



Citation: *CW v Canada Employment Insurance Commission*, 2023 SST 1158

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

Decision

Appellant: C. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (558985) dated December 20, 2022 (issued by Service Canada)

Tribunal member: Katherine Parker

Type of hearing: In person

Hearing date: May 4, 2023

Hearing participant: Appellant

Decision date: May 24, 2023

File number: GE-22-4293

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven 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 lost his job. The Appellant's employer said that he was let go because he was harassing other employees and causing a scene in front of guests. It said he was given numerous verbal and written warnings.

[4] Even though the Appellant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. The Appellant says that the employer actually let him go because he expressed his concerns about staff not completing their jobs. He said the employer exaggerated the incidents after he made a complaint to head office about a toxic workplace.

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

[5] The Appellant agrees that he had received verbal and written warnings about his behaviour, but he said he was just telling the truth and trying to have fun. He received warnings about:

- belittling and harassing his colleagues
- making a scene in the dining room by saying demeaning things about staff in front of guests, swearing in front of guests, and embarrassing the restaurant
- buckling the knees of his colleagues, and putting his cold, wet hands on the face of his colleagues
- the employer received a complaint that he pinned a colleague to a cupboard and wouldn't let her go

[6] 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 decided that the Appellant is disqualified from receiving EI benefits.

Issue

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

Analysis

[8] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[9] I find that the Appellant lost his job because he regularly belittled staff, used vulgar language in front of guests, regularly made a scene in the dining room, and harassed his colleagues.

[10] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that:

- The Appellant received three written warnings and several verbal warnings about being disruptive in the dining room where he was a server.
- The employer is a restaurant, and the Appellant was a server.
- After several verbal warnings, the Appellant received a written warning on April 17, 2022, and told that he would lose his job if the behaviour continued.²
- On August 6, 2022, the Appellant received a written warnings about pushing in the backs of knees, and he would get his hands wet with cold water and put them on his colleague's face. He had been told many times by his supervisor to stop doing it. He was told this would not be tolerated and if it continued, it would result in his termination.
- The August 6, 2022, warning also included an allegation that the Appellant pinned a colleague to the counter and wouldn't let go until the colleague got angry.³
- On October 6, 2022, the Appellant received a third warning about bickering with other employees in front of customers. He was spoken to about his actions and his language.⁴
- On October 27, 2022, the Appellant received a written notice that he had been inappropriate with other staff and that it was affecting moral. He belittled his colleagues saying he didn't know what they were being paid for, or why

² See GD3-28.

³ See GD-3-29.

⁴ See GD3-30.

they were employed. Guests had complained that they heard him swearing and speaking negatively to other employees.⁵

- The October 27, 2022, letter said the restaurant felt it was necessary to part ways with the Appellant and he was terminated.

[11] The Appellant disagrees. The Appellant says that the real reason he lost his job is that he voiced his concerns about the incompetence of staff, and they didn't like it. He said he never saw two of the three written warnings, but he did get a verbal warning.

[12] I find that the Appellant knew that what he was doing was causing problems and that he could be terminated. I accept the evidence of the employer that the Appellant's behaviour was not acceptable and that he had been given warnings, both written and verbal that his behaviour would not be tolerated and could result in his dismissal.

[13] The Appellant said he was warned about his behaviour on April 17, 2022, August 6, 2022, and October 6, 2022. Accordingly, I find that the Appellant lost his job because he regularly belittled staff, used vulgar language in front of guests, regularly made a scene in the dining room, and harassed his colleagues.

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

[14] The reason for the Appellant's dismissal is misconduct under the law.

[15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ The Appellant 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.⁸

⁵ See GD3-32.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

[16] 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.⁹

[17] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.¹⁰

[18] The Commission says that there was misconduct because the employer gave him several verbal and written warnings. It said the warnings were clear that any further conduct such as harassing other employees and making a scene would result in termination. The behaviour was causing concerns for both staff and guests.

[19] The Appellant says that there was no misconduct because he was just trying to have fun in the workplace. When he buckled the knees of colleagues, and watered their face, he said he wasn't trying to be rude, he was just playing around.

[20] He said the written warnings were bolstered by the employer after the fact because he went to head office with a complaint. But his complaint to head office didn't go until November, 2022, after he had been terminated. So I don't accept that the employer retroactively changed the warnings.

[21] I find that the Commission has proven that there was misconduct because the employer followed a process of progressive discipline, and the Appellant was aware he could be terminated:

- the Appellant received three written warnings from the employer
- the written warnings were in addition to several verbal warnings which the Appellant agreed he received

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

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the Appellant's behaviour was causing morale problems among staff, and embarrassing the employer
- even if the Appellant didn't receive the two written warnings from August 6, 2022, and October 6, 2022, he was verbally warned
- guests were complaining about his behaviour which threatened the restaurant's reputation
- the Appellant knew he was putting his employment at risk if he continued his behaviour, but he continued anyway.

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

[22] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

[23] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[24] This means that the appeal is dismissed.

Katherine Parker
Member, General Division—Employment Insurance Section