



[TRANSLATION]

Citation: *JC v Canada Employment Insurance Commission*, 2023 SST 1434

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

## Decision

**Appellant:** J. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (571632) dated April 17, 2023  
(issued by Service Canada)

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**Tribunal member:** Mylène Fortier

**Type of hearing:** Teleconference

**Hearing date:** August 2, 2023

**Hearing participant:** Appellant

**Decision date:** August 22, 2023

**File number:** GE-23-1273

## 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.<sup>1</sup>

## Overview

[3] The Appellant is J. C. He worked as a crane operator. He lost his job on September 14, 2022. His employer said that it let him go for breach of trust. An employee found drugs in the crane he had used. He later refused to be tested for drugs. The employer says that these events are in addition to the Appellant's other disciplinary issues, such as repeated tardiness.

[4] Although the Appellant doesn't dispute what happened, he says that this isn't the real reason for his dismissal and that it was unfair and unjustified. The Appellant says that the employer let him go because it didn't like him and was looking for an excuse to let him go. He says that he never had a disciplinary issue at work. The drugs didn't belong to him, and he was falsely accused of possessing them. He is of the view that the drug test wasn't required in the absence of signs of impairment.

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

## Issue

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

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

## **Analysis**

[7] 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* considers that reason to be misconduct.

### **Why did the Appellant lose his job?**

[8] I find that the Appellant lost his job because he went against the employer's drug and alcohol policy when he refused the drug test.

[9] The Commission and the Appellant 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.

### **Presence of drugs in the workplace**

[10] On the morning of September 7, 2022, an employee discovered a pouch of amphetamine tablets while inspecting a crane. The employer then questioned the Appellant, since he had used this crane during the evening shift on September 6, 2022. But the Appellant denied that the drugs belonged to him.

[11] The employer told the Commission that it had good reason to believe that the drugs found in the crane belonged to the Appellant. The Appellant was the last person to use this crane. And the surveillance cameras showed that no one else had used the crane.

[12] The Appellant said that the drugs didn't belong to him and that he wasn't the only one to use this crane. But he admitted that he was the last one to use it.

[13] He said that he didn't notice any drugs in the crane during his September 6, 2022, inspection.

[14] He said at the hearing that the drugs could have moved when he cleaned the cabin with an air jet at the end of his shift. He explained that the air jet may have dislodged things that were there long before he used the crane. He added that crane cabs are dirty and that anything can get in them. Also, because he works late at night and it is dark, he said that he could not see if something abnormal was there.

[15] Although the Appellant's explanations seem unlikely, I accept that there is no evidence that the drugs belonged to the Appellant. But, based on the surveillance camera footage, I find that the employer was right to have doubts about the Appellant. The presence of drugs in the workplace is something that can't be taken lightly.

### **Refusal to take drug test**

[16] The employer suspended the Appellant for administrative reasons after the drugs were discovered. It asked him to take a drug test.

[17] The Appellant initially accepted and signed the consent form for this test.<sup>2</sup> But he changed his mind and refused to comply. He told the Commission that he didn't remember giving consent.

[18] The Appellant initially told his employer that he refused to take the test because he had used amphetamine the weekend before. It was the same drug that was found in the crane. So, he said he was concerned that the drug was still in his system.

[19] The employer said that this refusal was a serious breach and broke the relationship of trust with the employee.

[20] Then, the Appellant changed his version of events. He told the Commission that he hadn't used drugs the weekend before. He told his employer this so that he would not have to get tested right away.

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<sup>2</sup> See the appeal file at GD3-31.

[21] Instead, he told the Commission that he had refused to take the drug test for another reason. He was of the view that his employer had to give him 48 hours' notice before testing him.

[22] He also told the Commission that he didn't think this test was required because he knew that he hadn't used drugs.

[23] At the hearing, the Appellant gave another version. He mentioned another reason. He explained that he did agree to take the test. He then changed his mind on the advice of another employee. This employee was the driver who took him to the drug test. The Appellant said that, on his way to the drug test, the employee told him that he had the right to refuse.

[24] The Appellant mentioned at the hearing that, in his opinion, he didn't have to take this drug test because there was no evidence that the drugs found in the crane belonged to him. Also, he didn't have any signs of impairment that morning that would suggest that he had used drugs.

[25] I note that the Appellant's reasons have changed on several occasions. This affects his credibility. I give little weight to the Appellant's position for this reason.

