



[TRANSLATION]

Citation: *KO v Canada Employment Insurance Commission*, 2023 SST 1792

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

**Decision**

**Appellant:** K. O.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (590412) dated May 26, 2023  
(issued by Service Canada)

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**Tribunal member:** Mylene Fortier  
**Type of hearing:** In writing  
**Decision date:** September 20, 2023  
**File number:** GE-23-1660

## 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 in this case is K. O. He lost his job. His employer says that he lost his job because he took a vacation without permission. It explains that, according to the collective agreement in force, an absence of three consecutive working days without a valid reason results in loss of employment. But, the employer says that this is considered a resignation. So, on the Record of Employment, it indicated quitting as the reason why the job ended.<sup>2</sup>

[4] The Commission found that the Appellant's job ended because of misconduct, not voluntary leaving. It found that he lost his job because of misconduct when he was absent without a valid reason. So, it disqualified him from receiving EI benefits.

[5] Although the Appellant doesn't dispute what happened, he says that he should not have been let go. He says that he asked for more vacation time at his own expense and was entitled to it. The Appellant says that his dismissal isn't justified.

[6] The Appellant says that his job ended not because of voluntary leaving or misconduct. He says that he was let go.

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<sup>1</sup> 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 appeal file at GD3-13.

## **Matter I have to consider first**

### **Potential added party**

[7] The Tribunal identified the Appellant's former employer as a potential added party. So, the Tribunal sent the former employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party.

[8] The employer didn't respond by the date of this decision. As there is nothing in the file to indicate that the employer has a direct interest in the appeal, I have decided not to add it as a party to this appeal.

### **Issue**

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

### **Analysis**

[10] 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?**

[11] I find that the Appellant lost his job because he didn't go to work for three consecutive days without a valid reason. As set out in the collective agreement, this situation resulted in the loss of his job.

[12] The Commission and the Appellant agree on why the Appellant lost his job. They also agree that the Appellant was let go. But, he disagrees with his dismissal, which he finds unjustified.

[13] The fact that the Appellant disagrees with his dismissal doesn't change the fact that he lost his job for that reason.

[14] Since the parties agree on this factor and I have no evidence that the Appellant lost his job for any other reason, I accept it as fact.

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

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

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Claimant 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.<sup>5</sup>

[17] There is misconduct if the Claimant 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.<sup>6</sup>

[18] 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>7</sup>

[19] The Commission says that there was misconduct because the Appellant knowingly didn't comply with the collective agreement. It says that he could expect that he could lose his job since he was familiar with the collective agreement.

[20] It says that the Appellant consciously decided to take additional vacation time even though he didn't have permission to. It is of the view that this is misconduct, since the Appellant's conduct was intentional.

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General v Secours*, A-352-94.

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

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Appellant says that there was no misconduct because his work record with the employer was flawless. He says that he didn't do anything that could be misconduct. He says that his dismissal is unjustified.

[22] The Appellant explains that, in November 2022, he had applied in writing for permission to take a vacation after the holidays. This additional vacation time was at his expense. But, he said it wasn't approved or denied. He simply didn't get an answer to his request.

[23] The Appellant confirms that he still decided to go on vacation after the holidays. He thought that this would not cause any problems given his seniority and that the vacation was at his expense. He had also noticed before the holiday break that the amount of work had decreased.

[24] The Appellant also says that he contacted his employer on January 3 and 5, 2023, when he decided to extend his vacation. He provided a timeline of events that happened after being absent from work. He says that this timeline shows that the employer is contradicting itself.<sup>8</sup> But, this document doesn't provide any evidence relevant to the issue at hand.

[25] The employer told the Commission that the Appellant's request for additional vacation time was denied. The Appellant was supposed to go back to work on January 3, 2023, but he didn't go back to work that day. He also didn't notify the employer he would be absent. He went back to work on January 10, 2023. That is when the employer told him that he had lost his job.

[26] I find that the Commission has proven that there was misconduct. The Appellant knew or should have known that, by being absent that way without permission or a valid reason, he could lose his job.

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<sup>8</sup> See appeal record at GD6-1 to GD6-7.

[27] I note that the Appellant confirmed to the Commission on more than one occasion that he was familiar with the collective agreement and specifically the section of the agreement dealing with being absent without permission.<sup>9</sup>

[28] The Appellant also confirmed that he decided to take additional vacation time without permission from his employer.<sup>10</sup> The Appellant argued that he felt that he didn't have to apply for permission because of his seniority and because it was at his expense.

[29] That argument can't be accepted. The agreement doesn't specify that vacations at the employee's expense are excluded from its scope. It also doesn't say that there is an exception based on seniority.

[30] The excerpt from the collective agreement<sup>11</sup> the employer provided the Commission indicates that an employee loses their seniority and their employment for one of the following reasons:

- A) They are let go for good and sufficient cause and not reinstated through the grievance and arbitration process.
- B) They voluntarily leave their job.
- C) They are absent from work for three consecutive working days without a valid reason.
- D) They are absent from work because of illness or an accident for a period of 24 consecutive months.
- E) They are laid off for a period exceeding 24 months.
- F) No response is received under the procedure set out in section 13.08.

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<sup>9</sup> See appeal file at GD3-16 to GD3-27.

<sup>10</sup> See appeal file at GD3-16, GD3-19, and GD3-27.

<sup>11</sup> See appeal file at GD3-26.

[31] I find that the employer applied the section of the collective agreement in accordance with what it says. The Appellant was indeed absent from January 3 to January 9, 2023, without permission which means without a valid reason. He was absent for more than three consecutive business days.

[32] I give little weight to the Appellant's version that he notified his employer on January 3 and 5, 2023, when he decided to extend his vacation. This version of events has come about later and is inconsistent with the employer's version.

[33] I further note that the timeline of events he himself provided doesn't mention making any calls to tell his employer he would be absent.

[34] I find that, even if he had notified his employer, the fact remains that his employer didn't give him permission to be absent.

[35] Regardless of the reasons the Appellant gave that he believes justify his right to be absent from work, I find that he wilfully and consciously decided not to go to work.

[36] I have no indication that the Appellant's conduct was an excuse for his dismissal. The reason his job ended is clear. His conduct is the reason his job ended.

[37] I don't have to consider whether the dismissal was justified. But, I have to decide whether the Appellant's conduct amounts to misconduct under the Act.<sup>12</sup>

[38] I find that the Appellant's conduct is misconduct for the following reasons:

- His conduct was intentional.
- His dismissal is directly related to his conduct.
- The conduct isn't an excuse for the dismissal.

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<sup>12</sup> See *Marion v Canada (Governor General)*, 2022 FCA 185.

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

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

**Conclusion**

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

[41] This means that the appeal is dismissed.

Mylene Fortier

Member, General Division – Employment Insurance Section