



Citation: *RC v Canada Employment Insurance Commission*, 2023 SST 430

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

## Decision

**Appellant:** R. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (547060) dated October 20, 2022 (issued by Service Canada)

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**Tribunal member:** Teresa M. Day

**Type of hearing:** Teleconference

**Hearing date:** March 22, 2023

**Hearing participant:** Appellant

**Decision date:** March 24, 2023

**File number:** GE-22-4298

## Decision

[1] The appeal is allowed.

[2] The Appellant did not voluntarily leave his job at X.

[3] The Respondent (Commission) has not proven the Appellant lost his employment due to his own misconduct.

[4] This means he is **not** disqualified from receiving employment insurance (EI) benefits.

## Overview

[5] The Appellant lost his job as an oil sands truck driver for X on April 29, 2022. He renewed his claim for EI benefits starting May 29, 2022.

[6] The Commission investigated the reason for the Appellant's separation from employment. The owner of X (the owner) said the Appellant was dismissed because he refused to follow the work schedule and was insubordinate. The owner said the Appellant received 3 verbal warnings and then a written warning the day before he was dismissed. A Record of Employment (ROE) was issued for the dismissal. The Appellant disputed the owner's version of events.

[7] The Commission decided the Appellant lost his job because of misconduct and imposed a disqualification on his claim for EI benefits<sup>1</sup>.

[8] The Appellant asked the Commission to reconsider its decision. He said the employer asked him to switch from the day shift to the night shift without allowing him the re-set time off from driving that is required by law. When he showed up to work his next shift, he was fired.

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<sup>1</sup> The Commission's decision letter is at GD3-32.

[9] During the reconsideration process, the owner changed his story and suddenly said the Appellant quit.

[10] The Appellant disputed the owner's statements, but the Commission accepted the owner's sudden new version of events. The Commission decided the Appellant voluntarily left his employment without just cause and maintained the disqualification on his claim for EI benefits<sup>2</sup>.

[11] The Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[12] The Appellant denies *both* versions of events the owner provided. He says they aren't the real reason he lost his job. He says the owner dismissed him for personal reasons that were unrelated to his job performance or conduct in the workplace.

[13] I must consider why the Appellant stopped working at X and then decide if it's grounds for disqualification from EI benefits.

## Issues

[14] Is the Appellant disqualified from receiving EI benefits because he **voluntarily left his job without just cause**<sup>3</sup>?

[15] To answer this, I must first address the Appellant's voluntary leaving. Then I have to decide whether he had just cause for leaving.

[16] If the Appellant did not voluntarily leave his job but was separated from his employment because of his own actions, then I must consider whether he is disqualified from EI benefits because he **lost his job due to his own misconduct**<sup>4</sup>.

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<sup>2</sup> The reconsideration decision letter is at GD3-54. It says the disqualification originally imposed on his claim for misconduct is changed to a disqualification for voluntarily leaving his employment without just cause. The effect remained the same – the Appellant could not receive EI benefits – only the reason why changed.

<sup>3</sup>This is the first question I must consider because this is the basis for the reconsideration decision the Appellant has appealed.

<sup>4</sup> Section 30 of the *Employment Insurance Act* (EI Act) provides for disqualification on 2 related grounds: if a claimant voluntarily leaves their job without just cause or if they lose their job because of their own

[17] To answer this, I must first determine the real cause of the Appellant's separation from his employment and then decide whether it amounts to misconduct for purposes of the *Employment Insurance Act* (EI Act).

## Analysis

### Issue 1: Did the Appellant voluntarily leave his job?

[18] No, he did not.

[19] The law says a claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can prove they had just cause for leaving<sup>5</sup>.

[20] To decide if the Claimant should be disqualified on this basis, I must first look at whether he, in fact, voluntarily left (quit) his job.

[21] The owner *repeatedly* (in 3 different interviews with Service Canada<sup>6</sup>) told the Commission that the Appellant was dismissed.

[22] The Appellant's ROE was issued on May 10, 2022 and coded as a "Dismissal or suspension". It was also *certified by the owner*<sup>7</sup>.

[23] The Appellant also told the Commission that he was fired<sup>8</sup>.

[24] But during the reconsideration process, the owner suddenly – and without an adequate or coherent explanation<sup>9</sup> – told the Commission that the Appellant quit.

