Citation: *DB v Canada Employment Insurance Commission*, 2023 SST 1404

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (461137) dated April 1, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	In person
Hearing date:	September 2, 2022
Hearing participant:	Appellant
Decision date:	March 31, 2023
File number:	GE-22-1554

Decision

[1] The appeal is dismissed. This 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.[1]

Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because of repeated instances of unprofessional comments and violating its code of conduct.

[4] Even though the Appellant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. He says the employer actually let him go as retaliation for filing complaints against them.

[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.

Matter I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's former employer as a potential added party to the Appellant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

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[1] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

I will accept documents sent in after the hearing

[7] After the hearing, the Appellant sent the Tribunal a document with further submissions. I have accepted this document as it is relevant to his appeal.

Issue

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

Analysis

[9] 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?

[10] I find that the Appellant lost his job because of several incidents in which he made unprofessional comments to customers and business partners.

[11] The Appellant and the Commission 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. The employer told the Commission that the Appellant was dismissed for violating the code of conduct and unprofessional behaviour with customers and business partners.

[12] The Appellant disagrees. The Appellant says that the employer targeted him for dismissal and started nitpicking his behaviour in retaliation for him filing complaints to employment standards and the human rights commission about them.

[13] The burden is on the Commission to show that the Appellant's loss of employment was because of his own misconduct. It has to show this on a balance of probabilities. Which means it has to show that it is more likely than not that this is the case. To meet this burden, I must be satisfied that the misconduct was the real reason

for the Appellant's dismissal not the excuse for it. This requires a factual determination of the reason for the Appellant's dismissal after weighing all the evidence.[2]

What the Commission says

[14] The employer told the Commission that they had received complaints about the Appellant from clients and from other employees. This behaviour was ongoing despite the Appellant being subject to the following progressive discipline:

- A written warning on July 9, 2019, for using profanity on one of his calls with a customer and another employee on the line.
- A one-day suspension on November 14, 2019, for not following his supervisor's directions.
- A three-day suspension on January 29, 2021, for calling another employee lazy and being rude to a customer on a call.
- A five-day suspension on July 13, 2021, for using inappropriate language in a Skype chat with his manager, telling a customer that his supervisor didn't know what she was doing, and criticizing the company in an message to his manager.

[15] The letters from the employer state that the Appellant's behaviour violates of the company's Code of Conduct and Code of Ethics and constitutes "customer damaging behaviour." On the suspension letter from November 2019, the employer stated that "any further recurrence of this behaviour will result in additional disciplinary measures up to and including termination."

[16] The employer dismissed the Appellant on December 9, 2021. The termination letter states that he is terminated for violating the Code of Conduct and for "customer damaging behaviour." It cites two phone calls from November 29, 2021, in which he

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[2] See *The Minister of Employment and Immigration v Bartone,* A-369-88 and *Davlut v Attorney General of Canada,* A-241-82.

showed “a lack of professionalism.” Specifically, he interrupted a customer and told them to call back because the customer was taking to long to select an installation date over the phone; and when a business partner was telling him about the details of his contact with a client, the Appellant said “whatever” and that he didn’t need the details.

[17] The employer provided a copy of its Code of Conduct and Code of Ethics documents to the Commission.

[18] The Code of Conduct sets out “behavioural standards” for employees to promote a “positive and productive work environment where employees conduct business with honesty and integrity and treat others with respect and courtesy.” It includes a non-exhaustive list of prohibited behaviours, such as: poor attitude, insubordination, and unprofessional conduct including the use of offensive language. The document states that violation of the Code of Conduct will be grounds for disciplinary action up to and including termination.

[19] The Code of Ethics sets out “standards of conduct” for employees to follow in order to deliver “high-qualify service in a legal, honest and professional manner.” These standards of conduct include respect for business partners and their clients and being courteous and friendly to customers. It states that violation of these standards will lead .to disciplinary action up to and including termination.

What the Appellant says

[20] The Appellant told the Commission and the Tribunal that he had filed two complaints about the employer to provincial organizations. In June 2020, he filed a complaint with Employment Standards regarding unpaid vacation pay.[3] And in September 2020, he filed a complaint to the Human Rights Commission about the employer’s failure to provide him with a suitable chair.

[3] The Appellant stated on his application for benefits that his complaint to Employment Standards happened in May 2019. However, in his testimony at the hearing and in subsequent submissions he said the Employment Standards complaint actually occurred in June 2020. See GD6-4.

[21] He testified that he was injured on his first day of training in August 2018, because he was given an unsuitable chair. In December 2018, he asked the employer to provide a suitable chair. The employer had an ergonomic assessment performed in December 2019 but then nothing happened. In September 2020, he filed a complaint to the Human Rights Commission about the employer's failure to provide him with a suitable chair.

[22] The Appellant believes that the employer targeted him for discipline and dismissal because of his complaints. He points to several things to support this belief.

[23] Firstly, the employer didn't discipline any of his co-workers. He said this shows he was targeted because he says it's likely that they engaged in the same conduct as him. He provided several logs that show messages sent within a private employee Skype chat. He says these chat logs show that other employees posted criticism and used informal language in these chats. He said it can be inferred that because of their behaviour in the chat, they were also using the same language with customers and the Team Manager.

