



Citation: *TR v Canada Employment Insurance Commission*, 2023 SST 514

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

Decision

Appellant: T. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (549784) dated November 7, 2022 (issued by Service Canada)

Tribunal member: Elyse Rosen

Type of hearing: Videoconference

Hearing date: March 1, 2023

Hearing participant: Appellant

Decision date: March 6, 2023

File number: GE-22-3708

Decision

[1] The appeal is dismissed.

[2] I find that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant left on a three-week vacation to Sri Lanka to look after his late mother's estate. He was expected back at work on May 30, 2022. He did not return when expected, and did not contact his employer to let them know he would be delayed.

[4] After a week with no news from him, the Appellant's employer sent him letter terminating his employment. They issued a record of employment (ROE) saying he quit.

[5] The Commission says the Appellant voluntarily left his job without just cause. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] The Appellant admits that he did not return to work when expected, and did not contact his employer to let them know he would be delayed. However, he claims this was out of his control. He says that on May 25, 2022, he developed a bad rash, which he believes was caused by an allergic reaction. The rash was itchy and unsightly, and he felt he could not travel in that condition. He told the Commission there was political unrest in Sri Lanka, and cellular and internet service were often down. This prevented him from communicating with his employer to let them know he would be delayed.

[7] He does not agree with the reason for the issuance of the ROE, which states that he quit. He says he always intended to return to his job. He insists that he was

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

terminated. He says his employer is using his failure to return to work when expected as an excuse. He believes they intended to fire him even before he left on vacation.

Issues

[8] Did the Appellant voluntarily leave his job without just cause or was he terminated for misconduct?

Analysis

[9] The Commission has decided that the Appellant is disqualified from receiving EI benefits. It made this decision on the basis that he voluntarily left his job.

[10] The law says you are disqualified from receiving EI benefits if you left your job voluntarily without just cause **or** if you lost your job because of misconduct.² Case law says that because both of these concepts are dealt with together in the law, I can apply either one when I decide if the Appellant is disqualified from getting benefits.³ I can do this even though the Commission's reconsideration decision says the Appellant was disqualified from receiving benefits because he voluntarily left his job without just cause.

What triggered the loss of employment?

[11] The Commission says that the Appellant abandoned his job. It concludes that this is voluntary leaving. I don't agree. These are the reasons:

- The Appellant's employer sent him a letter stating that he was terminated.⁴ This is what triggered the loss of employment.
- As soon as the Appellant became aware of the termination letter he responded, asking that they reconsider.⁵

² Section 30 of the Act.

³ See *Canada (Attorney General) v Easson*, A-1598-92, and *Canada (Attorney General) v Desson*, 2004 FCA 303.

⁴ See GD3-17.

⁵ See GD3-23.

- He contacted his supervisor, human resources, and the owner of the company to try to get them to take him back.
- He testified that it was always his intention to return to work.

[12] It is clear to me from the evidence that the Appellant did not abandon his job and wanted to continue working.

[13] I am aware that there are decisions of this Tribunal that conclude that not returning to work when expected can be considered as voluntary leaving. I am not bound by these decisions. And, in any event, I don't think that the facts in this case show that the Appellant voluntarily left his job.

[14] I find that the loss of employment occurred because the Appellant was terminated, and the employer refused to take him back. Now I have to decide if the reason for his termination was misconduct under the law.

Was the Appellant terminated because of misconduct?

[15] To answer this question, I first have to decide why the Appellant was terminated. Then, I have to decide if the reason he was terminated can be considered misconduct.

– Why was the Appellant terminated?

[16] I find that the Appellant was terminated because he did not return to work on May 30, 2022, and did not contact his employer to advise them he would not be back when expected.

[17] In the documents that he filed prior to the hearing, the Appellant claimed he had been terminated because some of his colleagues felt he had too close a relationship with the owner of the company. At the hearing, he changed his story. He declared there was a conspiracy to get rid of him and that one of his supervisors told him they were going to send him on a "long vacation". The Appellant understood this to mean they were planning to fire him.

[18] I don't think that the Appellant's termination resulted from either of these reasons. There is no evidence to support either theory. His story about an alleged conspiracy and about innuendos around a long vacation was brought up for the first time at the hearing. Neither version is very convincing, and the fact that the Appellant's explanation changed between the filing of the Notice of Appeal and the hearing makes both versions difficult to believe.