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misconduct. The court has said these grounds are linked in a way that requires me to consider whether a disqualification under section 30 of the EI Act is warranted on either of the 2 related grounds: see *Attorney General of Canada v. Easson*, A-1598-92, and *Borden* 2004 FCA 176.

<sup>5</sup> Section 30 of the EI Act.

<sup>6</sup> Once on June 14, 2022 (see GD3-21) and twice on August 2, 2022 (see GD3-22 and GD3-24).

<sup>7</sup> See Box 22 of the ROE at GD3-19.

<sup>8</sup> See GD3-27 and GD3-36.

<sup>9</sup> When the Service Canada representative asked why the ROE was issued as a dismissal, the owner said it was a miscommunication and provided no particulars or explanation as to the basis for the alleged miscommunication or how it occurred (see GD3-38).

[25] There is no credible evidence the Appellant resigned or took any steps to sever the employment relationship by quitting<sup>10</sup>.

[26] At the hearing, the Appellant testified that:

- On April 27, 2022, he showed up for work on the day shift. He was on the road and driving a truck loaded with oil when his field supervisor contacted him and said he was needed on the night shift later that day so he should “go and sleep”.
- He told the field supervisor he was already on the road with a fully loaded truck and asked the field supervisor for permission to complete the delivery first.
- The field supervisor gave him permission to do that first.
- Around 10am, just as the delivery was being completed, the owner phoned him and “freaked out”. The owner said he had to start a shift at 6pm that night – even though he was entitled to “re-set” time “by law” if he was switching from day shift to night shift<sup>11</sup>.
- When he showed up for the 6pm shift on April 27, 2022, he was given the warning letter at GD3-25.
- He signed it without reading it. He was never belligerent with anyone. He did his shift and then had 36 hours off.

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<sup>10</sup> I give little weight to the evidence obtained from the field supervisor (see GD3-45), because it was given in the presence of the owner and amounted to nothing more than a circumscribed, parroted version of the owner’s new story.

<sup>11</sup> The Appellant testified that there are laws around how long a truck driver can be on the road and the amount of time away from driving that is required when switching from daytime to nighttime driving. The owner also told the Commission that there had to be a 10-hour gap between the end of a driving shift and start of a new one (see GD3-50).

- When he returned to work the night shift on April 29, 2022, he went to “his truck”<sup>12</sup> and saw that his field supervisor was “emptying” the truck and removing his (the Appellant’s) personal belongings from it.
- When he asked why the field supervisor was doing this, the field supervisor said he was being laid off.
- But there was lots of work and he didn’t believe that. He asked for an “honest” answer, and the field supervisor said he was “fired”.
- He finished cleaning out the truck himself and then he left.
- He didn’t quit his job.
- He was driving a lot, things were going well got him, and he was making good money, as evidenced by the earnings on his ROE. He wanted to keep working.

[27] I accept the Appellant’s testimony that he was fired.

[28] It is consistent with both the owner’s repeated *original* statements to the Commission and his own. It is also supported by the ROE that was issued – *and certified by the owner himself* – contemporaneously with the events in question<sup>13</sup>.

[29] I give no weight to the evidence obtained from the owner during the reconsideration process. It represents an entirely new version of events that is unexplained and unsupported by any contemporaneous evidence<sup>14</sup>.

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<sup>12</sup> The Appellant testified that a truck was assigned to him by X and he lived in “his truck” most of the time, unless he had “a couple of days off” between shifts.

<sup>13</sup> I note that not only was the ROE coded for a dismissal, it also reported the Appellant’s last paid day of work as April 29, 2022. This last day is consistent with the Appellant’s testimony, whereas the employer told the Commission the Appellant was fired on April 28, 2022, the day after he received the written warning.

<sup>14</sup> See footnotes 9 and 10 above.

[30] The court has said I must consider whether the Appellant had a choice to stay or leave the job<sup>15</sup>.

[31] When the Appellant arrived for work on April 29, 2022, he found his field supervisor removing his personal possessions from “his truck”. He asked for an explanation. At first, the field supervisor said he was being laid off, but then the field supervisor admitted he was being fired. Either way, the evidence shows the employer was preventing the Appellant from working. And I believe the Appellant when he said he would have preferred to continue working.

