



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 621

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

## Decision

**Appellant:** S. M.  
**Representative:** C. M.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (519353) dated August 5, 2022  
(issued by Service Canada)

---

**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** January 12, 2023

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** February 2, 2023

**File number:** GE-22-2944

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has not proven that the Claimant lost his job because of misconduct. This means that the Claimant is not disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] S.M. is the Claimant in this case. He was working for a company driving trucks all year round. The Claimant was charged for driving under the influence (DUI). This incident took place outside of his working hours.

[4] The Claimant stopped working because he was unable to work for medical reasons from November 15, 2021 to February 15, 2022. Around the same time, he applied for and says he received EI sickness benefits. Once he recovered, he asked the Commission to convert his claim to EI regular benefits because his employer could not accommodate him.<sup>2</sup>

[5] The Claimant agreed that he committed the conduct and pled guilty to the DUI charges. He was given a three-month suspension of his driver's license. The only way he was allowed to drive is with an installed interlock device (device) for any vehicle he drives for a period of one year.

[6] The Claimant eventually recovered and was ready to return to work. However, the employer could not accommodate him because they could not put devices in all the vehicles that he might need to drive at work.

---

<sup>1</sup> See section 30 of the *Employment Insurance Act* (Act) says that Claimants who lose their job because of misconduct are disqualified from receiving benefits.

<sup>2</sup> See application for EI sickness benefits at GD3-3 to GD3-16 and Supplementary Record of Claim (SROC) at GD3-19.

[7] The Commission spoke to his employer and then decided that they could not pay him EI regular benefits because he lost his job due to his own misconduct.<sup>3</sup>

[8] Even though the Claimant does not dispute the conduct, he argues that he was not terminated, suspended or placed on a leave by his employer.<sup>4</sup> He argues it was not misconduct and says he is no longer working because of an illness. Alternately, he says that he stopped working because of a leave of absence, which was involuntary.

## **Issue**

[9] Why did the Claimant stop working? Was it because of misconduct?

## **Analysis**

[10] I have to decide two things. First, I have to determine why the Claimant stopped working. If the Claimant was dismissed, then I have to determine whether the law considers that reason to be misconduct.

[11] The Commission has to prove that the Claimant stopped working because of his own misconduct. So, after weighing all the evidence, I have to be satisfied that the misconduct was the reason for the dismissal not the excuse for it.<sup>5</sup>

## **Why did the Claimant stop working?**

[12] The Claimant and Commission do not agree on why the Claimant stopped working.

[13] I will start by reviewing what each of them say. I will then decide why the Claimant stopped working and if it was because of misconduct.

---

<sup>3</sup> See initial decision at GD3-23 and reconsideration decision at GD3-36.

<sup>4</sup> See GD2-10.

<sup>5</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88; *Davlut v Canada (Attorney General)*, A-241-82.

### **The Claimant's position**

[14] The Claimant argues that the employer never fired him, but that he was still an employee. He says that he stopped working initially because he was on a medical/sick leave. Once he recovered and tried to return to work, the employer could not accommodate him as they were unable to put the devices in multiple vehicles at work.

[15] I asked the Claimant to tell me what happened from the beginning.

[16] The Claimant testified that the DUI incident occurred after work on October 28, 2021. He called in sick to work the following day, on Friday October 29, 2021.

[17] He spoke to his boss about the incident and was told he could come into work on Monday, November 1, 2021. He lives close to his immediate boss and they had a personal friendship. For that day, he was put on "flag duty" instead of his usual truck driving role. At some point during the workday, he met with his boss and other superiors, as well as a union representative and they discussed the DUI incident. The superiors said they were thinking about firing him but agreed to give two weeks to talk to a lawyer about his situation.

[18] The Claimant spoke to a lawyer the following week because he was concerned about the charges. The DUI charges meant that would lose his driver's license for around 3 months. However, given the cost of legal representation, the amount of time it would take to be heard in court and the legal advice he got, he ultimately decided to plead guilty to the charges.

