



Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 614

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

Decision

Appellant: M. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (555700) dated December 12, 2022 (issued by Service Canada)

Tribunal member: Katherine Parker

Type of hearing: Teleconference

Hearing date: April 25, 2023

Hearing participant: The Appellant didn't show up for the hearing

Decision date: May 19, 2023

File number: GE-23-278

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant didn't voluntarily leave his job without just cause. But I find that the Appellant did lose his job as a result of misconduct. This means that the Appellant is disqualified from being paid benefits.

Overview

[3] The Appellant stopped working for his employer after he was incarcerated for driving while impaired and he didn't show up for work starting May 1, 2022. The Commission decided that the Appellant quit his job without just cause. As a result, the Commission disqualified him from being paid *Employment Insurance* (EI) benefits. The Appellant disagrees with the Commission's view of how his employment ended. He says that the employer unfairly dismissed him and that he let them know he was incarcerated.

[4] The Appellant was incarcerated until September 17, 2022. He contacted his employer on September 19, 2022, and asked to return to his job. The employer informed him that it had to terminate him because they didn't know where he was. It said he abandoned his job.

[5] The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. It decided that he voluntarily left (or chose to quit) his job without just cause, so it wasn't able to pay him benefits.

[6] I must decide whether the Appellant's actions disqualify him from receiving *Employment Insurance* (EI) benefits.

[7] The Commission says that the Appellant could have requested a leave of absence from his employer or contacted the employer with a return-to-work date. He didn't.

[8] The Appellant disagrees and states that he had asked his lawyer and his son to tell the employer that he was incarcerated and wouldn't be available for work until his release.

Matter I must address first

[9] The Appellant didn't show up for his hearing and didn't call. He sent a message after the hearing saying he was in a new job and couldn't take time off. He said he had no access to a cell phone during work hours.¹

[10] I sent him a letter asking if he would like to reschedule after work hours and I got no response.²

[11] I then sent a second letter saying I would proceed to a decision unless I heard from him with instructions to reschedule. I asked him to send me any documents or information he may want to add to his file by May 12, 2022. He didn't respond.³

[12] I have decided to proceed with this decision based on the documents I have in the appeal record. A hearing is allowed to go ahead without the Appellant if he was given the notice of the hearing.⁴ The Appellant was given several opportunities to participate or reschedule, so I will proceed without him.

Issue

[13] Is the Appellant disqualified from being paid benefits?

[14] To determine this, I will first decide whether the Appellant voluntarily left his job or whether he was dismissed. If I decide that he voluntarily left, then I will look at whether he had just cause for doing so. On the other hand, if I decide that he was dismissed, then I will look at whether the reason for the dismissal is misconduct under the law.

¹ See GD9-1.

² See GD10.

³ See GD11.

⁴ Section 12 of the *Social Security Tribunal Regulations*.

Analysis

[15] There is one section of the Employment Insurance Act that sets out two reasons why someone can be disqualified from being paid EI benefits: (1) voluntarily leaving a job without just cause and (2) being dismissed because of misconduct.

[16] Sometimes it isn't clear whether a person quit or voluntarily left work. The law says that in these situations, I am not bound by how the Commission decided it.

[17] The disqualification can be based on either of the two reasons, as long as it is supported by the evidence.⁵ Voluntary leaving is an employee's choice, and it may be with or without cause. The loss of a job because of misconduct is caused by the employee's own actions or conduct. A claimant is disqualified from receiving any benefits in both cases.

[18] Although the Commission decided that the Appellant voluntarily left his job without cause, I am able to look at evidence and decide whether it may in fact be a case of misconduct.

[19] While the issue (whether the Appellant is disqualified) is the same, the questions of who has to prove what are different, depending on whether it is a case of voluntarily leaving without just cause or misconduct. So, I will first decide which kind of case it is.

Did the Appellant voluntarily leave his job or was he dismissed?

[20] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.⁶ If the Appellant had a choice to stay or to leave his job, then he voluntarily left.⁷ The Appellant and the Commission do not agree on whether the Appellant had this choice.

⁵ Canada (Attorney General) v Desson, 2004 FCA 303.

⁶ Section 30 of the *Employment Insurance Act* (Act) explains this.

⁷ Peace 2004 FCA 56.

[21] The Appellant says that he lost his job because he was arrested. The Appellant says that he had no choice to stay or leave his job at that time because he was incarcerated. He didn't have a choice.⁸

[22] The Commission says that the Appellant voluntarily left his job, but he was arrested and sentenced for a crime. It said the Appellant didn't seek a leave of absence or look for options with the employer. It said even if he did, it would not be reasonable for an employer to hold his job while he was incarcerated.

[23] I find that the Appellant didn't have a choice to stay or leave his job. He was incarcerated and couldn't report to work or talk to his employer. I find that he was dismissed from his job for the following reasons:

- The Appellant was arrested on May 1, 2022, for driving while impaired.
- He was sentenced for six and a half months and served four months.
- He contacted his employer after his release to get his job back, but the employer had terminated the employment relationship by then.

Did the Appellant lose his job because of misconduct?

[24] The law says you will be disqualified from receiving benefits for misconduct.

[25] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless that it approaches willfulness.¹⁰ The Appellant does not have to have a wrongful intent for his behaviour to be misconduct under the law.¹¹

⁸ *Attorney General of Canada v. Peace*, 2004 FCA 56.

⁹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹¹ *Attorney General of Canada v Secours*, A-352-94.

[26] There is misconduct if the Appellant knew or ought to have known that his conduct could prevent him from working for his employer and that dismissal was a real possibility.¹²

[27] The Commission says that the Appellant was arrested, charged and sentenced to jail from May 1, 2022 to September 17, 2022 for impaired driving. Due to his incarceration, he could not meet the basic but essential condition of an employee-employer relationship – report to work.¹³ The loss of employment was as a result of his deliberate actions.

[28] The Appellant says that he tried to return to his employer after his release from prison, but his job was filled.

[29] I find that the Commission has proven that there was misconduct. There is no dispute that the Appellant was arrested, charged and sentenced to jail from May 1, 2022 to September 17, 2022 for impaired driving. As a result he was unable to go to report to work which led to his dismissal.

[30] When there is evidence of a criminal act, it isn't necessary that there be a wrongful intent for a behaviour to amount to misconduct under the Act. It is sufficient that the reprehensible act or omission complained of be made 'wilfully', that is, 'consciously, deliberately or intentionally'. In this case, the criminal act led to incarceration, and to the loss of his employment. This act is determined to be misconduct.¹⁴

[31] The employer didn't have any alternative but to end the employment relationship. There is case law that says employees can't force others to take on the burden of their unemployment.¹⁵

¹² *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See GD4-4.

¹⁴ *Canada (Attorney General) v. Ahmat Djalabi*, 2013 CAF 213.

¹⁵ *Canada (Attorney General) v. Brissette*, [1994] 1 FCR 684, 1993 CanLII 3020 (FCA); *Canada (Attorney General) v. Lavallée*, 2003 FCA 255, *Canada (Attorney General) v. Borden*, 2004 FCA 176.

[32] I find that the actions of the Appellant are considered misconduct under the law.

Conclusion

[33] I agree with the Commission, I find that the Appellant is disqualified from receiving benefits.

[34] This means that the appeal is dismissed.

Katherine Parker
Member, General Division—Employment Insurance Section