Citation: *RT v Canada Employment Insurance Commission*, 2023 SST 659

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (557753) dated December 22, 2023 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	Videoconference
Hearing date:	April 19, 2023
Hearing participants:	Appellant
Decision date:	May 3, 2023
File number:	GE-23-171

Decision

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

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant worked as safety trainer for a mining contractor and had a positive result on a random "fitness for duty" screening test on June 29, 2022. On July 6, 2022, the Appellant was placed on leave. On July 13, 2022, the Appellant lost his job for testing positive for THC.

[4] The Appellant says that he shouldn't have lost his job because he was fit for work when he arrived on site and his employer is incorrectly applying its policies to him. He also argues these policies aren't inline with Canadian law and recommended practices because he has a prescription for cannabis. He says that because his employer is based in Australia, where cannabis is illegal, senior management doesn't understand how to manage cannabis and workplace safety in Canada. He says he usually abstains from using his medication for five days before going to work as a precaution. On this occasion, he had a particularly bad day two days before his work rotation and needed to use his medication. He thought it would be okay because the mine site does "24-hour fitness for duty" oral swab tests.

[5] The Commission says the Appellant intentionally consumed cannabis, knowing he would fail a drug test if selected, and he knew his employer had a zero-tolerance policy toward drug and alcohol use.

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

[6] The Commission accepted the employer's reasons 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 must consider first

Jurisdiction of the Tribunal

[7] The Appellant has made substantial arguments regarding the legality of his termination under the *Ontario Human Rights Code* and the *Ontario Labour Standards Act*. He has also made arguments about his employer's fitness for duty policies not being inline with the *Canadian Centre for Occupational Health and Safety* guidelines.

[8] This Tribunal can only decide if the Appellant's actions are considered misconduct according to the *Employment Insurance Act* (Act). The Court has repeatedly confirmed that determining if an employer's policy is against labour law, or a human rights code, is irrelevant to an EI decision.[2] The Tribunal must focus on the conduct of the claimant, not the employer. It's an error of law for the Tribunal to consider whether the employer was guilty of misconduct or if the termination was unjust or excessive.[3] The Tribunal is to decide if the claimant was guilty of misconduct and if this misconduct resulted in losing his employment.[4]

[9] So, I can't decide if the Appellant should have been dismissed. I can only decide if he committed misconduct according to the EI Act and case law, and if those actions resulted in him losing his job.

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[2] In *Paradis v Canada (Attorney General),* 2016 FC 1282, the Federal Court (FC) said: "The applicant's reliance on the *Alberta Human Rights Act* policy on drug and alcohol dependencies in Alberta workplaces to argue that he was wrongfully dismissed is irrelevant…. Moreover, they are not, in the Court's view, relevant to the question that was before the tribunal for reasons that I will discuss below. Accordingly, they are inadmissible in this judicial review."

[3] See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *Canada (Attorney General) v Secours*, A-352-94; *Canada (Attorney General) v Namaro*, A-834-82; *Canada (Attorney General) v Marion*, 2002 FCA 185; and *Canada (Attorney General) v Macdonald*, A-152-96.

[4] See *Canada (Attorney General) v Langlois*, A-94-95, A-96-95.

Issue

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

Analysis

[11] To answer the question of whether the Appellant lost his job because of misconduct, I must decide two things. First, I have to determine why the Appellant lost his job. Then, I must decide whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[12] I find the Appellant lost his job because a random drug screening test detected THC in his system. These "fitness to work" screening tests affect the ability for employees to access the mining worksite and are a condition of employment with his employer.

[13] The Appellant doesn't dispute the validity of the test or the test result. The test is administered by a registered nurse and is processed by a third party with strict control measures. He admits to consuming cannabis, but he uses it as a medication, and holds a valid prescription for it.