[19] The Claimant admitted that he had a problem with alcohol and was dealing with alcoholism at that time. He met with his doctor who determined that for the period from November 15, 2021 to February 15, 2022, he was unable to work due to illness. This is supported by the medical note in the file.<sup>6</sup> The doctor then referred him to rehabilitation and treatment for alcoholism.

---

<sup>6</sup> See medical note dated November 15, 2021 at GD3-28.

[20] The Claimant told his immediate boss about the referral. He expected another follow-up meeting with his superiors and union representative around November 23, 2021, but that did not happen because he was on a sick leave from work. The file shows that the employer issued a *Record of Employment* (ROE) on November 30, 2021 identifying code “D” for “Illness or Injury”.<sup>7</sup>

[21] The Claimant confirmed that he attended an in-patient rehabilitation and treatment program for his alcoholism for exactly 54 days. He successfully completed the program around January 7, 2022.

[22] The Claimant then contacted his employer when he recovered, sometime after February 15, 2022 to go back to work. By that time, he already had his driver’s license back and was ready to return to work. However, he still had to have a device in any vehicle he was driving for a period of one year.

[23] The Claimant went to see his immediate boss at his house and told him that he was ready to return to work. His boss told him that they could not accommodate him and put devices in every snowplow. He noted that in the winter employees are often exchanging snowplows.

[24] The Claimant asked him if they could accommodate him by giving him another job, but his boss said it was not possible because he could not do “flag duty” everyday. The Claimant then told him that he was having trouble get *Employment Insurance* benefits because he did not have an updated ROE from the employer.

[25] The Claimant explained that he was never told he was fired verbally or in writing. He did not receive an updated ROE reflecting that the status of his employment had changed.

[26] The Claimant said that his recently employer contacted him about working again and wanted to find out when the device was no longer driving condition. The Claimant told them he is no longer required to have the device to drive as of late January 2022.

---

<sup>7</sup> See ROE at GD3-17 to GD3-18.

[27] In his view, the Claimant believes he is still an employee of the company because he was not fired, suspended or put on a leave of absence.

### **The Commission's position**

[28] The Commission says that there is no dispute that the Claimant ceased working due to medical reasons and underwent medical treatment until he recovered in February 2022. They say the issue is why the Claimant was unable to and did not return to employment once he had recovered.

[29] The Commission spoke to the employer.<sup>8</sup> The employer told them as of November 2, 2021, the Claimant was no longer considered an employee of the company.

[30] The employer admitted that they did not give him a termination letter, but said the Claimant was verbally notified that he was not an employee of the company. They noted that his termination was only confirmed in February 2022 when he wanted to return to work.

[31] The employer said he was a good worker and they would hire him back but were unable to do so because driving was his job, and he was unable to fulfill his duties. They could not accommodate him with a device in their vehicles.

[32] The Commission first decided that the Claimant lost his job due to misconduct, so he was disqualified from EI regular benefits from November 2, 2021.<sup>9</sup> However, the Commission now says that the disqualification from EI regular benefits was incorrectly established from the last day of work and should only have been applied from the date the Claimant's actions (conviction) affected his ability to return to work, ending the employment relationship February 20, 2022.<sup>10</sup>

---

<sup>8</sup> See SROC at GD3-34.

<sup>9</sup> See initial decision at GD3-23 and reconsideration decision at GD3-36.

<sup>10</sup> See GD4-4.

[33] Lastly, the Commission argues the Claimant's action of driving while under the influence have resulted in this restriction being imposed on his driver's license.<sup>11</sup> They submit that "the act of drinking while intoxicated is a willful act". They argue that the Claimant's inability to drive without the use of a device has a direct affect on the employment relationship, interfering with his ability to perform his job duties and as a result has put him in a situation of unemployment.