[19] I prefer the clear and logical reason set out in the termination letter: the Appellant failed to report for work after his authorized vacation ended and he did not communicate with his employer to advise them that he would not be back on the expected date. This reason is supported by the Commission's evidence of its conversation with the employer.⁶ I find it to be persuasive.

[20] Now I have to decide if this reason is misconduct under the law.

– **Is the reason for the Appellant's termination misconduct?**

[21] I find that the Appellant's decision not to return to work and not to advise his employer is misconduct.

[22] To be misconduct under the law, conduct has to be either wilful or so careless or reckless that it is almost wilful. A person doesn't have to mean to be doing something wrong for their behaviour to be misconduct under the law.

[23] There is misconduct if the Appellant 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.

[24] I find that the Appellant's conduct was so careless and reckless that it can be viewed as wilful. I also find that he knew, or should have known, that it would get in the way of his carrying out his duties to his employer and could get him fired.

⁶ See GD3-28.

[25] From the Commission's evidence and the Appellant's testimony at the hearing I conclude that:

- The Appellant had to obtain his employer's authorization before leaving on vacation. He was allowed a three-week vacation and was due back at work on May 30, 2022.
- Before he left, his supervisor insisted on knowing what date he would be leaving on vacation and on what date he would return. The Appellant's return date was clearly important to the employer.
- His role was a key role in the company. It was time consuming and stressful. The person who normally took over his duties when he went away had to take a vacation immediately after having covered the Appellant's role because it was so exhausting to cover this role in addition to handling his own.
- The Appellant cancelled his flight back to Canada, which had been scheduled for May 26, 2022, and rebooked it for June 26, 2022. He did this because he had a rash and did not feel comfortable travelling. He did not contact his employer before rebooking his flight even though it meant he would not be back on May 30, 2022, as expected.
- In the days and weeks after rebooking his flight, he did not let his employer know he would not be back on May 30, 2022, and that he would be gone until the end of June 2022.
- The first time he communicated with his employer after cancelling his May 26, 2022, flight was on June 12, 2022. This was only after he learned that they had sent him a termination letter.
- It would have been possible for him to contact his employer sooner, but he didn't try to do so. He did not try to contact them because he "didn't take it seriously."

- He now recognizes that it was a mistake not to contact his employer to let them know he would not be back on time. He has apologized for his mistake.⁷

[26] From the evidence, it is far from clear to me that the Appellant could not have flown home on May 26, 2022, as originally planned, despite his allergic reaction. That said, I am prepared to give him the benefit of the doubt that his rash prevented him from travelling on that day.

[27] However, rebooking his flight for nearly a month after his expected return date and not letting his employer know he would not be back when expected was reckless.

[28] The Appellant's role was, by his own admission, very difficult. It should have been clear to him that after a three-week period during which someone else had to cover his role, in addition to their own, he was needed back. If he could not make it back on the agreed upon date, it was important that he let his employer know as quickly as possible and that he come back as soon as he could. The Appellant did neither. He did not take the situation seriously. He made no effort to contact his employer. He booked a flight on June 26, 2002, even though earlier flights were available.⁸ This is misconduct under the law.

[29] The Appellant says he didn't think anything would happen if he didn't come back when he was expected and did not contact his employer to advise them. This is wilful blindness. If he did not know that his conduct would get in the way of his carrying out his obligations to his employer and that it could get him fired, he certainly should have. I can't accept that the Appellant believed he could be away from work for an additional month after his three week vacation ended, without notifying anyone and without consequence.

[30] The Appellant says he consulted a lawyer and was told that his employer was obliged to give him notice before terminating him. This is not a matter under the Tribunal's jurisdiction. All I have to consider is whether the conduct that led to his

⁷ See GD3-27.

⁸ The Appellant testified that he could have come back earlier than he did, but an earlier flight would have cost him more money.

termination is misconduct under the *Employment Insurance Act*. My decision has no impact on any civil law recourses that the Appellant may have against his employer, and he is free to pursue those recourses if he so wishes.

Conclusion

[31] Based on my findings above, I find that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[32] The appeal is dismissed.

Elyse Rosen

Member, General Division – Employment Insurance Section