[14] In the hearing, the Appellant raised several issues with his employer's senior staff. His employer is based in Australia, and the worksite is their only mining contract in Canada. He says that because his employer isn't very active in Canada, they aren't well versed in the safety regulations and laws that apply to this project. As the safety trainer, it was his responsibility to point out unacceptable practices, but the remedies can cost a company money and complicate operations.

[15] The Appellant had a "blow up" two days before his suspension with an Australian superintendent regarding a near-miss incident that was "covered up" and improperly reported to the mine. He says that reports were falsified, and procedures weren't followed to protect the job of another superintendent's son. He also said that there are

cultural differences between Australians and Canadians regarding gender and sexual orientation—and he called out homophobic slurs used by this superintendent.[5]

[16] The Appellant argues that his dismissal might be linked to his interpersonal conflict with his employer's senior staff from head office. He says:

> *The local X people all wanted to keep me around after my positive test results, because they had respected me helping with all of the above mentioned missed safety related concerns. It wasn't until those same X [senior management] …were involved that that all changed. They sent [the superintendent] to us and [he] and I had a falling out over falsified incident reporting.*
>
> *Next thing I know is the support I had was gone and things had changed to a dismissal.*[6]

[17] In its initial conversation with the Commission, the employer said that the "notes on file also say that [the Appellant's] manager Jaime fought to have [the Appellant] remain as an employee and thought it was not reasonable grounds to fire him."[7] This supports the Appellant's testimony that he had managerial support to keep his job.

[18] The Commission submits the employer's termination letter which says the Appellant tested positive for THC, which is a violation of the *Ontario Occupational Health and Safety Act* (OHSA) and that "the *Mines and Mining Plants Regulation* expressly prohibits any person, including employees, from entering a mine under the influence of a drug or narcotic substance."

[19] It goes on to state that the Appellant was dismissed because, by "reporting to work under the influence of THC…not only have you materially breached the policies applicable to your employment with X and the Evolution Mine Operation…your misconduct has also fundamentally damaged your employment relationship with X beyond repair."[8]

[20] The law says there must be a direct link between the misconduct the claimant is accused of doing, and his termination. Not only does the misconduct have to cause the

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[5] See GD09-2-5 for this paragraph and the one before it.
[6] See GD09-5.
[7] See GD03-30.
[8] See GD03-70.

loss of employment, it must be the primary reason.[9] It also says that the actual reason for the dismissal is what is important, not the excuse used by the employer for firing the claimant.[10] The Court requires me to make my own objective assessment of the facts and not simply adopt the conclusion of the employer on misconduct.[11]

[21] I find that the Appellant had initial support from management to keep his job. It's possible that his interpersonal conflict with the Australian superintendent affected the decisions of senior management by undermining the support the Appellant had locally. However, the decision of the employer was still about the Appellant testing positive for THC. This means that the drug test result was the primary reason for the dismissal.

[22] So, while there might have other contributing factors, the Appellant lost his job because he tested positive for THC on a drug test.

What is misconduct under the law?

[23] To be misconduct under the law, the conduct must be wilful. This means that the conduct was either conscious, deliberate, or intentional.[12] Misconduct can also exist if the behaviour was so reckless that it is almost wilful.[13] This means that even if there isn't wrongful intent (in other words, you don't mean to do something wrong) behaviour can still be misconduct under the law.[14]

[24] To be considered misconduct, the law requires that the Appellant knew, or should have known, that there was a real possibility of losing his job because of his conduct, or that it could prevent him from fulfilling his duties toward his employer.[15]

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[9] See *Canada (Attorney General) v Cartier*, 2001 FCA 274; *Smith v Canada (Attorney General)*, A-875-96; *Canada (Attorney General) v Brissette*, A-1342-92; and *Canada (Attorney General) v Nolet*, A-517-91.
[10] See *Davlut v Canada (Attorney General),* A-241-82, [1983] S.C.C.A. 398.
[11] See *Meunier v Canada Employment and Immigration Commission*, A-130-96.
[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.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[25] The Commission must prove that the Appellant lost his job because of misconduct on the balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost his job because of misconduct.[16]

[26] Since misconduct is the exception to the general rule that eligible individuals are entitled to benefits, it must be strictly interpreted. Disqualification under the Act is a punishment for claimants who lose their jobs through wrongdoing.[17] A finding of misconduct results in the claimant losing all his insurable hours for the employment he was dismissed from. This is a very serious consequence, so the burden of proof for the Commission is high.

