



Citation: *EI v Canada Employment Insurance Commission*, 2023 SST 992

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

Decision

Appellant: E. I.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (542671) dated October 13, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge
Type of hearing: Teleconference
Hearing date: March 28, 2023
Hearing participants: Appellant
Interpreter
Decision date: April 28, 2023
File number: GE-22-3496

Decision

[1] I am dismissing E. I.'s appeal.

[2] He didn't return to work after his two weeks of approved vacation—ignoring his employer's policy, directions and warning to him. His employer dismissed him because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven that he lost his job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, he did something that caused him to lose his job.

[4] This means he is disqualified from getting Employment Insurance (EI) benefits.

Overview

[5] In June 2022 E. I. (the Appellant) lost his job working for a parking solution company (employer) in the Greater Toronto Area. He worked as a patrol officer.

[6] His employer says it let him go because he took four consecutive weeks of vacation although it told him he couldn't do that. It approved him to take two consecutive weeks. His employer said this was job abandonment, insubordination, and just cause for termination.

[7] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission disqualified him from getting EI benefits.

[8] The Appellant says there was no misconduct. He had a right to take four weeks of vacation each year. He needed to take four consecutive weeks to travel to his country of origin to settle some legal matters. He says his employer didn't give him clear instruction and delayed making a decision. So he bought a plane ticket, to be away for four weeks.

[9] I have to decide whether the Appellant lost his job for misconduct under the EI Act.

Issue

[10] Did the Appellant lose his job because of misconduct under the EI Act?

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct.¹

[12] I have to decide two things.

- the reason the Appellant lost his job
- whether the EI Act considers that reason to be misconduct

The reason the Appellant lost his job

[13] I find the Appellant's employer dismissed him because he didn't comply with its vacation policy and its decision approving him for two consecutive weeks of vacation—not four.

[14] The employer told the Appellant it terminated his employment for job abandonment, just cause, and insubordination because he didn't return to work after the two weeks of vacation it approved him to take.²

[15] The Appellant disagrees. He says he had a right to disregard his employer's decision.³ And said that the real reason his employer dismissed him was to avoid paying out severance packages should that need arise in the future.⁴

[16] I prefer the Commission's evidence (from the employer) over the Appellant's evidence. I have no reason to doubt the reason the employer told the Commission and

¹ See section 30(1) of the EI Act. It says that a claimant for EI is disqualified from receiving any benefits if they lost their job because of misconduct.

² See the termination letter the employer sent the Appellant (dated June 30, 2022), at GD3-24. This is also what the employer told the Commission during phone calls. See the Commission's notes of those calls at GD3-26 and GD3-33.

³ See the Commission's notes of its call with the Appellant, at GD3-25.

⁴ See his reconsideration request, at GD3-31, and his appeal notice, at GD2-7.

wrote in its termination letter to the Appellant. It makes sense in the circumstances and is supported by events and documents—from when the Appellant first requested vacation until his employer dismissed him. There is no evidence to support the Appellant’s belief that his employer fired him to get around paying severance.

The reason is misconduct under the law

[17] The Appellant’s failure to return to work after his two weeks of approved vacation—ignoring his employer’s policy, directions and warning to him—is misconduct under the EI Act.

What misconduct means under the EI Act

[18] The EI Act doesn’t say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal issues I must consider when making my decision.

[19] The Commission has to prove that it is more likely than not he lost his job because of misconduct.⁵

[20] I have to focus on what the Appellant did or didn’t do, and whether that conduct amounts to misconduct under the EI Act.⁶ I can’t consider whether the employer’s policy is reasonable, or whether suspension and dismissal were reasonable penalties.⁷

[21] The Appellant doesn’t have to have wrongful intent. In other words, he doesn’t have to mean to do something wrong for me to decide his conduct is misconduct.⁸ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.⁹ And misconduct also includes conduct that is so reckless that it is almost wilful.¹⁰

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁶ This is what sections 30 and 31 of the EI Act say.

⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁸ See *Attorney General of Canada v Secours*, A-352-94 (FCA).

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[22] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility his employer would let him go because of that.¹¹

[23] I can rely on Tribunal decisions in other appeals to help decide this appeal. I can follow a decision where it's well-reasoned, raises the same legal issue, and has similar facts to this appeal. The Tribunal and Umpires (who decided appeals before the Tribunal existed) have decided that an appellant committed misconduct under the EI Act where they:

- took an extra week of vacation after their employer told them not to¹²
- took a week of vacation after his employer told him it wasn't approved and if they did there could be consequences up to loss of employment¹³
- took time off after being refused that time off, even though they had someone fill in for them¹⁴
- didn't attend work as required on a particular date without permission¹⁵

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *CUB 78604*. *CUB* is short for **Canadian Umpire Benefit decision**. Umpires decided EI appeals under the old system, which existed before the Tribunal was set up. The Government of Canada keeps a public, on-line database of many, but not all, [CUB decisions](#).

¹³ See *VG v CEIC*, 2014 SSTGDEI 26.

¹⁴ See *CUB 17914*.

¹⁵ See *CUBs 10125, 10439, 12421, and 28772*.