[26] Regardless of the reason given by the Appellant, I find that the Appellant voluntarily and consciously decided to refuse the drug test.

### **Disciplinary issues at work**

[27] The employer told the Commission that there were other disciplinary issues, including repeated tardiness. It told the Commission that these other issues were detailed in the dismissal letter.

[28] I note that this letter,<sup>3</sup> dated September 28, 2022, doesn't mention any other type of disciplinary issue. The letter says that the Appellant was let go for serious misconduct, after the events of September 6, 2022.

[29] The employer told the Commission that the Appellant was often late for work. Because of this, he was now working evenings. The employer had also changed the Appellant's schedule. But it told the Commission that, despite these arrangements, the tardiness continued, but was less frequent.

[30] The employer gave the Commission a copy of a letter,<sup>4</sup> addressed to the Appellant, that testified to his frequent tardiness. This letter, dated August 3, 2022, says that, given his frequent tardiness, the Appellant will start his shift 30 minutes later than scheduled and finish 30 minutes later.

[31] At the hearing, the Appellant didn't deny that he was late for work. But he said that it wasn't that bad and that he was never more than an hour late. He explained that he finishes his shift late in the evening, often well past the scheduled time. He has to drive home, and it is difficult for him to get back on time the next day for this reason.

[32] I have no evidence that the dismissal was caused by disciplinary issues other than the September 6, 2022, incident. But I note that the Appellant had told the Commission<sup>5</sup> that he didn't have a problem with tardiness, absences, or violent or disrespectful behaviour. I find that this again shows that the Appellant's credibility is weak.

[33] Concerning the Appellant's credibility, I also note that the employer told the Commission that it considered that the Appellant had somehow admitted the misconduct when he was let go. At that time, he told the employer that he could not believe that he was let go for such a small error.

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<sup>3</sup> See the appeal file at GD3-30.

<sup>4</sup> See the appeal file at GD3-33.

<sup>5</sup> See the appeal file at GD3-26.

[34] The Appellant has given different explanations for what he said over time. He told the Commission that he said this out of nervousness. Then, he said that he said this in desperation and because his employer could believe what it wanted. He then said at the hearing that it was because of the pressure he felt that he told his employer this.

[35] The Appellant's different explanations greatly undermine his credibility.

[36] In summary, the employer's position is that it had lost confidence in the Appellant for the following reasons:

- Drugs were found in the Appellant's usual crane.
- The surveillance camera footage showed that the Appellant was the only one to have used this crane and the last one to have used it.
- The Appellant denied that the drugs belonged to him, and he had no reasonable explanation for this.
- The Appellant said that he had used the same drug a few days before.
- The Appellant refused to take a drug test.

[37] The Appellant disagrees. At the hearing, he said that he didn't understand the reason for his dismissal. He said that he felt the real reason he lost his job was because the CEO didn't like him. In his view, he was looking for an excuse to let him go.

[38] But the Appellant had given the Commission a different interpretation in November 2022. He said at the time that the company tends to fire older employees who have good wages. When asked about this at the hearing, the Appellant said that he no longer agreed. He said this out of hatred.

[39] The Appellant didn't deny at the hearing that he had used drugs the weekend before that incident. He said that what he did with his free time didn't concern his employer. So, this version is different from the one he gave the Commission earlier.

[40] I find that the Appellant was let go because he refused to take a drug test.

[41] The employer had doubts about the Appellant's possession and use of drugs, which is contrary to the drug and alcohol policy. So, it asked for a drug test, as set out in the policy, which was legitimate in the circumstances. It also offered support through the employee assistance program.

[42] The Appellant refused to take this test, denied a drinking problem, and refused the employer's help. This violated his employer's drug and alcohol policy. That is why he was let go.

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

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

[44] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>7</sup> The claimant doesn't have to have wrongful intent (in other words, they don't have to mean to be doing something wrong) for their behaviour to be misconduct under the law.<sup>8</sup>

[45] There is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.<sup>9</sup>

[46] 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.<sup>10</sup>

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<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>8</sup> See *Attorney General v Secours*, A-352-94.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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



[47] The Commission said that there was misconduct because the acts of professional misconduct for not complying with the policy were misconduct.

[48] The Commission said that the Appellant knew the employer could get him tested if it suspected him of not complying with the drug and alcohol policy. The Appellant confirmed to the Commission that he was aware of the policy in question and that the employer didn't approve of drug use in and outside the workplace. Because the employer's policy wasn't followed, the relationship of trust was broken, which showed misconduct, according to the Commission.