[27] The Commission must prove misconduct exists using clear evidence and facts that point directly to it. It can't speculate, assume, or rely on the opinion of the employer to prove misconduct.[18]

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

[28] The Commission has failed to prove the conduct that resulted in the Appellant's dismissal was misconduct under the law.

[29] There is insufficient evidence for me to decide misconduct occurred.

[30] The employer provided the Commission its termination letter addressed to the Appellant, a single page from its *Employment Agreement* initialed by the Appellant, its one-page *Fitness for Work Policy*, a single page from its *X Canada Employee Handbook—Red Lake Operations* plus a signature page that confirms the Appellant received and read it, and the Appellant's test results. Not only are these documents incomplete, they are ambiguous and contradictory.

[31] The employer's *Employment Agreement* says (emphases are my own):[19]

> 20. FITNESS FOR DUTY

[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[17] See *Canada (Attorney General) v McLaughlin*, A-244-94
[18] See *Crichlow v Canada (Attorney General)*, A-562-97.
[19] See GD03-60

> As part of our commitment to safety, the Company takes steps to ensure that all employees are fit for duty when they report to work and during their shifts. The Company requires all employees in safety-sensitive positions to submit to drug tests (by oral swab) and alcohol tests (by breathalyzer) ***in accordance with the site drug and alcohol policy***. The tests are directed at ensuring that all employees are fit for work. ***The Company does not gather information about an employee's private life or off-work conduct unless it interferes with an employee's ability to work productively and safely***. Our alcohol and drug testing procedure is discreet, confidential and professionally run. ***The Company follows the site drug and alcohol policy at all times, details of which will be made available to you.***

The agreement doesn't define what "fit for work" means, other than it includes the "site drug and alcohol policy." It also implies that the employer doesn't restrict the use of drugs and alcohol offsite or outside of work hours unless that behaviour affects an employee's ability to work "productively and safely." This is confirmed by the first conversation between the employer and the Commission, where the employer stated it doesn't have a specific policy about off-duty drug and alcohol use, "but [employees] have to be fit for work when they return."[20] The "site drug and alcohol policy" hasn't been provided for examination.

[32] The employer's Fitness for Work Policy says (emphases are my own):[21]

> The X Group ***Fitness for Work Standard (Standard) details the minimum expectations*** of Staff in managing issues in relation to fitness for work.
>
> X is committed to providing a safe and healthy workplace for all persons accessing and working on its sites. X will:
>
> • Ensure staff are aware of the standard;
> • Educate staff that fitness for work may be ***influenced*** by fatigue, illness, injury, stress, medication or the inappropriate use of alcohol or drugs;
> • Provide an employee's assistance program that staff may access to confidentially work through fitness for work issues,
> • Support staff in their efforts to comply with policy requirements;
> • Provide appropriate testing programs to verify adherence by staff to the ***drug and alcohol aspects of the standard****;*
> • Manage ***breaches of the standard*** fairly and constructively; and
> • Actively promote a culture of fitness for work and healthy lifestyle throughout the X Group.
>
> …
>
> Staff must not expose themselves or others to unnecessary safety or health risks. Importantly, Staff must ensure that they are in a fit state to work at the start of and throughout the work period without risk to themselves or others and ensure they take every precaution to prevent impairments on their fitness for work, including the adverse effects of fatigue, stress, medication, alcohol or other drugs.