What the Commission and the Appellant say

[24] The Commission says not going to work when the employer has refused to authorize vacation is misconduct, especially if the appellant has been formally warned of the risk associated with defying the employer's decision.¹⁶

[25] The Commission says the employer had a right to expect the Appellant to return to work after two weeks. The employer approved two consecutive weeks' vacation. The Appellant knew that. He knew if took four consecutive weeks, he would be putting his job at risk. He took four weeks anyway. And his employer dismissed him because of that. So not following his employer's policy and direction was wilful or reckless to the point of being wilful.

[26] The documents from the employer show:

- it has a vacation policy and procedure¹⁷
- the vacation request form the Appellant signed on March 29, 2022, states:
 - employees have to get approval to take vacation
 - employees MUST NOT make any vacation commitments until vacation scheduling has been approved in writing
- April 13 and 17, 2022: Appellant emails vice president finance asking to take four consecutive weeks vacation, because his manager had rejected this request and only approved two weeks¹⁸
- April 17, 2022: vice president finance emails Appellant stating request for four consecutive weeks' vacation is not approved, only two consecutive weeks approved

¹⁶ See the Commission's representations, at GD4.

¹⁷ See GD2-13.

¹⁸ See these emails at GD3-34 to GD3-38.

- May 25, 2022: vice president finance emails Appellant to re-confirm his request for four weeks vacation not granted and warn him if he didn't return after two weeks of vacation, he would be putting his employment at risk
- June 1, 2022: Appellant emails vice president to confirm he received May 25, 2022 email

[27] The Appellant says he gave a letter to L. G., his immediate supervisor, on May 2, 2022. He wrote, "This is my one month advance notice that I will be taking my annual vacation entitlement of 20 working days starting June 6, 2022, up to and including July 4, 2022. I will be back to work on Tuesday July 5, 2022."¹⁹

[28] The Appellant says he gets four weeks vacation a year. So he had a right to take those four weeks consecutively. His employer didn't give him clear instruction about what to do. And delayed making the decision whether to approve his vacation request. So he went ahead and bought his plane ticket—**before** his employer refused his request to take four consecutive weeks (and approved only two consecutive weeks). He told his employer what he was doing—every step of the way.

[29] At the hearing I pointed out the dates on his plane ticket and his employer's emails to him. These dates show he bought the ticket **after** his employer refused his four consecutive weeks vacation request. He thought about it and agreed he bought the ticket after his employer's refusal.

[30] The Appellant testified that L. G., his immediate supervisor, said it was OK for him to take four consecutive weeks. I asked him why he took the word of his immediate supervisor over the written decisions of the vice president of finance. Especially since she re-confirmed her decision on May 25, after his conversation with his supervisor. He said L. G. was the company owner's mother. And she has power too.

¹⁹ See that email at GD2-3.

[31] I accept the Commission's evidence and argument. I have no reason to doubt its evidence, which is mainly based on documents the Commission got from the employer. I have no reason to doubt those documents are real.

[32] Based on that evidence I find the Commission has shown the Appellant committed misconduct when he took four consecutive weeks of vacation. His conduct went against a direct, written order of his employer. And he had been warned in writing he could be dismissed if he didn't return to work after two weeks' vacation. The Tribunal and Umpire decisions I listed above also support the Commission's argument.

[33] I don't accept the Appellant believed his supervisor rather than the emails he acknowledges he received from the vice president of finance. I find this was one of many reasons he gave to justify going against his employer's decision—because he didn't agree with it. I find he knew his employer had refused his request and expected him to return to work after two weeks. And he knew there was a real possibility it would dismiss him if he didn't. I find he knew this because his employer refused his request in orally (one) and in writing (twice). It also warned him in writing there would be consequences if he didn't return to work after two weeks.

[34] If I am wrong, and he didn't know, I find **he should have known**. It wasn't reasonable of him to accept and believe what his supervisor told him when the vice president of finance said the opposite in writing. The vacation request form he filled out says vacation request have to be approved in writing. So I find his conduct is misconduct because **he should have known** he could not take more than two weeks of vacation and **should have known** he could lose his job if he did.

– **The Appellant's other arguments**

[35] The Appellant says I should give him the benefit of the doubt.²⁰

²⁰ Section 49(2) of the EI Act says: "The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30 or disentitling the claimant under section 31, 32 or 33, if the evidence on each side of the issue is equally balanced."

[36] I am not going to do that, for two reasons.

[37] First, the “benefit of the doubt” rule applies to the Commission, not the Tribunal.

[38] Second, and more importantly, that rule only applies where “the evidence on each side of the issue is equally balanced”. In this appeal, it’s not. I have found that the Commission has proven—based on the evidence—it’s **more likely than not** the Appellant conduct was misconduct. In other words, the Commission’s evidence that he committed misconduct is stronger than the Appellant’s evidence that he didn’t. It’s much stronger, for the reasons I gave above.

Conclusion

[39] I have decided the Commission has proven the Appellant lost his job for a reason that counts as misconduct under the EI Act.

[40] This means the Appellant is disqualified from getting EI benefits.

[41] So the Commission made the correct decision.

[42] And I have to dismiss his appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section