Citation: *KC v Canada Employment Insurance Commission*, 2024 SST 25

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated October 12, 2023 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	December 14, 2023
Hearing participant:	Appellant
Decision date:	January 3, 2024
File number:	GE-23-2908

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.[1]

[2] The Canada Employment Insurance Commission (Commission) has not proven the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means the Appellant is not disqualified from receiving EI benefits.[2]

Overview

[3] The Appellant was dismissed from his job. The Appellant's employer said he was let go because he refused to sign off on two of the employer's policies.

[4] Even though the Appellant doesn't dispute this happened, he says that it isn't the real reason why the employer let him go. The Appellant says the employer let him go because a few weeks after his supervisor had a confrontation with the Appellant, he decided the Appellant had to sign a new policy and an existing policy. Before this, the supervisor accepted that the Appellant's signature on his employment contract was acknowledgement of the policies.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided the Appellant is disqualified from receiving EI benefits.

Matters I considered first

The Appellant's appeal was returned to the General Division

[6] The Appellant first appealed the denial of EI benefits to the Tribunal's General Division in March 2023. The General Division member dismissed the Appellant's appeal because she found the Appellant knew he would likely be dismissed if he did not

[1] A person who applies for employment insurance (EI) benefits is a "claimant." A person who appeals to the Tribunal is an "appellant."
[2] Section 30 of the *Employment Insurance Act* (EI Act) says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

sign the documents and his refusal to sign the documents was wilful, conscious and deliberate. This meant the Appellant had lost his job due to his own misconduct.

[7] The Appellant appealed the General Division's decision to the Tribunal's Appeal Division. The Appeal Division found the General Division did not consider the employer's conduct prior to the Appellant's "misconduct" to properly assess whether his conduct was intentional or not.[3] The Appeal Division ordered the appeal be returned to the General Division for reconsideration by a different Tribunal Member. This decision is a result of the second hearing.

The hearing was adjourned

[8] The hearing was initially scheduled for November 30, 2023. Prior to that hearing the Appellant submitted a copy of Minutes of Settlement (Minutes) he reached with his employer. He said that, as part of the settlement, the employer agreed he has been terminated without cause and it reissued the Record of Employment (ROE) to show this. The Appellant said at the hearing he had been talking to representatives at Service Canada who agreed he did not commit misconduct.

[9] I explained to the Appellant he could chose to withdraw his appeal given the statements made by Service Canada officers, or I could ask the Commission to provide a submission on whether the Minutes changed its position. The Appellant agreed to the latter and, if the Commission's position was unchanged, the hearing would continue on December 14, 2023. The Commission's position did not change so the hearing continued on December 14, 2023 as scheduled.

The employer is not an added party

[10] Sometimes the Tribunal sends an Appellant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

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[3] In a footnote to this finding, the Appeal Division cited *Astolfi v Canada (Attorney General),* 2020 FC 30.

[11] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Minutes of Settlement

[12] The Federal Court has said before a settlement agreement can be used to contradict an earlier finding of the Commission, there must be some evidence which would contradict the position taken by the employer during the investigation by the Commission.[4]

[13] There is no evidence the employer changed its reasons for dismissing the Appellant. As a result, and, given my findings the Commission has not met its burden of proving misconduct, I have not taken the Minutes into consideration in reaching my decision.

Issue

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

Analysis

[15] 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?

[16] I find that the Appellant lost his job because he refused to sign the policies his employer asked him to sign.

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[4] See *Canada (Attorney General) v. Courchene*, 2007 FCA 183. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

[17] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says the reason the employer gave is the real reason for the dismissal. Representatives of the employer told the Commission the Appellant was dismissed for refusal to sign off on employer documents which were a condition of his employment. The employer's representative said it was not the Appellant's behaviour leading to the disciplinary action that resulted in his dismissal, but rather the refusing to the sign the documents required after the disciplinary action.

[18] The Appellant disagrees. The Appellant says the real reason he was dismissed from his job is because a few weeks before the dismissal his supervisor got into an argument with him in front of the Appellant's subordinate. The supervisor later apologized but then asked the Appellant to sign off on a verbal warning that said Appellant exhibited unacceptable conduct, was confrontational with the supervisor and acted unprofessionally and also required him to sign off on two select employer policies. The Appellant refused to sign off on the letter, because he said that was not what happened. He also refused to sign the policies because his employer had previously agreed his signature on his original employment contract was a satisfactory signoff on the employer's policies.

[19] The letter of termination issued to the Appellant says that action was necessary because the Appellant failed to sign off on the company policies, procedures and employee handbook. Because of this the employer determined the terms of the employment relationship were irreparably breached.

[20] I think the Appellant was dismissed for his refusal to sign the policies as requested by his employer. The evidence shows the Appellant was asked to sign the policies and he told his employer he would not sign.

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

[21] The reason for the Appellant's dismissal is not misconduct under the law.