[20] See GD03-30
[21] See GD03-61

> **Staff must at all times have a blood alcohol reading of 0.00 and be below the *limits for drugs prescribed in the Standard.***
> …
> ***A client's fitness for work procedure or standard (Client Standard) and any law affecting a site will take precedence over the Standard to the extent that the Client Standard or the law contains more stringent threshold limits for alcohol and other drug testing or more stringent requirements with respect to the management of positive tests.***

Ironically, the *Fitness for Work Policy* also fails to specify what "fit for work" means. Instead, it lists things that can affect fitness for work, how the company will help employees comply with the "Fitness for Work Standard," what the company will do with breaches, and where to find the definitions and standards for being classified as "fit for work."

[33] The "Fitness for Work Standard" hasn't been provided for examination despite it containing the definitions and standards of being "fit for work" and the acceptable limit for THC. These details are critical in deciding if the Appellant is in breach of a policy. The Client Standard, which would be another way of saying the "site policy," is again, also unavailable. This is another crucial document in determining what the acceptable THC limit is, especially since this policy sets out multiple options for the source of acceptable drug limits.

[34] The *Fitness for Work Policy* contradicts the *Employment Agreement* when deciding which policy applies to the Appellant. The first one says that the most strict policy or law will apply, but the other says that the employer follows the "site drug and alcohol policy at all times." Since I haven't been provided copies of the relevant laws, policies, or standards, I can't decide what procedures, standards, or limits apply to the Appellant's conduct.

[35] The Appellant argues that he was told that the drug test was a "24-hour fitness for duty test." The Appellant told the nurse before the test, and the mine project manager and his supervisor immediately after the test, that he had consumed cannabis thirty-five hours before the test, and that he has a prescription for it. The mine project manager told him "not to worry about it until [the] test came in and [they] would deal with

it then."[22] He says he wasn't intoxicated at the time of the test and wasn't intoxicated at any time during the eight days he was allowed to work between the test and his suspension. The employer told the Commission "there was nothing on his file indicating that he was impaired the morning of the test."[23]

[36] The Appellant says this proves he was considered "fit for work" by both his employer and the mine.

[37] I agree with the Appellant. If the act of using cannabis within 48 hours of work was a violation of a policy or standard, his employer should have removed him from work as soon as he told them about his consumption of cannabis thirty-five hours before the test. If the act of using cannabis, or potentially having THC in his system, was enough to declare the Appellant "under the influence," "intoxicated," or otherwise not "fit for work," then his employer should have removed him from work immediately. Instead, the Appellant was allowed to work for over a week.

[38] The employer has stated it doesn't care about off-work drug and alcohol use so long as employees arrive "fit for work." It would appear, in the absence of evidence to the contrary, that being "fit for work" is less about employees using drugs or alcohol, and more about the employee's mental and physical capacity to carry out his work duties "safely and productively." The Appellant has provided evidence that he was both safe and productive in between his drug test and his suspension.[24]

[39] I find that the employer considered the Appellant "fit for work" at the time of the drug test and the remainder of his time at work.

[40] The Commission has relied on the *Fitness for Work Policy* for its primary argument that the Appellant's use of cannabis counts as misconduct. Specifically, the Commission argues that it's not within the Tribunal's jurisdiction to determine if the Appellant was wrongfully dismissed, if the policy was legal, or what effects cannabis

[22] See GD02-29.
[23] See GD03-30.
[24] See GD09.

had on the Appellant, merely that "[i]t suffices that the employer had a zero tolerance drug and alcohol policy."[25]

[41] The Commission's interpretation of the employer's *Fitness for Work Policy* is incorrect. The policy clearly states that there is zero-tolerance for alcohol, but drugs are allowed up to a limit. But, without all the relevant documents, what the allowable limit is for THC remains a mystery.

[42] The employer's *X Canada Employee Handbook—Red Lake Operations* says:[26]

> While the Disciplinary Procedure normally escalates in response to continued non-compliance or performance related issues, X reserves the right to repeat any step of the Disciplinary Procedure, or to issue disciplinary actions at any step up to and including immediate termination for just cause, where justified by the circumstances.
>
> Gross misconduct. Examples of behaviour that will be treated as gross misconduct and which will justify a more serious disciplinary response or immediate termination for just cause include:
>
> …
>
> xiii. Drunkenness, drinking on the job or being under the influence of prohibited substances.
>
> …
>
> xviii. Serious breaches of Occupational Safety and Health laws, regulations and/or procedures.
>
> …
>
> xix. Wilful breaches of Company policies.

