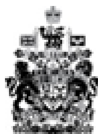

[TRANSLATION]

Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 557

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. L.
Representative:	Jean-Pierre Gagnon Roberval Legal Aid Office
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (550265) dated December 1, 2022 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Videoconference
Hearing date:	April 4, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	April 5, 2023
File number:	GE-22-3905

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 he can receive Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant stopped working as a clerk at Loblaws after going into the women's locker room to get a card.

[4] On the Record of Employment, the employer put K-Other and added in the "Comments" section: "involuntary without cause." Two separate warning letters to the Appellant dated May 20, 2022, said that, if another such incident occurred, a more severe penalty, such as dismissal, could be imposed. However, at the meeting on May 21, 2022, the employer allegedly verbally let the Appellant go without issuing a letter of dismissal.

[5] The Commission accepted the employer's explanations and found that the Appellant lost his job because of misconduct. So, it disqualified him from receiving EI benefits.

[6] The Appellant disagrees with the Commission's decision. He says that the "retractable knife (exacto)" incident didn't happen and that the employer refused to provide video evidence. Concerning the "locker room" incident, the Appellant admits the facts. He says that he went to get a points card in his partner's locker and that there was no one in the locker room at the time. He says that he was very surprised when the boss told him he was let go.

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

[7] I have to decide whether the Appellant stopped working because of misconduct and whether he can receive EI benefits.

Issue

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

Analysis

[9] 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 *Employment Insurance Act* (Act) considers that reason to be misconduct.

Why did the Appellant lose his job?

[10] I find that the Appellant lost his job because he went into the women’s locker room and because the employer accused him of threatening a co-worker with a retractable knife.

[11] On September 9, 2022, the manager said that the Appellant had stopped working because he went into the women’s locker room. According to this initial version given to a Commission employee, the Appellant voluntarily left his job before being let go. However, on November 24, 2022, the manager admitted that he had given the Appellant the option of voluntarily leaving his job instead of being let go.

[12] On November 30, 2022, a human resources employee at the employer said that he didn’t understand why “K,” Other, had been indicated on the Record of Employment and that “E,” Voluntary Leaving, should appear on it. He said that he didn’t know whether the Appellant would have been let go if he hadn’t voluntarily left his job.

[13] The Commission says that the Appellant was let go because he threatened a co-worker with a retractable knife and that this aggressive act amounts to misconduct. However, it admits that the facts on file are contradictory and that it is difficult to determine whether the Appellant voluntarily left his job or was let go.

[14] When he completed his application for benefits, the Appellant indicated that he was let go because he went into the women's locker room. He admits that this happened. He says that this wasn't the first time he went into the women's locker room to get the PC Optimum card he shares with his partner, who also works at Loblaws.

[15] The Appellant also mentioned another incident that the employer allegedly accused him of when they met in the employer's office on May 21, 2022. The employer allegedly accused him of committing an armed attack and threatened to call the police if he didn't leave the premises. The Appellant explained that the employer told him that he had threatened a co-worker with a retractable knife and that this act constituted armed aggression. The Appellant denied the facts, but the employer asked him to leave or he would be let go. According to the Appellant, this was a constructive dismissal.

[16] When contacted by the Commission, the employer initially mentioned only the "locker room" incident. Two warning letters issued on May 20, 2022, which weren't signed by the Appellant, named two incidents, respectively. But although these letters show that the employer warned the Appellant that he would be let go if another incident occurred, according to the Appellant's version, the manager would have let him go at the meeting in his office.

[17] So, the employer first told the Commission that the Appellant had voluntarily left his job after the "locker room" incident. Then, on November 24, 2022, it told a Commission employee that it had given the Appellant the choice of voluntarily leaving his job or being let go. During this interview, the manager mentioned that the "locker room" incident was less serious than the "retractable knife" incident.

[18] The facts are clear that the Appellant didn't have the option of staying or leaving.[2] The Appellant mentioned that he liked his job and that he was surprised to be let go. I accept his version of the facts.

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[2] See *Peace*, 2004 FCA 56.

[19] I find that the Appellant lost his job because he went into the women's locker room and did what the employer accused him of doing. I also find that the Appellant lost his job because the employer accused him of threatening a co-worker with a retractable knife.

