



Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 1714

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

Decision

Appellant: M. S.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (503371) dated August 11, 2022 (issued by Service Canada)

Tribunal member: Suzanne Graves
Type of hearing: In person
Hearing date: November 21, 2022
Hearing participants: Appellant

Decision date: December 5, 2022
File number: GE-22-2868

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proved 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 isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was dismissed from his job. The Claimant's employer told the Commission he was let go because he intervened following a customer incident and confiscated a patron's fare card. The employer said the Claimant acted outside his authority as a station janitor, and he was previously warned that taking this type of action may lead to dismissal.

[4] The Claimant says the incident that led to his dismissal wasn't misconduct. He says that he did not act inappropriately, and his job title was a station collector, not a janitor. As a station collector, he says that he had the authority to intervene following the incident and to ask the customer to surrender their fare pass.

[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. The Claimant is appealing the Commission's decision to the Social Security Tribunal (Tribunal).

Matter I have to consider first

The employer is not a party to the appeal

[6] Sometimes, the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

employer a letter.² The employer did not reply to that letter. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

Issue

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

Analysis

[8] 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?

[9] I find that the Claimant lost his job on April 1, 2022,³ because he intervened after an incident at a transit station and asked a customer to surrender their fare card.

[10] The Commission says that the explanation the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant acted outside his authority when he confiscated a customer's fare pass at a transit station after an incident. The customer later filed a complaint about the Claimant. It says he had previously been warned not to intervene in such situations.

[11] The Claimant doesn't dispute that he lost his job as a result of this incident. But he says that he was acting appropriately, and within his authority as a station collector. He also denies ever previously receiving a warning.

² The Tribunal's notice to the employer is at GD5.

³ The Claimant's first record of employment (ROE) is at GD3-22. An amended ROE showing his last work day as March 31, 2022, is at GD3-24.

[12] I find that the Claimant lost his job because a customer reported to the employer that he had intervened after an incident at a transit station and asked the customer to surrender their fare card.

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

[13] I find that the Commission has not provided enough evidence to show that the reason for the Claimant's dismissal is misconduct under the law. My reasons are set out below.

[14] The Commission must prove that the Claimant lost his job because of misconduct. It must prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁴

[15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[16] 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.⁸

[17] The Commission says there was misconduct because the Claimant confiscated a fare card from a patron, and this action was outside the scope of his duties. The employer told the Commission that the Claimant acted inappropriately, and had been warned that he would lose his job for such an action, pursuant to a "last chance"

⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁵ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

agreement dated March 22, 2021.⁹ The employer also reported that the Claimant was informed at a meeting that he should not intervene in incidents at transit stations.

[18] The Claimant says there was no misconduct because he acted appropriately and within the scope of his authority as a station collector. He says the customer vandalized a store¹⁰ and he approached her calmly and professionally afterwards, following the transit authority rules.¹¹ He then immediately reported the incident.

[19] The customer later filed a complaint, stating that the Claimant yelled at her, and “stole” her fare card. He says that he took similar action the previous year, and was not disciplined in any way. He testified that he did not recall ever being told that he must not take such action.

[20] The Claimant doesn’t dispute that he acted consciously and deliberately in asking the transit customer to surrender her fare pass. He testified that he acted appropriately and within his authority, noting that the transit authority posts public bulletins that a customer may have to surrender their transit pass for certain behaviour. So, I find that the Claimant’s actions were wilful.

Did the Claimant know, or should he have known there was a real possibility of being dismissed for his actions?

[21] I must next consider whether the Claimant knew, or should have known that his actions 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.

[22] The Commission says that the Claimant was working in a janitor position, and so he didn’t have the authority of a station collector. As a result, he would know that his actions went beyond the scope of his job. The Commission notes that the Claimant reported his job title as “janitor” on his application for benefits, and says the duties he

⁹ The Commission’s record of its discussion with the employer is at GD3-26.