[32] I find the Appellant did ***not*** voluntarily leave his job because he did not have the choice to remain in the employment.

[33] Since the Appellant did not voluntarily leave his job, he cannot be disqualified from receiving EI benefits for doing so.

## **Issue 2: Did the Appellant lose his job because of his own misconduct?**

[34] To answer the question of whether the Appellant lost his job due to misconduct, I have to decide two things:

- a) Why did he lost his job?
- b) Does the law considers that reason to be misconduct?

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

[35] The Appellant lost his job because the owner made a personal decision to end the employment relationship.

[36] The Appellant and the Commission don't agree on why the Appellant lost his job.

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<sup>15</sup> See *Canada (Attorney General) v. Peace*, 2004 FCA 56.

[37] The Commission says the Appellant quit. For the reasons set out under Issue 1 above, I have found there is no credible evidence of that.

[38] So why did the Appellant lose his job?

[39] In the original fact finding done by Service Canada, the owner said the Appellant was dismissed because he didn't follow the work schedule and was insubordinate.

[40] The Appellant agrees he was dismissed but denies the owners allegations. He says the real reason he lost his job is because the owner made a personal decision that he no longer wanted to have the Appellant as an employee.

[41] I agree with the Appellant. These are my reasons why.

[42] The Appellant testified that:

- When he interviewed for the job with X, he was told it would be an "in field" position.
- This meant he would only be required to drive within the "field" of the oil sands operation he was assigned to – and not on the highway. In field driving is done at a slower speed, while highway driving is much faster.
- He didn't have experience driving oil tankers on the highway but could do the in field driving with the experience he did have.
- After he started, it became clear to him that he was required to do highway driving as well as in field driving. He spoke to the owner about this new fact. The owner said he would get training for the highway driving. He agreed to give it a try, but he wasn't happy.
- The owner said "no one gets EI from me", which basically meant he had no choice but to do it.



- He did the training and, as it turned out, he didn't mind the highway driving during the day. The night shift was a different story. He was still new at it and felt very anxious at night. He also worried about falling asleep.
- But he never refused to follow the work schedule.
- He lived in his truck. When he was on shift (but not driving), he lived out of the truck and slept in the back of the cab. This arrangement allowed him to work a lot.
- His pay cheques show he worked "non stop".
- He knew the other drivers were "jealous" and grumbling about him making them look bad, but he was making good money and just kept at it.
- The owner often called him for "a favour" and had him to do a run on what should have been non-driving time required by law.
- He never had any warnings about not following the schedule. He lived in his truck and did the work assigned to him – including the favours the owner asked for.
- He did get one (1) verbal warning when he filled out a log book incorrectly.
- Otherwise, no one had any problems with him or his work.
- About 2 weeks before he was dismissed, the owner got mad at him for going to church. The owner said he should have been sleeping instead.
- But he was "off duty" at the time.
- The law says he must "shut down" and not drive for 8 hours/day. This is his own personal time. He spends some of it sleeping, and some of it attending to personal matters.

- He is a “strong Christian” and very open about his faith. He was aware that his “Christianity” made the owner “uncomfortable”.
- He tried to persuade the owner that he was entitled to go to church, but the owner told him he was fired.
- “I can’t give up the Lord to keep a job.”
- Shortly after firing him for going to church, the owner “knew he’d crossed a line” and told the Appellant he could come back to work.
- He did return, but things were not the same.
- The owner had made up his mind that he wanted him gone and would “make it happen” at a later date.
- And 2 weeks later, that’s exactly what happened.

**Note: see the testimony set out at paragraph 26 before continuing to read. For the sake of brevity, it has not been repeated here – but it is necessary for the chronology of events.**

- He never read the April 27<sup>th</sup> warning letter. Nor did anyone read it to him. There was some discussion about him getting stuck in the mud. He did “chain up” and got stuck anyway. But he never thought he could lose his job for that.
- He wasn’t belligerent or argumentative or disrespectful.
- He signed the warning letter and got back to work. Whatever the letter said, it was only his second warning, and he knew there was a 3-warning system.
- He finished his shift, then had 36 hours off. This included the re-set time he was entitled to in order to get onto the night shift after the owner had yelled at him.
- He was away from his truck for this time off.