[22] To be misconduct under the law, the conduct has to be wilful. This means 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]

[23] There is misconduct if the Appellant knew or should have known 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]

[24] The Commission has to prove the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show it is more likely than not the Appellant lost his job because of misconduct.[9]

[25] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment.[10]

[26] The Commission says there was misconduct because the Appellant was aware if he failed to sign the company policies it would lead to his dismissal. It says the Appellant made a conscious choice to refuse to comply. The Commission submitted it did not have the burden to prove the employer's policies were reasonable or fair, or that the employer's conduct is relevant. It says there are other avenues where the Appellant can raise these arguments. The Commission said it was reasonable for the employer to change policies over time and to require employees to acknowledge and sign such policies.

[27] With respect to the Minutes reached between the Appellant and his former employer, the Commission submits the Minutes do not contain any evidence to contradict the previous findings of misconduct. It is a decision and agreement of the

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[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.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v. Lemire,* 2010 FCA 314

parties to resolve the matter amicably. The Commission says the decision between the Appellant and his employer does not prove that misconduct did not occur.

[28] The Appellant says there was no misconduct because his employer had no reason to fire him for cause. He says he committed no misconduct in the four years he was working. He received full performance bonuses and did not stop doing his duties despite the abuse from his employer as documented in the appeal file.

[29] The Appellant testified he was given permission to work from home. He was the social media coordinator and marketing manager. Part of his duties involved editing videos. The videos would be shot at the employer's locations. He used his personal computer equipment and software to do the editing with the employer's permission because the employer did not want to supply the equipment or software. The Appellant said he had an office at one of his employer's locations.

[30] The Appellant testified a subordinate was hired in 2022 to perform some of the video work. The subordinate asked him to come into work with him one day. The Appellant and the subordinate were in an office following the lunch break talking about non-work things. The Appellant said his supervisor approached him in the office and abused him in front of the subordinate and apologized in the same breath.

[31] The Appellant spoke to a Service Canada officer on February 8, 2023. The Appellant told a Service Canada officer that the supervisor started yelling at the Appellant and the subordinate for sitting around for 30 minutes talking about non-work stuff when they say they are always busy and that working from home was stupid, it doesn't work, and no one should be allowed to work from home. The Appellant told the officer he asked the supervisor if he could speak to him in private. The supervisor continued to talk about people working from home being lazy. At which point the Appellant asked the supervisor where he was for three months. The supervisor had been working from another country. At that point, the Appellant said, the supervisor apologized, said he overreacted because he was stressed and took it out in the Appellant.

[32] The Appellant testified after the confrontation he returned to the worksite and started working from his office. He was then told he could work from home one or two days a week.

[33] The Appellant testified he signed an employment contract that said he agreed to adhere to company policies and that those polices could change. Over the course of four years, his supervisor would ask if he signed the employee handbook. The Appellant would reply no, I've signed the employment contract and he would be told "oh, okay, that's okay."

[34] The Appellant testified that about three weeks after the confrontation the employee handbook came up again. He said with no warning his supervisor approached him on August 29, 2022, and wanted to discipline him because the supervisor said it was the Appellant who had abused him. The Appellant was expected to agree with this version of events. He was asked to sign what he assumed were extracts (two policies) from the company handbook that would allow the employer to fire him for anything he did outside his workplace that did not agree with his employer's views. The Appellant said he told his employer he would not be comfortable signing that.

[35] The two policies the Appellant were asked to sign are in the appeal file. One is called "Attitude and Conduct Policy." The other is called "Code of Conduct." The policies are not dated. The Appellant testified the Attitude and Conduct Policy was modified to say all employees were expected to maintain a level of personal conduct that will not reflect negatively on the employer and employees whose conduct compromised the integrity of the employer could face disciplinary measures up to and including termination. The Appellant could not say if the Code of Conduct had been amended. The Appellant testified no other employee was asked to sign the modified Attitude and Conduct Policy at the time he was asked to sign it.

[36] The Appellant thought he would continue working if he did not sign the policies or the warning. He spoke to his family and a lawyer – all said it was unnecessary for him to sign the documents. There had been no misconduct. The Appellant said he was not

given a copy of the employee handbook when he was hired. There were employee handbooks around the office, he said he was familiar with the policies and followed them.

[37] The Appellant testified he received the letter dated September 1, 2022 from his supervisor. That letter said the Appellant had until the start of his shift on September 6, 2022 to provide proper signoff to the attached documents (the two policies). The letter went on to say because signoff was a condition of his employment, refusal to comply would result in a temporary unpaid suspension or termination of employment.

[38] The Appellant reported to work on September 6, 2023 and worked until noon when he was dismissed.

[39] The Appellant submitted that his employer reached a settlement with him whereby the employer agreed to remove "fired for cause." He was paid severance in accordance with his contract of employment and received money for his legal expenses.