**The Commission has not proven that the Claimant was fired**

[34] 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>

[35] I find that the Claimant's last day of work was around November 2, 2021. The Claimant was off from work from November 15, 2021 to February 15, 2022 for medical reasons and received EI sickness benefits. These facts are not disputed between the parties.

[36] For the reasons that follow, I find that the Commission has not proven the Claimant lost his job because of misconduct.

[37] First, I find it more likely than not, that the Claimant remained an employee after returning from his medical leave in February 2022. I preferred the Claimant's testimony over the Commission's discussion with the employer.<sup>13</sup>

[38] At the hearing, the Claimant provided a lot detail about what happened and when it happened. I believe him when he says that he was not fired at any point either before he started his sick leave in November 2021 or after he returned from his sick leave in February 2022.

---

<sup>11</sup> See GD4-4.

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

<sup>13</sup> See SROC at GD3-34.

[39] Second, the employer told the Commission that he was no longer an employee as of November 2, 2021, but this contradicted the ROE issued by the employer.<sup>14</sup> The ROE on file issued on November 30, 2021 shows that he stopped working due to “illness or injury”.<sup>15</sup>

[40] If the employer had intended to fire him as of November 2, 2021 and he was no longer an employee as stated, then presumably the ROE would have reflected that he was fired. By November 30, 2021, the Claimant had already given the employer the medical note, was on a medical leave and his immediate boss knew that he was going into rehab.<sup>16</sup>

[41] Third, the Claimant said that he had a meeting with his boss, superiors and union representative on November 2, 2021 and was given additional two weeks to obtain a lawyer to deal with the DUI charges. As noted above, the second follow-up meeting in November 2021 never took place. Even when the Claimant recovered and wanted to return to work, a formal meeting with his employer and union representative never took place to discuss the status of his employment.

[42] I have also considered that when the Commission spoke to the employer, they provided no specific details about when he was terminated or who told him he was terminated.<sup>17</sup> Because of this, I was not persuaded that the Claimant was actually ever told that he was fired and the specific reason he was fired.

[43] Lastly, there was no termination letter issued and the employer did not provide the Claimant and/or the Commission with an updated ROE showing that he was fired.

[44] After the Claimant’s discussion with his boss in February 2022, he understood that they could not accommodate him at that time. Even though he told his boss he had

---

<sup>14</sup> See SROC at GD3-34.

<sup>15</sup> See ROE at GD3-17 to GD3-18.

<sup>16</sup> See medical note dated November 15, 2021 at GD3-28.

<sup>17</sup> See SROC at GD3-34.



not received an updated ROE, one never came showing that he was fired, suspended or put on an unpaid leave of absence.

[45] In my view, the employer did not fire him, but rather they could not accommodate him after his medical leave. Specifically, they were unable to put a device or devices in their vehicles to allow the Claimant to do his job as a trucker or give him an alternate job. However, the fact that the employer could not accommodate him after his medical leave does not necessarily mean that he was fired from his job due to DUI incident that occurred months prior.

[46] I note that the employer did try calling the Claimant recently to see if he was able to drive without a device. This may support the fact that he was still an employee, but possibly on an unpaid leave of absence.

[47] After weighing all the evidence, I find that the Commission has not proven that the Claimant lost his employment due to misconduct. There wasn't enough evidence to prove that he was dismissed from his job.

[48] Even if I am wrong and the Claimant was somehow dismissed from his job, I would not have found that the Claimant's conduct was wilful misconduct because it was not conscious, deliberate, intentional or reckless.<sup>18</sup> The Claimant had a medical condition that required medical treatment. He saw his doctor who referred him to rehab. The Claimant did not know and could not have known that his employer would dismiss him after his medical leave ended.

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

[49] Based on my findings above, I find that the Claimant did not lose his job because of misconduct.

---

<sup>18</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96.

## **Conclusion**

[50] The Commission has not proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is not disqualified from receiving EI regular benefits.

[51] This means that the appeal is allowed.

Solange Losier

Member, General Division – Employment Insurance Section