- He actually went in early for his next shift because he wanted to get his truck cleaned up and ready. He was surprised to see the field supervisor “clearing out” his truck.
- He knew something was up.
- He asked what was going on. The field supervisor said he was being laid off. That made him laugh because there was lots of work. He asked the field supervisor to be honest with him. He asked if he was being fired. The field supervisor said, ‘Yes, you’re fired’. He finished cleaning out the truck himself and then he took his personal belongings and left.
- “My Christianity killed me.”

[43] I give greatest weight to the Appellant’s testimony at the hearing. This is because the particulars about what was going on at work and the nature of his relationship with the owner were provided through active adjudication during the hearing and are consistent with what he told the Commission.

[44] In preparing for the hearing, I reviewed the Supplementary Records of Claim prepared by the Service Canada representatives who spoke with the Appellant during the original fact-finding and the reconsideration process. These notes show they had difficulty getting relevant information from the Appellant. The Service Canada representatives noted the Appellant was prone to emotional responses (such as calling the owner a fraud); went off on tangents (such as describing how he missed out on another job opportunity because of misleading information about the X job); got side-tracked with irrelevant topics (such as a potential claim for sickness benefits); and had difficulty providing dates and details of events.

[45] It was apparent to me the Appellant would need the assistance of active adjudication at the hearing to give evidence that was relevant to the decision under appeal.

[46] To this end, I engaged with the Appellant to obtain a detailed chronological sequence of events and asked him about the April 27, 2022 written warning<sup>16</sup>. In this way, the Appellant was able to establish a timeline of events leading up to the dismissal and describe the reasons for the problems between himself and the owner.

[47] I find the Appellant's testimony to be credible because it was given thoughtfully and in response to sequential, direct questions from me. It also corresponded – albeit in a more organized way and in greater detail, to what he told the Commission both before and after the disqualification was imposed on his claim<sup>17</sup>.

[48] By contrast, I give less weight to the evidence the Commission obtained from the owner about the Appellant's alleged failure to follow the schedule and insubordination. I cannot ignore the fact that the owner abruptly and blatantly contradicted his own prior statements to the Commission with an entirely new version of events during the reconsideration process – and thought he could explain the sudden change in his story as a miscommunication. This casts serious doubt on the credibility of the owner's statements throughout his interviews with Service Canada. I am also troubled by the personal nature of some of the comments the owner made about the Appellant to the Commission, including a comment that the Appellant was mentally unstable<sup>18</sup>; and by inconsistencies in the written warning letter the owner provided<sup>19</sup>.

[49] It seems more likely than not that the owner simply decided he no longer wanted the Appellant working for him.

[50] The Appellant had only worked at X for a short time and believed things were going well. He was stunned when the owner fired him for going to church on his own

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<sup>16</sup> I note that the Appellant appeared not to understand the reason he had received a written warning. I read it to him during the hearing and he seemed surprised by its contents. This is consistent with the Appellant's statements to the Commission that he signed the warning but wasn't sure what he signed for (see GD3-23).

<sup>17</sup> The basic elements of his testimony were provided to the Service Canada agents, just not in an organized or coherent way and buried amongst much other irrelevant information.

<sup>18</sup> See GD3-46.

<sup>19</sup> These are discussed in paragraph 58 below.

time – only to immediately retract the firing. The Appellant is openly Christian<sup>20</sup> and knew this made the owner uncomfortable. The owner may not have wanted to be seen as firing the Appellant because of his Christianity, but he had nonetheless come to a personal decision that he no longer wanted the Appellant around. The owner's determination to take steps to quickly get rid of the Appellant is reflected in his original statements to the Commission, when the owner described how the Appellant was warned verbally multiple times over a 7-day period, then given a written warning and then fired the very next day<sup>21</sup>.

[51] The credible evidence supports a finding that the Appellant was terminated because the owner made a personal decision to end the employment relationship. Whether the owner came to this decision because he was uncomfortable with the Appellant's "Christianity" or because of jealous grumbling from the other drivers<sup>22</sup> (or for a combination of these reasons) isn't important. The owner came to this decision for personal reasons that were unrelated to the Appellant's job performance or behaviour in the workplace.

[52] I find the Appellant lost his job because the owner made a personal decision to end the employment relationship.

[53] This is the conduct to which the legal test for *misconduct* (and the resulting disqualification from EI benefits) must be applied.