[24] Secondly, he wasn't given access to the recordings of the two calls that resulted in his dismissal. He said that he asked to listen to these calls at his termination meeting. The employer agreed but refused his request for additional time to make notes about the calls. It said that he could arrange another appointment to listen to the calls at a later time, but the employer then refused to schedule a listening appointment since he was no longer an employee.

The reason for the Appellant's dismissal

[25] The Appellant provided evidence that employees, including himself, engaged in somewhat offensive language in a casual manner when speaking with each other. But the Appellant wasn't disciplined for his comments in the private employee Skype chat. He was disciplined for using offensive language in a direct message to his Team Manager and for making unprofessional comments to business partners and clients over the phone.

[26] The Appellant says that it can be presumed that the other employees engaged in the same conduct as him because of the language they used in the employee Skype chat. In other words, he says it is likely that other employees used offensive language in direct messages to their Team Manager and made unprofessional comments over the phone to clients and business partners. I'm not persuaded by this argument.

[27] There is a clear and obvious difference in how someone may behave when speaking in a friendly manner with co-workers and how they would speak in a professional role to clients or their supervisors. What may be acceptable in one environment is not necessarily acceptable in another. This is common sense in the workplace. So, I don't find the co-workers' conduct in the private employee Skype chat to be conclusive as to what their behaviour would be while performing their job duties.

[28] As there is no evidence that the Appellant's co-workers made unprofessional comments to clients or business partners, the employer not disciplining those employees doesn't prove anything. For these reasons, I don't put any weight on the Appellant's argument that the employer targeted him by disciplining him for this behaviour.

[29] I am also not convinced that the employer disciplined the Appellant in retaliation for his complaints to provincial organizations. He made his first complaint to Employment Standards in June 2020. However, he was subject to multiple disciplinary actions before that time.[4]

[30] I understand the Appellant's argument that the employer may have targeted him for discipline and dismissal because of his employment standards and human rights complaints. But, the Appellant hasn't produced any evidence to support this argument. While the employer's actions may have raised the Appellant's suspicion that he was being targeted, I find it is outweighed by the Commission's documentary evidence of the Appellant's history of non-compliance with the company's rules.

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[4] See GD3-26, GD3-32m and GD3-143 to GD3-144.

[31] The preponderance of evidence supports that the Appellant was dismissed because of several incidents in which he made unprofessional comments to customers and other employees. The Appellant wasn't able to confirm the accuracy of the alleged dialogue by listening to the phone calls. Importantly, though, he doesn't dispute the substance of the employer's allegations about his conduct during the phone calls in question.

[32] I'm not satisfied that the Appellant has shown there was a connection between his complaints and his progressive discipline and dismissal. The evidence before me supports that the Appellant's unprofessional comments is the conduct that led to his dismissal. I find it is more likely that this was the real reason for his dismissal, and not an excuse.

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

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

[34] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[5] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] 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.[7]

[35] 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.[8]

[36] 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

[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.[9]

[37] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[38] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner due to the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[39] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found that the question in misconduct cases is, "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is, "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

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[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[40] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[13]

[41] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[14] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[15]

[42] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[43] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

[44] The Commission says that there was misconduct because:

- the employer had a Code of Conduct and Code of Ethics and communicated those policies to the Appellant.

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[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

- the employer's policies gave guidelines for its expectations for employee conduct, including using inappropriate or unprofessional behaviour in the workplace or with customers.
- he had been warned multiple times about this behaviour.
- he was told that further instances of this behaviour could result in his termination
- the employer dismissed him because he did not comply with its policies.

[45] The Appellant says that there was no misconduct because:

- He was under constant stress in his job to reduce call times, so he may have been abrupt with some customers or business partners, but it was done to cut out unnecessary dialogue or explanations.
- He is not unfailingly perfect and sometimes his conduct would fall below the standard because he was feeling stressed due to his job duties or uncomfortable due to the inadequate seating provided by the employer.
- His behaviour was not that bad. Sometimes communication is subjectively understood. So, even if he didn't mean to be rude or unprofessional, it may have come across that way to the client or business partner.
- His conduct didn't harm the employer.

[46] The evidence is clear that the employer had policies setting out guidelines for employee conduct, including the use of inappropriate or unprofessional behaviour in the workplace, or with clients and business partners. The Appellant testified that he was aware of these policies. The Commission also provided evidence that the Appellant had acknowledged these policies in July 2021.

[47] I understand that the Appellant was under stress in his position to maintain low call times and to manage his health condition with unsuitable seating in his workplace.

However, I am not convinced that these are reasonable explanations for the Appellant's repeated violations of the employer's Code of Conduct and Code of Ethics.

[48] The Appellant was warned multiple times about his unprofessional comments and conduct. He was given three progressive suspensions for similar behaviours. He was told that further instances of this behaviour could result in termination. The Appellant was aware of the consequences of not complying with the employer's policies.

[49] I understand the Appellant's argument that his behaviour didn't warrant suspension or dismissal. But, this is beyond the scope of this appeal. A Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[16]

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

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

Conclusion

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

[52] This means that the appeal is dismissed..

Catherine Shaw

Member, General Division – Employment Insurance Section

[16] See *Canada (Attorney General) v Marion,* 2002 FCA 185.