



Citation: *LG v Canada Employment Insurance Commission*, 2023 SST 1328

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

## Decision

**Appellant:** L. G.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (563957) dated February 6, 2023 (issued by Service Canada)

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**Tribunal member:** Peter Mancini

**Type of hearing:** Teleconference

**Hearing date:** June 20, 2023

**Hearing participants:** Appellant  
Respondent

**Decision date:** July 6, 2023

**File number:** GE-23-432

## 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 lost his job. The Appellant's employer said that he was let go because he refused to follow the company policy regarding drug/substance testing.

[4] Even though the Appellant doesn't dispute that this happened, he says he voluntarily left his employment before he was fired. He also says the employer was not following its own policy and that was why he wouldn't take the test. He also felt that he would test positive because of the ingestion of drugs and alcohol on the weekend before the test.

[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, the Commission decided that the Appellant is disqualified from receiving EI benefits.

## Issue

[6] Did the Appellant lose his job because of misconduct; or did the Appellant voluntarily leave his job?

[7] In either case, is the Appellant disqualified from receiving E.I. benefits

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

## Analysis

[8] The Appellant says he voluntarily left his job because he had just cause to do so. The Commission says he was let go by his employer because of misconduct.

[9] Because the parties don't seem to agree on why the Appellant wasn't working, I need to decide why so that I know which legal test to apply.

[10] The Act sets out two different notions that may result in an Appellant being disqualified from receiving benefits. These are voluntary leaving and misconduct<sup>2</sup>. The notions are linked because it is not always clear whether the unemployment resulted from an employee being dismissed for misconduct or from the employee deciding to leave without just cause.

[11] It is open to the Tribunal to make a finding based on either of those two grounds<sup>3</sup>. That means that when the reason for separation from employment is not clear, I have the jurisdiction to decide whether it is based on voluntarily leaving without just cause or misconduct. This is because it does not matter who took the initiative in ending the employment relationship because both cases can result in a disqualification<sup>4</sup>.

[12] I recognize that the Commission's arguments are directed towards misconduct. However, in their written submissions they also addressed the issue of voluntary leave. They did this at page GD4-5 acknowledging that the Appellant was asserting that his loss of employment was his own choice. So, I do not think they would suffer any prejudice should I conclude that this is a case of voluntary leave. The Appellant was also questioned during the hearing about facts that were relevant to both the test for voluntary leave and misconduct. He was aware of the Commission's position and put forward his own position in this regard, so I do not think he would suffer any prejudice should I conclude that this is a case of misconduct.

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<sup>2</sup> This is set out in the *Employment Insurance Act* (Act) at section 30

<sup>3</sup> See *Canada (Attorney General) v Borden*, 2004 FCA 176

<sup>4</sup> Both these issues can result in disqualification under section 30(1) of the Act. The Court has also reached this conclusion in its decisions in *Canada (Attorney General) v Easson A-1598-92* and *Canada (Attorney General) v Desson*, 2004 FCA 303

So, I will start by looking at why the Appellant was separated from his employment.

## **Why wasn't the Appellant working?**

[13] I find that the Appellant wasn't working because he refused to follow the employer's policy regarding drug/ substance testing, and he was dismissed.

[14] The Commission has argued that this was a case of misconduct because the Appellant refused to follow the employer's policy and submit to a substance test. The Commission says he was aware of the policy, signed the policy and when asked to comply with the policy refused. This resulted in the employer letting him go on September 6<sup>th</sup>, 2022.

[15] The Appellant disagrees. In his notice of appeal and at the hearing he said he quit his job. The Appellant says that he was told to take a substance test and he refused to take it. He argues that he told the employer that he would not take the test for valid reasons and then left the work site and took a job the next day with another employer.

[16] The Appellant filed his claim for regular benefits on November 4<sup>th</sup>, 2022. In the application for benefits he had an option to explain why he was no longer working. He could check off options including that he quit his job or that he was dismissed or suspended from his job. He answered that he was dismissed or suspended from his job.

[17] In a written explanation contained in his application for benefits he said, "I felt I had no choice but to refuse the test and was consequently terminated by my employer."

[18] He checked off the Attestation section of the application for benefits declaring that all the information given in the application was true to the best of his knowledge.

[19] The record of employment filed with the Commission stated he was dismissed or suspended.

[20] The Appellant said during the reconsideration process, when questioned by an employee of the Commission on January 23<sup>rd</sup>, 2023, that he was dismissed as soon as he refused to take the test (GD3-44).

[21] In his Notice of Appeal, the Appellant raised the issue of voluntary leaving for the first time. He said that “while technically it was a dismissal it was as much or even more so a resignation.” He said taking the test wasn’t his only consideration on the day he was asked to take the test. He said there were other considerations and explained that he wasn’t having a good year with the company.