[40] As noted above, with respect to the first decision by the General Division on this appeal, the Appeal Division member found the General Division did not consider the employer's conduct prior to the Appellant's "misconduct" to properly assess whether his conduct was intentional or not.[11]

[41] In *Astolfi*, the Federal Court said that focussing only on a claimant's conduct is too narrow an application of the legal test for misconduct because there is a distinction between an employer's conduct after alleged misconduct, and an employer's conduct which may have led to the "misconduct" in the first place.[12]

[42] In *Astolfi*, Mr. Astolfi felt that the president and CEO of the company had harassed him during a meeting. After the meeting, Mr. Astolfi told his employer he would continue working from home until the situation had been investigated and resolved. The employer ordered Mr. Astolfi to be physically present at the workplace.

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[11] This finding is based on a decision by the Federal Court, *Astolfi v Canada (Attorney General)* 2020 FC 30, 2020, (*Astolfi).*
[12] See *Astolfi v Canada (Attorney General)* 2020 FC 30, 2020

Otherwise, it would deem he had abandoned his job. Mr. Astolfi did not report to the workplace. The employer considered this "misconduct", so the employer dismissed him. According to Mr. Astolfi, his refusal to show up at work was a direct result of his employer's actions before the misconduct.

[43] The Federal Court held in *Astolfi*, it would be reasonable for the General Division to consider the employer's conduct **before** the Appellant's misconduct. (emphasis added). This would allow the General Division to properly assess whether Mr. Astolfi's conduct was intentional or not. The Federal Court concluded that the General Division had to consider Mr. Astolfi's allegations of harassment in the full context.

[44] In my view, an assessment of whether an appellant's "conduct was intentional or not" is in effect, an assessment of whether an appellant's conduct was wilful, conscious or deliberate in the context of the employer's actions that led to the appellant's conduct.

[45] The Appellant says his employer was abusive when he confronted the Appellant and his subordinate for talking about non-work things. The confrontation occurred two to three weeks before the supervisor asked the Appellant to sign a verbal warning letter and two select policies.

[46] The verbal warning letter referred to the Appellant's "performance/productivity and unprofessional conduct and work performance not meeting company standards." The letter required the appellant to be on location for each shift until there was a significant improvement in performance and behaviour.

[47] The letter also said:

> "There has been a recent incident with the [supervisor] regarding your reaction when approached regarding a discussion with another employee. You became very confrontational and when there was an attempt to deescalate the situation you returned and acted in an unprofessional manner in the presence to (*sic*) other employees."

[48] The letter went on to say, “In addition to this warning, you are responsible for reviewing and signing off on the attached “Attitude and Conduct” and “Code of Conduct” Polices and return to me by no later than August 30, 2022.”

[49] The evidence tells me it was the confrontation with the supervisor that led to the verbal warning letter and the Appellant’s later dismissal. I accept the Appellant’s testimony that the supervisor instigated the confrontation and apologized for it. The Appellant has been consistent in his version of events when speaking to Service Canada officers, in his appeal and in his testimony before me.

[50] The Appellant felt he was dismissed because of the confrontation and the supervisor’s embarrassment over that confrontation. The Appellant believed the request to sign the two policies was a direct result of the confrontation. The Appellant interpreted the request that he sign the two policies to be a means by which the employer could fire him at any time for any future behaviour they disagreed with. The employer had previously accepted his signature on the employment contract as sufficient acknowledgment of the policies. For this reason, the Appellant did not think he could be dismissed for refusing to sign the two policies.

[51] The employer’s representative told a Service Canada officer it was not the Appellant’s behaviour leading to the disciplinary action that resulted in his dismissal, but rather the refusing to sign the documents required **after** the disciplinary action. (emphasis added) The employer representative went on to say, had the Appellant signed the documents, he would not have been dismissed from his employment.

[52] I find, based on a balance of probabilities, the Appellant’s refusal to sign the policies is not misconduct.

[53] The evidence is clear the employer had, for four years, accepted the Appellant’s signature on the employment contract as sufficient acknowledgement of the employer’s policies. The evidence is equally clear the requirement to sign off on two select policies only arose some weeks after the Appellant and his supervisor had a confrontation. The employer required the Appellant to sign the two select policies in the context of also

signing a verbal warning to express his agreement with the supervisor's version of events of the confrontation.

[54] The Appellant refused to agree with the supervisor's version of events. He was not disciplined or dismissed for his behavior during the confrontation. He was not dismissed for refusing to agree to the supervisor's version of events. Instead, the reason for the dismissal morphed into the Appellant's refusal to sign off on the two select policies as requested by the employer in the context of a verbal letter of warning.

[55] In my view, this means the dismissal for the refusal to sign the policies was an excuse for the Appellant's dismissal and not the reason for the dismissal. As a result, I find that, while the Appellant did choose to not sign off on the select policies, his conduct was not wilful, conscious or deliberate, because his employer was using the refusal to sign off a guise for his dismissal. This means the Commission has not met its burden of proving the Appellant lost his job due to his own misconduct within the meaning of the EI Act and case law cited above.

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

[56] Based on my findings above, I find the Appellant did not lose his job because of misconduct.

Conclusion

[57] The Commission has not proven the Appellant lost his job because of misconduct. Because of this, the Appellant is not disqualified from receiving EI benefits.

[58] This means the appeal is allowed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section