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

[54] No, it is not.

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<sup>20</sup> He testified about this at the hearing.

<sup>21</sup> See GD3-22.

<sup>22</sup> The Appellant testified this may also have been a factor, since the other drivers were grumbling that he was living in his truck and this allowed him to make more money than they did.

[55] There is misconduct if the Appellant knew or ought to have known that his conduct could get in the way of carrying out his duties to the employer and that there was a real possibility of being let go because of that<sup>23</sup>.

[56] It cannot be said that the Appellant could possibly have known he would lose his job because the owner would make a personal decision to part ways.

[57] Also, to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional<sup>24</sup> or conduct that is so reckless that it is almost wilful<sup>25</sup>.

[58] I do not believe the Appellant acted wilfully or recklessly in connection with the changeover of his shift on April 27, 2022 or in any of his dealings with the field supervisor on April 29, 2022. I base this in part on the credibility of the Appellant's testimony at the hearing (see Issue 2 above), and in part on my concerns about the written warning the owner provided to the Commission (at GD3-25). These include (a) the fact that the letter is labelled "Verbal Warning"; (b) the fact that it does not reference any of the multiple prior verbal warnings that were supposedly given to the Appellant for allegedly similar conduct; and (c) the fact that it does not indicate the consequences of any further similar conduct, such as discipline up to and including termination.

[59] I see no credible basis for a finding of misconduct in the Appellant's separation from his employment at X.

[60] The Commission has the onus of proving the Appellant lost his job because of misconduct<sup>26</sup>.

[61] The law says that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not

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<sup>23</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>25</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>26</sup> The Commission must prove this on the balance of probabilities, which means it has to show it is more likely than not that the Appellant lost his job due to his own misconduct: see *Minister of Employment and Immigration v Bartone*, A-369-88.

merely on speculation and suppositions. It is up to the Commission to prove such evidence irrespective of the opinion of the employer<sup>27</sup>.

[62] It has not done so.

[63] I have set out my concerns about the owner's credibility under Issues 1 and 2 above. In my view, there is a distinct lack of clear evidence to support the allegations of inappropriate conduct that have been made against the Appellant.

[64] The law says it is not the excuse used by an employer for dismissing a claimant but the real reason for the dismissal that is relevant to a finding of misconduct<sup>28</sup>.

[65] As set out above, I have significant doubts about whether the Appellant was, in fact, terminated because he refused to follow the work schedule and was insubordinate. I find it more likely the owner came to a personal decision that he no longer wished to have the Appellant working for X. The field supervisor tried to tell the Appellant that he was being laid off, but they both knew what was really happening.

[66] It's not my role to determine whether the steps taken by the employer were legal or appropriate.

[67] I must consider whether the conduct that was the **real cause** of the Appellant's separation from employment amounted to "misconduct" for purposes of the EI Act. And I must do so while ignoring the employer's subjective assessment as to whether there was conduct that warranted dismissal in the circumstances<sup>29</sup>.

[68] This means the Commission must prove that the Appellant's termination was due to misconduct – not as the employer defines the term, but as the term is considered for purposes of the EI Act.

[69] It has not done so.

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<sup>27</sup> See *Crichlow A-562-97*.

<sup>28</sup> See *Davlut A-241-82*

<sup>29</sup> See *Summers A-225-94*

[70] I have found that the Appellant lost his job because of a personal decision by the owner that he no longer wished to employ him. The owner acted on this decision on April 29, 2022, after a brief period in which a series of verbal warnings were rapidly issued to the Appellant, followed by a written warning and then immediate termination the very next day.

[71] There is no credible evidence that conclusively points to willful or reckless behavior on the part of the Appellant, which he knew or ought to have known could have resulted in dismissal from his employment. In my view, the evidence points in the opposite direction: his separation from employment was due to factors that were beyond his control.

[72] For these reasons, I find that the evidence relied upon by the Commission is **not** sufficient to prove misconduct in this case.

## **Conclusion**

[73] The Appellant did not voluntarily leave his job at X.

[74] This Commission has not proven the Appellant lost his job due to his own misconduct.

[75] This means the Appellant is **not** disqualified from receiving EI benefits.

[76] The appeal is allowed.

**Teresa M. Day**  
**Member, General Division – Employment Insurance Section**