



Citation: *MA v Canada Employment Insurance Commission*, 2023 SST 702

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (550408) dated November 28, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: May 9, 2023

Hearing participant: Appellant

Decision date: May 23, 2023

File number: GE-22-4241

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.¹

[3] I accept that the Commission made a clerical error in the Notice of Decision and that benefits should have been denied from March 12, 2022 onwards.²

Overview

[4] The Appellant lost his job. The Appellant's employer said that he was let go because he operated a machine that he was not certified on.

[5] 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. The Appellant says that the employer actually let him go because he was complaining about other employees harassing him. The Appellant feels that the employer was trying to get rid of him and that they used this as an excuse.

[6] 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.

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

² See GD4-2.

Matter I have to consider first

The Commission made a clerical error

[7] The Commission says it made a clerical error in the Notice of Decision and that benefits should have been denied from March 12, 2022.³ I accept that this was a clerical error.

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 he operated a machine that he was permitted to operate.

[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 operated a vehicle that he was not trained on and it caused some damage.⁴ The employer also told the Commission that the Appellant knew that he was not allowed to operate unauthorized machinery and that he had previous infractions for machinery use.⁵ This incident led to his employer suspending and then dismissing him.

³ See GD4-2.

⁴ See GD3-26.

⁵ See GD3-28.

[12] The Appellant disagrees. The Appellant says that the real reason he lost his job is that he was complaining about co-workers. The Appellant says that he feels that he was treated differently by management because he complained about the harassment he was facing from co-workers. The Appellant says that the co-workers were friends with management and that he was being targeted. The Appellant says that other employees did worse things at work and they didn't lose their jobs.

Background

[13] The Appellant testified that he worked for his employer since July 2008. The Appellant has had different roles over the years in different departments. In 2021, prior to taking a vacation, he was doing one of the "preferred" jobs at the warehouse which was loading. When he got back from vacation he had to "picking/selection" of orders which he felt was a demotion. He says that his supervisor said that management wanted everyone to be able to do all jobs.

[14] The Appellant doesn't believe that this was the case. The Appellant says that he had been the target of harassment by a number of different co-workers. He feels that these co-workers were colluding with the supervisors because they appeared to be friends.

[15] The Appellant wrote to the Human Resources (HR) department. The Appellant provided the Tribunal with a copy of those letters.⁶ The Appellant did not give/send the final letter to HR. The Appellant feels that HR never looked into his complaints and feels that nothing was done.

[16] On March 8, 2022, there was an incident at the Appellant's work. The Appellant says his co-worker, one who had been harassing him, put a "reach machine" in the way of a table the Appellant was using to pick an order. The reach machine being where it was meant that the Appellant couldn't continue doing the job he was working on.

⁶ See GD6-9; GD6-24; and GD6-28 which was dated March 8, 2022 and not sent to anyone.

[17] The Appellant testified that he was concerned that this was done on purpose, as part of the ongoing harassment. He was also concerned if he delayed doing the selection/picking job, that it could mean he could be reprimanded for not meeting service times.

[18] The Appellant decided to move the reach machine. While he was moving the reach machine, he hit the table. He acknowledges that the machine had some nominal damage. The employer said \$150.00 and the Appellant doesn't dispute that.

[19] The Appellant didn't report the incident. He believes the co-worker that put the reach machine in his way was the one that reported the incident to management.

[20] The Appellant testified during the hearing that he knew he was not permitted to operate the reach machine. The Appellant acknowledged that he did not successfully pass training for that machine with his employer.

[21] The Appellant also testified that he believes the rules at his place of employment were not always followed. For example, he said that it is a rule that no one be in the warehouse alone. The Appellant says that rule could be overridden by a supervisor/team lead. The Appellant recalled a time that he was specifically given permission to be in the warehouse alone. Yet, the Appellant agrees that he was never given any permission to operate this machine.

[22] The Appellant also testified that he knew that supervisors/team leads had asked others to move machines before. The Appellant agreed that he was not asked, nor ever given permission, to move this machine.

[23] The Appellant says that after management found out about his moving the machine, he was sent to a different department that day. He said later he was told by the health and safety manager that he would be suspended for 3 days.

[24] After his suspension, on Friday, March 11, 2022, there was a panel review. The Appellant explained that there was a panel that was reviewing what happened. He testified that there was a manager, a supervisor, a team lead, a peer co-worker, and two

people from HR present. He says they asked him questions and then he was told to go to a waiting room.

[25] Later, the senior HR person came out and informed him that he was dismissed.

[26] The Appellant says he thought his employer would look at other training he had received outside of work. But, they didn't. The Appellant provided copies of his certifications to the Tribunal.⁷

[27] The Appellant testified he had previous infractions involving machinery. The Appellant agreed he didn't have permission, nor the certification, to operate the reach machine.

[28] The Appellant agreed that he shouldn't have been operating that machine. But he says he wasn't using it for his regular job. He says he was moving the machine, to get it out of the way, so he could continue to do his actual job.

[29] The Appellant testified that he was aware that the consequences for using an unauthorized machine can be a verbal warning, suspension or dismissal.⁸

[30] The Appellant feels that this situation is different because he was not using it for his daily work. The Appellant feels that the policy, or rules, at work are not absolute.

[31] The Appellant says that other employees have done "worse" with machines, and caused more damage. He says that it is unfair because he feels he is being treated differently. He says that these other employees were allowed to return to work but he was fired. He feels that his employer was trying to get rid of him and this incident was just an excuse. He feels that the employer, through management, was displaying favouritism.

[32] The Appellant gave an example of a co-worker that had been using a reach machine and knocked off a rack. This means he knocked off freight. The Appellant says

⁷ See GD6-31 to GD6-36.