[22] I have no formal letter of resignation from the Appellant to his employer in evidence before me. I have his testimony at the hearing and his statement in the Notice of Appeal that he quit. I do not have any evidence that he told his employer he quit.

[23] Nor do I have a letter of termination from the employer to the Appellant. I do have the record of employment from the employer that the Appellant was terminated. To some extent the evidence of the employer confirms that the Appellant simply walked out the door after he was told that a refusal to take the test would result in a dismissal, and I have the notes of the Appellant and the Commission conversation of January 23<sup>rd</sup> that the Appellant was dismissed.

[24] In weighing all the evidence, I have concluded that the Appellant knew when he filed for benefits that he had been dismissed. He attested to this in his application for benefits, and in his explanation that accompanied that application. He confirmed this in his discussions with the service Canada employees when being questioned during the reconsideration process. The employer filed an ROE stating the Appellant had been suspended, so obviously the employer came to the same conclusion as the Appellant, that the Appellant had been dismissed. I place more weight on the Appellant’s statements when he applied for benefits than I do after he had been denied benefits and appealed the decision of the Commission following his reconsideration. The statements made on his application and throughout the application process were made earlier in time and when the incident was fresh in the mind of the Appellant. The statement that he voluntarily left his employment I consider an after thought, and one made by the Appellant in hopes of a successful appeal. For that reason, I find the earlier statements more credible. I find that the Appellant believed he had no choice on September 6<sup>th</sup>, 2022. He was certain that if he took the test, it would show drugs and alcohol in his

system, and he would be fired. So, having no choice he left the room. The fact that he had no choice confirms that he was dismissed.<sup>5</sup>

[25] So, I find that the Appellant was dismissed. I must now decide if the reason for the Claimant's dismissal is misconduct under the law.

[26] 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 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.<sup>8</sup>

[27] 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.<sup>9</sup>

[28] 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>

[29] The Commission says that there was misconduct because the Appellant refused to follow the employer's drug/substance testing policy following an accident with the company truck and that the Appellant knew about the policy, had signed acknowledging the policy and still refused to follow it.

[30] The Appellant says that there was no misconduct because the employer didn't have reasonable grounds to request that he take the test, the test would have shown he had drugs in his system from the weekend and the employer was trying to get rid of him.

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<sup>5</sup> Canada (Attorney General) v Peace 2004 FAC 56

<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 of Canada 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.

[31] I find that the Commission has proven that there was misconduct, because the Appellant had signed the policy and then refused to follow it. Even if the Appellant was unaware of the details of the policy, the employer explained the consequences of a refusal to take the test on the day of the Appellant's dismissal.

[32] Monday, September 5<sup>th</sup>, 2022, was a holiday. It is commonly referred to as a long weekend. The Appellant had stayed in a hotel in Red Deer, Alberta and celebrated during the long weekend. He was in possession of the employer's truck. On Tuesday September 6<sup>th</sup>, 2022, he was directed to go to Grand Prairie at 5 a.m. that day by his employer. The Appellant said he told his foreman that he was tired from a lack of sleep the night before. He said he thought the foreman would get someone else to drive, but the foreman told him to go. He began to drive the employer's truck to Grand Prairie. He fell asleep while driving. This resulted in an accident, and the truck was damaged. He reported this to his foreman. The foreman reported the accident to the safety officer.

[33] The safety officer and another individual whom the Appellant says was an owner of the company arrived at the Appellant's location and drove him to the employer's Red Deer location. They told him he would have to take a drug test.

[34] The employer filed a comprehensive accident report that formed part of the evidence before the Tribunal. The report contained written and photographic material. The photos were of the damage to the truck, and of the interior of the truck.

[35] The accident report is detailed and was prepared the day following the incident. I accept the evidence as an accurate report of what the safety officer did and saw at the time.

[36] It is not disputed that the truck driven by the Appellant was involved in an incident. The employer's policy, signed by the Appellant sets out that testing can be requested of those involved in a workplace incident.

[37] When the Appellant arrived at the employer's office, he was asked to take the drug/substance test. He refused. He said he had been drinking and had been using drugs over the long weekend and he believed there would be residue in his system that

would show up on the drug test. He believed the employer would use the test to fire him. There was an argument between the employer and the Appellant about taking the test. The Appellant says he was told that if he didn't take the test, it would be the same as a failure, which would result in a dismissal. The employer confirms this conversation. When the Appellant refused to take the test, he says he was dismissed, and he walked out the door.

[38] The employer had a drug testing policy. It was comprehensive. It was part of the evidence before the tribunal. It was titled *fitness for duty/impairment-free workplace policy*. It had been in place since 2018. Although the Appellant said he had never been presented with the policy, and had never signed such a policy, he later acknowledged that he had signed it on May 12, 2022. He explained that he had forgotten about the policy, and it must have been presented to him to sign. He said it had never been explained to him and he had never had training on the policy. The employer did not confirm that the employee had been trained regarding the policy. However, the policy was clearly explained to the Appellant when he met with the employer in Red Deer following the workplace incident.