The employer is within its rights to terminate any employee that commits gross misconduct. The employer considers breaches of company policies, serious breaches of OH&S rules, and being under the influence at work as gross misconduct. But, without the applicable policies, laws, and standards, I can't decide that the Appellant committed an offense the employer considers "gross misconduct."

[43] The employer provided the Appellant's test results. Non-DOT drug and alcohol testing was conducted by DriverCheck using an oral swab (saliva) and breathalyzer. The Appellant tested negative for alcohol and all drugs except "marijuana." In the notes it states the quantitative level, which is the amount detected in the Appellant's system, was 30 nanograms per millilitre. No information is provided about what is considered an unacceptable amount for each class of drug, if the test can determine incapacitation or

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[25] See GD04-3.
[26] See GD03-59

intoxication, if there can be false negatives or positives, or if the test shows real time use or historical use.[27]

[44] In its termination letter, the employer said the Appellant "reported to work under the influence of THC, drugs, or some other mind-altering substance"[28] which violated its policies and the mine's policies. It goes on to say that the Appellant is in violation of the OHSA, the *Mine and Mining Plants Regulations*, and Evolution Mining's *Lifesaving Rules (Fit for Work)*. The Commission, and the Tribunal, haven't been provided copies of any of Evolution Mining's policies, or the relevant section(s) of the OHSA and the *Mine and Mining Plants Regulations*. So, I can't decide if the Appellant violated them.

[45] I also can't accept the employer's interpretation that the *Mine and Mining Plants Regulations* "expressly prohibits any person, including employees, from entering a mine under the influence of a drug or narcotic substance," without examining the statute. The employer's interpretation, without any context or definition to specify what is considered a 'drug', would prevent anyone on any kind of medication from working in a mine. Obviously, that's a ridiculous interpretation that wouldn't be inline with the spirit and intent of any workplace regulation.

[46] The employer says it "would not be living up to its statutory obligation under the [OHSA] to take every precaution reasonable in the circumstances for the protection of the health and safety of a worker if X continued to employ [the Appellant] in light of [his] misconduct."[29] Even though it cites several policy breaches, the employer makes clear that the defining reason the Appellant was fired is the employer feels it would be violating the OHSA if it didn't terminate him.

[47] Clearly, the OHSA is a critical piece of legislation to this appeal. I can't decide if it was violated because it hasn't been presented. The Commission erred by accepting the

[27] See GD03-63-69 for this paragraph.
[28] See GD03-70.
[29] See GD03-71.

employer's interpretation of the legislation without examining it and applying it to the facts.[30]

[48] The Federal Court of Appeal has confirmed that a Tribunal must have sufficiently detailed evidence and the relevant facts before it can conclude misconduct occurred.[31]

[49] The same Court upheld a decision that an act of misconduct hadn't been proven, even though the claimant had an automatic license suspension for excessive blood alcohol levels, because the Commission didn't provide the relevant laws and regulations for review to determine if the claimant had violated them. The claimant admitted to drinking alcohol, but since drinking alcohol is legal the very act of consuming it isn't misconduct unless it can be proven to be excessive or reckless. The Commission

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[30] See *Meunier v Canada Employment and Immigration Commission*, A-130-96.