[49] The Appellant argues that there was no misconduct for the following reasons:

- There was no evidence that the drugs belonged to him.
- He didn't have drugs.
- He didn't have to get tested without signs of impairment.
- He didn't know he could be let go if he refused to take a drug test.
- His employer should have told him that he would be let go if he refused to take the test.

[50] I find that the Commission has proven that there was misconduct. The Appellant should have known that he could be let go for not complying with the drug and alcohol policy.

[51] The Appellant told the Commission that he was aware of his employer's zero-tolerance drug and alcohol policy. He confirmed this at the hearing. I find that it is more likely than not that the Appellant knew the consequences of refusing to take the test.

[52] The Appellant mentioned that he believed there had to be proof of possession of drugs or concrete signs of impairment to give the employer the right to ask for a drug test.

[53] However, the employer's policy<sup>11</sup> clearly states, among other things, that:

- No employee may use, possess, sell, dispose of, or purchase any drug or other substance that may affect their physical or mental capacity.
- The employer won't tolerate employees who report for work while impaired by alcohol or drug use and the zero-tolerance principle will apply.
- Employees who don't comply with the alcohol or drug abuse policy will be subject to disciplinary measures up to and including dismissal.
- The employer reserves the right to investigate when it has reason to believe that banned substances (drugs or alcohol) are on the premises or that a particular employee has violated this policy.
- The employer may carry out searches and testing if necessary.
- A refusal to cooperate with a search will be interpreted as an act of insubordination.
- Compliance with the policy is required to maintain employment with the employer.

[54] The policy gives examples of reasonable cause to believe the policy isn't being followed:

- physical symptoms or manifestations of consumption
- abnormal or erratic behaviour
- repeated absenteeism
- difficulty speaking or walking

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<sup>11</sup> See the appeal file at GD3-20.

- frequent tardiness
- decreased performance
- reporting the use, possession, or distribution of alcohol or drugs
- smell or fumes of drugs or alcohol

[55] I find that the employer had reasonable cause because drugs were in the crane the Appellant had used. It was reasonable for the employer to ask for a drug test, in accordance with its policy.

[56] The Appellant confirmed that he had a copy of the drug and alcohol policy and that he also knew where to consult it if necessary. It was given to him when he was hired. He said at the hearing that he didn't think to read this policy again when this happened to verify his rights and obligations.

[57] The Appellant confirmed at the hearing that his employer had previously asked him to get tested at a Christmas party. He said that he didn't have symptoms of substance use at that time either, but his employer thought he was intoxicated. But he had agreed to take the test, and his employer hadn't followed up after that.

[58] At the hearing, the Appellant was asked why he had acted differently this time by refusing to take the test. He explained that this was because there was less work at the time, and he had time to go. I don't believe this explanation.

[59] I can't agree with the Appellant's position. He knew or should have known that refusing to take a drug test, given his employer's doubts, could lead to his dismissal. The Appellant had previously agreed to take a similar test. He was aware of his employer's policy on this.

[60] I understand the Appellant's position that there was no evidence that the drugs belonged to him. I accept that there is no evidence that the drugs belonged to the

Appellant. But this evidence isn't necessary to prove misconduct here. That isn't the reason for the dismissal.

[61] There were factors that allowed the employer to ask the Appellant for a drug test, in accordance with its policy.

[62] The Appellant's misconduct is not the alleged possession of drugs, but the refusal to take the drug test, given the circumstances and the employer's drug and alcohol policy.

[63] The Appellant said that he didn't know he could be let go if he refused to get tested. I can't accept this argument.

[64] The evidence shows that he was aware of the policy. In addition, the different versions the Appellant gave his employer, the Commission, and at the hearing affect his credibility.

[65] The Appellant also says that his employer should have told him that he could be let go if he refused the test.

[66] I disagree with the Appellant. I have no evidence that the employer explained to the Appellant the possible consequences of refusing to take this test. But I find that, since he had the policy and knew it, the Appellant knew or should have known that he could be let go.

[67] The Appellant voluntarily refused to submit to a drug test. So, he didn't follow his employer's policy.

[68] The Appellant could have assumed the consequences of his actions and known that he could be let go.

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

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

## **Conclusion**

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

[71] This means that the appeal is dismissed.

Mylene Fortier

Member, General Division - Employment Insurance Section