[39] I find that the existence of the policy is not in question, nor is there any dispute that the signature on the policy is that of the Appellant. Above the signature is an employee acknowledgement. By signing the policy, the employee confirms that they have read and understand the employee handbook, and that they agree to comply with the employer's policies and procedures. Given that the Appellant's recollection concerning the policy and his signature on it are unclear I find I cannot rely on his recollection. I accept the policy as evidence that the Appellant signed and acknowledged the contents of the policy.

[40] Clause 15 (h) of the policy clearly states that an employee who refuses to test and is not self-reporting shall be terminated immediately with cause. This is exactly what the employer told the Appellant when he was asked to take the test on September 6<sup>th</sup>, 2022.



[41] By refusing to take the test the Appellant knew he would be dismissed. He said this in his application for benefits. So, he knew that his conduct would get in the way of carrying out his duties for his employer. He refused to follow the company policy. The refusal was, by the Appellant's own admission, deliberate and willful. He felt it was unfair of the Company to ask him to take the test and he deliberately and intentionally refused to do so.

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

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

### **If the Appellant had voluntarily left his employment, then did he have just cause to do so?**

[43] If I were to have found that the Appellant voluntarily left his job, I would be of the view that he did not have just cause on the day he did leave his employment. To have found that the Appellant voluntarily left his job I would have had to accept his statement in his Notice of Appeal that he chose to quit rather than take the test.

[44] The Appellant says that several conditions existed which led him to the decision to quit on September 6<sup>th</sup>, 2022. He said there were other issues with the employer leading up to his decision to quit besides the request to take the drug/substance test. I have considered these in light of the Employment Insurance Act (the Act) to determine if he had just cause to leave work<sup>11</sup>.

[45] If I had found that the Appellant had voluntarily quit his job, he would have to prove on the balance of probabilities that he had just cause to leave his job.

[46] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause. Having a good reason for leaving a job isn't enough to prove just cause.

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<sup>11</sup> The Employment Insurance Act (the Act) 2022 section 29

[47] The law explains what it means by “just cause.” The law says you had just cause if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all circumstances.

[48] The law sets out some of the circumstances that I have to look at when deciding if the Appellant had no reasonable alternative to leaving when he did.<sup>12</sup>

[49] The Appellant worked for the employer for approximately 20 years and for 18 of those 20 years, he knew the owner and said he had a good working relationship with the employer. He said he believes the Company went into bankruptcy and new owners were in place. He found a change in the company culture. He did not feel as welcome as he did previously. He said the last year with the company wasn’t a good one.

[50] He felt the employer was angry with him because he had given them notice that he would be leaving to move to Nova Scotia to care for his mother. He did this a year before the dismissal. However, there is no evidence of any harassment or significant changes in work duties that would constitute just cause for the Appellant to quit. The Appellant always chose to stay with the employer until the testing incident.

[51] He said a month before his dismissal he had been disrespected by the employer. He said he had been working with a crew in Edmonton, and that crew packed up and left town, leaving him alone. He went to work with another crew after that, and refused to work with his old crew, and he reported the incident to the employer. The day after that incident, he was texting with a friend who told him about another employer, X, where he might get work. He considered quitting his job. After working with another crew for a week or so, his old foreman called him and apologized and asked him to come back to his old crew. He did. I do not find there was antagonism towards the Appellant from his employer that the Appellant wasn’t responsible for. There were tensions but the Appellant remained with the employer even though he knew he had another job to go to following this incident.

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<sup>12</sup> See the Employment Insurance Act (the Act) section 29 (c)

[52] A month after this incident the employer asked him to take the drug/substance test after he had an accident with a company vehicle. He refused. He decided to quit. He said in his notice of appeal that after he walked out the door the foreman called him while he was in the company parking lot and tried talking him into going back inside. He refused.

[53] I find that if the Appellant did voluntarily leave his job, he had a reasonable alternative to doing so. He could have taken the test. He confirms this in his Notice of Appeal. The Appellant believed he would fail the test, but this was not certain. Moreover, the policy of the employer had in place options for an employee who failed a test. Even if the Appellant was unaware of these options, he could have discussed the test results with the employer.

[54] Considering the circumstances that existed when the Appellant says he quit, he had reasonable alternatives to leaving when he did. This means the Appellant didn't have just cause for leaving his job.

[55] So, if I had found the Appellant voluntarily left his job, I would also find he was disqualified from receiving benefits.

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

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

### **Conclusion**

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

[58] This means that the appeal is dismissed.

Peter Mancini

Member, General Division – Employment Insurance Section