[31] In *Joseph v Canada Employment and Immigration Commission*, A-636-85 the Federal Court of Appeal (FCA) set aside a decision by the Umpire and the Board of Referees for a lack of details and evidence because misconduct "is not proven simply by showing that the employer found his employee's conduct to be reprehensible, or charged him with misconduct in general terms. For a board of referees to conclude that there was misconduct by an employee, it must have before it sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behavior was reprehensible. In the case at bar, we are all of the view that the evidence that was before the board of referees does not meet these requirements." In this case the Claimant argued that the Commission had not proven misconduct because the Commission relied solely on the letters from the employer as their evidence. The Claimant gave the Board of Referees vague answers to their questions, but the onus is not on the Claimant to disprove the claim of misconduct. The Commission must prove the misconduct.

In *Meunier v Canada Employment and Immigration Commission*, A-130-96 the FCA said the Umpire saying "I am of the opinion that all the circumstances, taken as a whole, were entirely such as might constitute misconduct within the meaning of subsection 28(l) of the Act," was an error in law because he came to this conclusion using assumptions based on unverified claims. The FCA also noted this case had insufficient evidence and relied on the employer's opinions for its case: "We are compelled to observe that, essentially, the only evidence in the Commission's file was the employer's account of the facts, remarkably vague and speculative though that account was."

needed to provide proof for both the claimant's blood alcohol level and that such a level was in violation of a regulation.[32]

[50] I find there is insufficient evidence that the Appellant breached:

- His Employment Agreement.
- The X Canada Employee Handbook—Red Lake Operations.
- The employer's Fitness for Work Policy.
- The employer's Fitness for Work Standard.
- Evolution Mining's Lifesaving Rules (Fit for Work), or the "Client Standard" or the "site drug and alcohol policy."
- The Ontario Occupational Health and Safety Act
- The Mine and Mining Plants Regulations.

[51] So, I find the Commission has failed to prove:

- The Appellant's use of cannabis at home during his off-work hours was a violation of any policy or regulation.
- The Appellant was not "fit for work."
- The level of cannabis detected in the Appellant's system was above the acceptable limit set by a standard, policy, regulation, or law.

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[32] *Canada (Attorney General) v Granstrom, 2003 FCA 485* is of significant value to this appeal because it highlights the fact that consuming alcohol in and of itself isn't misconduct (because it's legal, like cannabis is in Canada) and it addresses insufficient evidence from the Commission to prove misconduct. Several key paragraphs directly apply to this appeal. I will produce them here.

At para 5: In essence, the Umpire found that the act of misconduct upon which the Commission relied had not been identified. He also was of the view that the evidence of misconduct was either lacking, deficient, or confusing. In this respect, we reproduce the following paragraphs from his decision:

> *The 'requirement' under which the suspension was made was not produced or cited. In its representations to the Umpire in support of this appeal the Commission said that the suspension was made under the British Columbia Administrative Driving Prohibitions without citing the relevant provisions thereof. There is no evidence in the material to indicate the province in which claimant committed the alleged offence of impaired driving…*
>
> *The provisions of the provincial statute pursuant to which the suspension was made has not been produced to permit the Board of Referees or the Umpire to examine the reason for the suspension for the purpose of determining whether claimant committed an act which may be considered misconduct…*
>
> *The claimant admitted to drinking alcohol but there is no evidence as to the amount he consumed. The act of consuming alcohol does not consist of an act of misconduct unless it can be shown that the consumption was excessive.*

At para 10: On the other hand, although the fact of the suspension itself was proven, there was not even on the record prima facie evidence as to the legal requirements that the driver's license be suspended. We understand from a reading of his decision that, had there been such evidence, his conclusion would have been different if the requirements had been met unless, of course, the claimant could have rebutted that prima facie evidence on a balance of probabilities. In other words, if proper evidence of the statutory foundation for the suspension had been filed, the Umpire would have been in a position to determine if the conditions or requirements for the suspension had been met… [11] However, on the basis of the record that he had before him, we cannot say that he erred in concluding as he did.

Did the Appellant know he could lose his job?

[52] I find that the Appellant didn't know that his use of cannabis in this specific instance could lead to him losing his job.

[53] There is no formal policy regarding the use of cannabis away from work. Using cannabis recreationally is now considered more or less the same as drinking alcohol in Canada. So, using cannabis while off-duty is not in and of itself misconduct.