⁸ The Appellant also told this to the Commission, see GD3-27.

the co-worker didn't report that incident but management found out by looking at video. The Appellant says that the co-worker was suspended only. The Appellant says this is an example of how he has been treated differently.

[33] The Appellant brought a wrongful dismissal court action against his employer. The Appellant filed the minutes of settlement.⁹ The minutes of settlement are only signed by the Appellant and a witness, but he says a copy was signed by his employer.

[34] There is no admission of wrongful dismissal by his employer in the minutes of settlement. The employer maintained that the Appellant was terminated for cause.¹⁰

[35] The existence of the minutes of settlement about the Appellant's wrongful dismissal claim doesn't determine the issue of whether or not there was misconduct. I must look at the facts of the case and make a determination.¹¹

[36] My focus is on the Appellant and what he did or didn't do. My focus is on the EI Act.

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

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

[38] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹² Misconduct also includes conduct that is so reckless that it is almost wilful.¹³ 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.¹⁴

⁹ See GD6-68 to GD6-70.

¹⁰ See GD6-69.

¹¹ See, for example, *Canada (Attorney General) v Morris*, A-291-98 (leave to appeal to the Supreme Court of Canada refused).

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

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

[39] 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.¹⁵

[40] 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.¹⁶

[41] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.¹⁷ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[42] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.¹⁸ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[43] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹⁹

[44] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.²⁰

[45] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.²¹ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.²²

[46] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.²³ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.²⁴

[47] These cases make it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[48] The Commission says that there was misconduct because the Appellant admitted that he shouldn't have been operating the machine. The Appellant admitted that he didn't have the training, nor any permission, to operate that machine.

[49] The Commission says that the employer let the Appellant go because:²⁵

²⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

²¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²² See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

²³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ See GD3-28.

- It was a safety violation for the Appellant to use the machine
- The Appellant willingly used the machine
- The Appellant knew that he was not authorized to use the machine
- The Appellant has had many previous infractions related to machinery use

[50] The Commission also says that the Appellant did not report the incident to management.²⁶

[51] The Appellant says that there was no misconduct because he didn't have intent. He also says that he couldn't have expected that he would be fired.

Elements of Misconduct

[52] I find that the Commission has proven that there was misconduct for the reasons that follow.

[53] I find that the Commission has proven that there was misconduct, because the Appellant agreed to the key facts.

[54] There is no dispute that the Appellant did not have employer approved training to operate the machine.

[55] There is no dispute that the employer had a policy about using unauthorized machines.²⁷

[56] The Appellant agreed that he operated the machine and moved it. Despite the Appellant saying that he had no intent, he did the very thing that the employer said he did which was to operate the machine without the proper authorization. I find that this means that there was intent as the Appellant knew what he was doing. This means that

²⁶ See GD3-27.

²⁷ See GD3-27.

the Appellant's choice to move the machine was **conscious, deliberate and intentional**.

[57] The Appellant argues that he was not using the machine to operate it, just to move it so he could do his job. I find that this is still operating the machine. I understand that the Appellant was moving the machine so he could get back to his job. Yet, as the Appellant acknowledged, he hadn't passed training through his employer for this machine and wasn't supposed to operate it.

[58] I also appreciate that the Appellant didn't intend that there would be any accident or incident. I understand that the accident wasn't intended. Yet, this doesn't change that the Appellant knew, at all times, what he was doing. He knew he didn't have permission, yet he operated the machine.

[59] The employer told the Commission that employees receive training every two years regarding safety and regulations. The Appellant was aware that he wasn't in compliance with his employer's policy.

[60] The Appellant's failure to comply with an employer's policy means he wasn't carrying out his **duties owed to his employer**.

[61] I find that the Appellant also knew, or should have known, that his job could be at risk.

[62] The Appellant agreed during the hearing, and told the Commission, he knew the consequences for using an unauthorized machine.²⁸ Those consequences can be a verbal warning, suspension or a dismissal. The Appellant admitted that he had many previous infractions regarding machines. This means that the Appellant **knew, or should have known, that he could be let go**.

[63] The Appellant says he only moved the machine a little so that he could do his job. He says his co-worker put the machine there on purpose to harass him.

²⁸ See GD3-27.

[64] It isn't my role, nor that of the Tribunal, to decide if the Appellant was being harassed in this case. The Appellant says that the reason he was dismissed was because he was complaining about being harassed. I don't find the Appellant's claim to be supported by the facts. This isn't to say that he was or wasn't being harassed. This means that I don't find that this was the reason he was dismissed.

[65] I find the reason for dismissal was the Appellant was using a machine that he wasn't authorized to use. I find that there was no excuse for the Appellant to have used a machine that he knew he wasn't allowed to use. The Appellant could have dealt with the issue of the machine being in his way differently.

[66] The Appellant agreed that he had many infractions related to machinery use and detailed some of them at the hearing.

[67] It isn't my role to determine if the dismissal was the appropriate measure, I can only consider whether or not the Appellant's conduct amounted to "misconduct" under the Employment Insurance Act and the related case law.²⁹

[68] Finally, I find that there is a connection between the conduct, operating the machine, and the reason the Appellant was dismissed. The employer told the Commission that this was the reason the Appellant was dismissed.³⁰ The Appellant didn't dispute that this was the reason why he was dismissed. The Appellant disputes that he shouldn't have been terminated.

[69] I find that the Appellant was dismissed for operating a machine he didn't have permission to use. I find **this conduct was the reason the Appellant lost his job.**

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

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

²⁹ *Canada (Attorney General) v Caul*, 2006 FCA 251.

³⁰ See GD3-28.

Conclusion

[71] The Commission made a clerical error in the Notice of Decision and benefits should have been denied from March 12, 2022 onwards.³¹

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

[73] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section

³¹ See GD4-2.