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

[20] The reason for the Appellant's dismissal isn't misconduct under the Act. A worker who is let go for misconduct can't receive EI benefits.

[21] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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 Act.[5]

[22] 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.[6]

[23] 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.[7]

[24] The Commission says that the Appellant stopped working because of misconduct. It alleges that he himself admitted that he was let go in his application for benefits and that, contrary to what he argues, video evidence isn't necessary to establish the truth of the facts and that the witness's credibility is enough. It argues that,

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[3] See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General v Secours*, A-352-94.
[6] See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.

by saying that he voluntarily left his job, he is admitting, in a way, to the facts complained of and their seriousness.

[25] The Commission points to a Court decision that says misconduct doesn't stop being misconduct simply because a claimant acted foolishly.[8] It says that the Appellant hasn't given a clear version of what actually happened, but it is of the view that the Appellant's aggressive behaviour is established using the documents the employer provided.

[26] The Commission also says that the Appellant was let go after a series of aggressive acts and that, since he had received warnings, he knew that he could be let go if he reoffended. When he transcribed the facts of an interview, a Commission employee indicated that the Appellant recounted several incidents that would have hurt him.

[27] The manager at Loblaws told the Commission that the Appellant had violated the *Politique sur la violence, le harcèlement et l'intimidation en milieu de travail* [workplace violence, harassment, and bullying policy], which justified his immediate dismissal. On September 9, 2022, he said that he met with the Appellant two or three days after the "locker room" incident, but that the Appellant had voluntarily left his job before being let go.[9]

[28] The Appellant admits that he went into the women's locker room, but he says that there was no one in the locker room and that he didn't have malicious intent. He went to get a PC Optimum card. His partner, who works at Loblaws, had given him permission to take the PC Optimum card from her locker, and the Appellant wanted to earn points when he bought his lunch.

[29] At the hearing, the Appellant explained that the boss never told him before letting him go that he could not get the card from the locker room. He says that a co-worker

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[8] See *Attorney General of Canada v Caul*, 2006 FCA 251.
[9] See GD3-25.

once made a comment to him about this at lunch. The manager later accused him of threatening a co-worker with a retractable knife.

[30] The Appellant denies that this last incident happened. He says that the employer called him into its office on May 21, 2022. According to his version, the boss was sitting with his feet on his desk. Five other people attended the meeting, and some of them represented the union.

[31] The boss then told him that he was let go for threatening a co-worker with an exacto knife and that this act constituted armed aggression. He told the Appellant that he could call the police. The Appellant denied the facts, but according to his version, the boss said, [translation] "I believe what I want to believe." The Appellant then asked for video proof of what he had done from the supermarket camera, but the boss refused.

[32] At the hearing, the Appellant argued that he was unable to present his version of the facts when he met with the manager and that he was arbitrarily let go. He said that, when he tried to argue, the boss told him that, if he didn't leave, he would call the police. The Appellant feared that a complaint of assault with a weapon would be filed, and he left the premises.

[33] The Appellant's representative argues that the employer didn't follow the workplace violence, harassment, and bullying policy that it submitted to the Commission. If the Appellant was suspected of having bullied or harassed a co-worker, the employer should have investigated and allowed the Appellant to provide his version of the facts.[10] However, none of the steps set out in the policy were followed by the employer, and the Appellant was verbally let go. He wasn't given a letter of dismissal, and the Record of Employment completed by the employer says K-Other "involuntary without cause." He argues that the Appellant didn't receive fair treatment.

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[10] See Loblaws *Politique sur la violence, le harcèlement et l'intimidation en milieu de travail* [workplace violence, harassment, and bullying policy], at GD3-29.

[34] The Appellant says that he contacted the union representative, but he didn’t get any help. He argues that he liked his job and did it well.

[35] I am of the view that the Appellant’s act, and the act he is accused of, doesn’t amount to misconduct under the Act for the following reasons.