[54] The Appellant testified that he has stomach and musculoskeletal conditions that reduce his sleep and require treatment for pain and discomfort. He said that other pharmaceutical drugs left him feeling groggy and slow, which means he can't safely work. His doctor prescribed him cannabis in 2015, which is effectively treating his medical conditions without impacting his ability to function. He had been safely using cannabis as a medicine for seven years before his termination, and this is the first time he's failed a drug test.

[55] The Appellant says he usually abstains from using his medication for five days before he flies to work as a precaution. In this instance, he had a family emergency on the Monday before his rotation started that was very stressful physically, and emotionally. His medical conditions flared to an intolerable level, so he used his cannabis before bed, as prescribed—but at a lower dose than his prescription indicates. He was told he could be randomly selected for "24-hour fitness for duty" tests, but since he didn't start work until Wednesday morning, he thought he should be safe to use his medicine.

[56] The Appellant is an expert in safety. He knew he was unsafe to work when he was taking various pharmaceutical medications, so he didn't use them. The Appellant has maintained a cannabis prescription for over seven years because it effectively treats his medical conditions without impacting his ability to work safely. He also testified that he never uses the daily prescribed amount because it would be excessive and could affect his ability to work the next day. This demonstrates a level of personal awareness and responsibility that must be considered when evaluating his conduct.

[57] The employer's drug and alcohol policies are vague and contradictory, so the Appellant wasn't fully informed of his rights or obligations. He was only told he would be subject to random "24-hour fitness for duty" tests, and that he can't be "under the influence" at work. He used cannabis medicinally 35 hours before he reported for work and knew he wouldn't be intoxicated when he arrived. So, the Appellant didn't know he could lose his job when he consumed the cannabis.

[58] The Appellant has a prescription to use cannabis. The Appellant says he is legally entitled to use cannabis to treat his medical conditions just as anyone else is allowed to use their prescription medication. He did disclose both his prescription and Canadian legal requirements to his employer before his termination. While I can't decide if his prescription makes his dismissal improper or illegal, it's reasonable to accept the Appellant's arguments that he didn't think he'd lose his job because he thought the law would prevent it.

[59] Misconduct can be found if the violation means the claimant can longer meet an essential condition of employment.[33] Being banned from a worksite for testing positive on a drug test can be grounds for dismissal for misconduct.[34]

[60] The employer's client didn't ban the Appellant from the mine site for testing positive for THC. The site policy, as communicated to the employer, required the Appellant to be evaluated by a Substance Abuse Professional, follow the recommended plan resulting from this assessment, and pass a Return-to-Duty test. It also requires the employer to pay for the assessment and treatment program.

[61] The Appellant didn't refuse to participate in the policy requirements. The employer didn't "follow the site drug and alcohol policy at all times," and chose to dismiss the Appellant instead of paying for an assessment and treatment program. So, at the time he was dismissed, the Appellant was still capable of meeting essential employment conditions.

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[33] See *Canada (Attorney General) v Brissette*, A-1342-92 and *Smith v. Canada (Attorney General),* 1997 F.C.J. No. 1182.
[34] See *Canada (AG) v McNamara*, 2007 FCA 107.

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

[62] The reason for the Appellant's dismissal isn't misconduct under the law.

[63] I find that the Commission hasn't proven there was misconduct, because:

- The Appellant didn't know, or should have known, that using cannabis when he did could have resulted in losing his job.
- The Appellant was still capable of meeting essential conditions of his employment when he was dismissed.
- The Commission hasn't proven that a policy violation occurred.

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

[64] Based on my findings above, I find that the Appellant didn't lose his job because of misconduct.

Conclusion

[65] The Commission hasn't proven that the Appellant lost his job because of misconduct. Because of this, the Appellant isn't disqualified from receiving EI benefits.

[66] This means that the appeal is allowed.

Ambrosia Varaschin

Member, General Division – Employment Insurance Section