant was suspended from his employment because of misconduct. The Commission disentitled him from receiving benefits from September 20, 2021, to December 17, 2021.²

[8] The Claimant says that he is 64 years old and has never been in trouble with the law. He thinks calling what he did "misconduct" is a misuse of the word. He would have

¹ See record of employment on page GD3-15. See also page GD3-17. All page numbers refer to the appeal file.

² The disentitlement is under section 31 of the *Employment Insurance Act*. See initial decision letter on page GD3-21.

been able to get to his job had there been work he could do. It was near the end of the season and there simply wasn't any work he could do without a driver's licence.

Issue

[9] Has the Commission proved that the Claimant was suspended from his job because of misconduct?

Analysis

[10] Under the *Employment Insurance Act* (Act), a claimant who is suspended from their work because of their misconduct is not entitled to receive benefits until:

- the suspension ends;
- the claimant loses or voluntarily leaves the employment; or
- the claimant qualifies for benefits from other employment.³

[11] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[12] 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 or suspended because of that.⁷

[13] 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

³ Section 31 of the *Employment Insurance Act*.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁸

Why was the Claimant suspended from his job?

[14] The Claimant was suspended from his job because he lost his driver's licence.

[15] The employer told the Commission that it laid the Claimant off in September 2021, because he lost his driver's licence. If the Claimant hadn't lost his driver's licence, the employer wouldn't have laid him off until the end of November or start of December.⁹

[16] The Claimant argues that he wasn't "suspended". He explained that he was laid off because he couldn't drive a truck. He could have operated the heavy equipment, but there were no spots available. Despite what he said before, at the hearing he agreed that there would have been work for him if he hadn't lost his driver's licence.

[17] While the employer may not have described the lay-off as a suspension, it is clear that the reason the Claimant wasn't working between September 25, 2021, and the actual end of the season in November or December 2021, was because he didn't have a driver's licence. I find that this is a suspension from employment under the Act.

[18] It is not necessary for the employer to use the word "suspension" for it to be a suspension under the Act.

Is the reason for the suspension misconduct under the law?

[19] When a truck driver takes an action that causes them to lose their driver's licence, that action is usually considered misconduct under the Act.¹⁰

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁹ See page GD3-17.

¹⁰ The possession of a driver's licence is an indispensable condition of employment for truck drivers. Any action jeopardizing that condition is misconduct. For example, see *Canada (Attorney General) v Brissette*, A-1342-92 and *Canada (Attorney General) v. Thibault* (2005 FCA 369).

[20] There is no dispute that having a driver's licence is an essential condition to the Claimant's employment as a truck driver. There is no dispute that the Claimant's driver's licence was suspended.

[21] So I have to consider whether the Commission has proven that the Claimant did something that led to the suspension of his driver's licence.

– **Why was his driver's licence suspended?**

[22] The Claimant's driver record shows that his licence suspension was an ADLS or Administrative Driver's licence suspension.¹¹ This is an Administrative Driver's licence Suspension under the *Highway Traffic Act of Ontario*.¹²

[23] The Claimant testified that he had a blood alcohol count of more than 0.08. He drove his vehicle a short distance only – just far enough to get it off the street.

[24] Having care and control of a vehicle with a blood alcohol count of more than 0.08 is one of the reasons an administrative licence suspension can be issued.

[25] The Claimant is appealing the licence suspension. He has hired a lawyer to defend him. He has a court date in April 2023.

– **Did the Claimant do something to cause his driver's licence to be suspended?**

[26] Yes. I am satisfied that the Claimant's actions of drinking alcohol until he was over the legal limit while having care, charge or control of his vehicle caused his driver's licence to be suspended.

[27] The Claimant testified that he drove a vehicle (had care, charge or control) while having a blood alcohol count over the legal limit.

¹¹ See page GD7-1.

¹² It seems that these suspensions are given when a police officer is satisfied that someone having care, charge or control of a motor vehicle (i) has a blood alcohol count more than .08, (ii) fails or refuses to give breath, blood, oral fluid or urine, or blood, or (iii) fails or refuses to perform physical co-ordination tests or a drug evaluation.

[28] I acknowledge that the licence suspension is being appealed.¹³ But the Claimant's testimony that he drove even a short distance while having a blood alcohol count over the legal limit is enough to prove he did something to cause his licence to be suspended.

– **Has the Commission proven misconduct under the law?**

[29] Yes. Even if the court finds the Claimant shouldn't have had his driver's licence suspended, the Claimant's acknowledgment that he had care and control of a vehicle, and actually drove, albeit a short distance, while over the legal limit, is enough to prove his actions were so reckless as to approach wilfulness.

[30] The Claimant knew or ought to have known that his driver's licence could be suspended if he had care and control of a vehicle and drove with a blood alcohol count over the legal limit.

[31] The Claimant knew that he needed a driver's licence to do his job.

[32] So I find that the Claimant's suspension from work for not having a driver's licence is misconduct under the law.

[33] I acknowledge the Claimant's arguments. But they don't change the fact that he did something that he knew, or ought to have known, could lead to the loss of his driver's licence, and he knew that he needed a driver's licence to work. Taking those actions, whether or not the driver's licence suspension is upheld, led to his suspension from work. This is misconduct under the law.

¹³ I considered that the administrative driver's licence suspension could be considered an unproven allegation because it has not been proven in court and is being appealed. See *Meunier v Canada Employment and Immigration Commission*, A-130-96, where the Federal Court of Appeal said that the Commission cannot discharge its onus by relying solely on unproven allegations without further verification. The facts in that case are different from the one before me. In the Claimant's case, he acknowledges that he had a blood alcohol count over the legal limit while having control over his vehicle (and drove it a short distance).

– **Date of disentitlement**

[34] The Commission started the disentitlement on September 20, 2021.

[35] The Claimant lost his licence on September 18, 2021, but the disentitlement starts when he was suspended from work, not from when he lost his licence.

[36] The Claimant was suspended from work as of September 25, 2021. So this is when the disentitlement starts.

Conclusion

[37] Based on my findings above, I find that the Commission has proven that the Claimant was suspended from work because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[38] The disentitlement starts on September 25, 2021, not September 20, 2021. The Claimant will have to repay any benefits he received after the disentitlement date.¹⁴

[39] The appeal is dismissed with modification to the start date of the disentitlement.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section

¹⁴ See sections 43 and 44 of the *Employment Insurance Act*.