¹⁰ The Claimant’s description of the incident is set out in his notice of application at GD3-10.

¹¹ In his request for reconsideration, the Claimant cites section C3.2 of the Collector Resource book.

described do not point to him being a station collector.¹² The Commission also references a memorandum of agreement which states that the Claimant would be placed in a janitor role effective October 31, 2021.¹³ Further, it says that the Claimant was previously warned not to intervene in similar incidents.

[23] The Claimant strongly denies he was warned not to take the action he took. He agrees that he signed a “last chance” agreement on March 22, 2021, which previously placed him into a janitor position due to health issues. But, he got an updated medical report, and submitted a pre-bid under the collective agreement which cancelled this arrangement.¹⁴ He admits he mistakenly selected janitor on his application but says he initially tried unsuccessfully to select station collector, and tried to amend it later. He argues that his pay stubs clearly show that his job title is “station collector.”¹⁵

[24] There is conflicting evidence about the Claimant’s actions on the date of the incident and about his job title. So, I have to evaluate the evidence before me, taking into account that the Commission is required to prove all of the elements of misconduct, on the balance of probabilities.

[25] Courts have said that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation. So, I have to make my decision on the evidence before me, and in the absence of evidence, I cannot speculate.¹⁶

[26] I find that there is not enough evidence to show, on the balance of probabilities, that the Claimant acted inappropriately by swearing or yelling at a customer. In making this finding, I have put weight on the Claimant’s forthright testimony that he acted calmly, and immediately reported the incident.

¹² The Commission makes these submissions at GD4-4.

¹³ The memorandum of agreement dated October 27, 2022, is at GD3-69 to 70.

¹⁴ The Claimant’s medical report dated June 27, 2021, is at GD2-10. The Claimant’s pre-bid cancellation dated June 28, 2021, is at GD2-11.

¹⁵ Copies of the Claimant’s job pay stubs are at GD3-71 to 85.

¹⁶ *Crichlow v. Canada (Attorney General)*, A-562-9.

[27] The Claimant testified that, after the March 22, 2021, last chance agreement, his job title was changed back to station collector on June 28, 2021, when he submitted his updated medical report. He acknowledges the memorandum of agreement dated October 27, 2021, but says the janitor assignment was again immediately cancelled once the employer took into account his medical report.¹⁷ He doesn't dispute that he agreed to follow all transit authority rules.

[28] The evidence shows that the Commission attempted unsuccessfully to contact the employer several times by phone and also by mail in July 2022, after the Claimant made his reconsideration request.¹⁸ The Commission did not attend the hearing or file any written documents from the employer confirming that the Claimant was previously warned about intervening in similar transit station incidents.

[29] The Claimant's notice of termination dated April 1, 2022, includes a sentence that the Claimant stated he did not recall any earlier safety briefing where he was told to report and not to intervene in incidents.¹⁹ I find that there is not enough evidence to show that the Claimant was warned to observe, and not to intervene in station incidents.

[30] The Claimant's testimony about his job title is consistent with the information clearly shown on his pay stubs, and earlier statements he made to the Commission. I have put weight on his testimony and also find that the job title shown on the Claimant's pay stubs is the most reliable evidence about his job classification.

[31] I find that the Claimant acted wilfully, but there is insufficient evidence to show that he acted outside his authority, or that he knew or should have known that he might lose his job as a result of his actions on March 18, 2022.

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

[32] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct.

¹⁷ The Claimant's pre-bid cancellation dated October 28, 2021, is at GD8-2.

¹⁸ See GD3-36 to 37.

¹⁹ The Claimant's notice of termination is at GD3-40 to 41

Conclusion

[33] The Commission hasn't proved that the Claimant lost his job because of misconduct. Because of this, the Claimant is not disqualified from receiving EI benefits.

[34] This means that the appeal is allowed.

Suzanne Graves
Member, General Division – Employment Insurance Section