[36] First, the Commission only makes arguments about the “retractable knife” incident. I don’t agree with its statement that, when he left the meeting, the Appellant admitted that the facts happened in this way—that is, that he deliberately threatened a co-worker with a retractable knife. As the Appellant’s representative argued, the Appellant didn’t sign the disciplinary notices about these incidents, and the Appellant says that he was prompted to leave.

[37] The statements on file and the Appellant’s testimony at the hearing show that there were some conflicts between the Appellant and his co-workers. The Appellant said that he was mocked by his boss and some of his co-workers. He said that, when he was at lunch, his boss would laugh at what he was eating in front of the others. Also, he says that the clothes from his locker were thrown in the garbage.

[38] On this point, while it is true that the Appellant’s explanations aren’t always clear, his version of the facts is consistent and his testimony persuaded me of one thing: the facts didn’t necessarily unfold as the employer initially told the Commission. The labour relations as they are presented suggest conflicts, and the employer admits that it accepted another employee’s testimony when it came to evidence about the “retractable knife” incident.

[39] That is why the Appellant asked the employer to check the facts on the video. But the employer refused to confirm the facts in this way. When the Commission asked the manager if these facts had been filmed by the supermarket camera, the manager replied that the cameras only kept events for a month.

[40] It also appears that other incidents had happened in the past and that the employer didn’t consider the Appellant to be credible. Namely, for wearing a mask in a

non-compliant manner or for an unauthorized absence. However, the warning letters, dated May 20, 2022, are clear that they are a warning that the Appellant could be let go if another such incident occurred. On November 24, 2022, the manager admitted that he intended to let the Appellant go at the May 21, 2022, meeting if he didn't voluntarily leave his job.

[41] I agree with the Commission that such an act—threatening someone with a knife—is not only reprehensible and to be forbidden, but constitutes violence and violence is unacceptable.

[42] But I agree with the Appellant that the employer had the option of confirming whether the incident actually happened if this part of the supermarket was filmed. The employer refused to provide this evidence, merely accepting the Appellant's co-worker's alleged version and telling a Commission employee several months later that the camera didn't keep events for longer than a month.

[43] Then, concerning the "locker room" incident, I find this act reprehensible. Although the Appellant mentioned that there was no one in the locker room, someone could have been there and not heard him coming in. The women's locker room is for women and if the Appellant needed something in it, he could have asked a co-worker, a supervisor, or gotten his own points card so he didn't have to go in.

[44] However, on November 24, 2022, the manager downplayed this incident. He then told a Commission employee that it may be assumed that women undress in the locker room but that, in fact, it is mostly a place to put boots and coats.

[45] In the presence of such conflicting versions from the employer, and also in view of the "retractable knife" incident that the employer didn't mention to the Commission employee from the outset on September 9, 2022, merely commenting on it when asked by a Commission employee several weeks later, I can't find that the Appellant was actually let go for the reason initially mentioned by the employer.

[46] The employer wasn't at the hearing to present its version of the facts, but the way in which the Appellant's dismissal occurred and the version the employer gave the Commission regarding the supermarket videotapes are enough to find that, on a balance of probabilities, the Appellant didn't lose his job because of misconduct. I would go so far as to say that the facts presented don't establish that the Appellant was let go for the actual reason the employer initially mentioned to a Commission employee.

[47] So, for the purposes of the Act, I am not assessing the seriousness of the act, but rather whether the Appellant's act amounts to misconduct. To do this, I need to be satisfied that the alleged misconduct was the actual reason for the Appellant's dismissal.[11]

[48] Similarly, I don't have to determine whether the dismissal was an appropriate measure, which is for another forum. Under the Act, I have to determine whether the Appellant did this wilfully and whether this act amounts to misconduct.

[49] Because of the circumstances surrounding the Appellant's dismissal, I can't find that he wilfully and voluntarily committed the acts he is accused of. Based on the evidence, these acts don't amount to misconduct.

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

[50] As mentioned, I don't have to determine whether the dismissal was an appropriate penalty, but whether the act amounts to misconduct.

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

Conclusion

[52] The Commission hasn't proven that the Appellant lost his job because of misconduct.

[11] *Macdonald*, A-152-96.

[53] This means that the appeal is allowed.

Josée Langlois

Member, General Division – Employment Insurance Section