



Citation: *TV v Canada Employment Insurance Commission*, 2023 SST 1659

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

## Decision

**Appellant:** T. V.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (535246) dated September 22, 2022 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** In person

**Hearing date:** April 12, 2023

**Hearing participant:** Appellant

**Decision date:** May 9, 2023

**File number:** GE-22-3550

## Decision

[1] T. V. is the Appellant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that the reason he lost his job is misconduct, under the meaning of the law. This is because I find that he lost his job because he didn't follow his employer's policy on taking breaks. I find that he regularly took longer breaks without his employer's permission. I think he reasonably should have known he could lose his job by doing this. My decision means he can't get EI benefits.

## Overview

[3] The Appellant worked in a machine shop. His employer started monitoring how he took his breaks. After a few weeks, the employer fired him. They told him that they were firing him because he regularly took longer breaks than he was supposed to take. He also didn't clock in and out properly when he took breaks. The employer considered this to be time theft. The Appellant applied for EI benefits, but the Commission refused to pay any benefits.

[4] The Commission says the reason the Appellant lost his job is misconduct. The Commission says this is because he acted deliberately by taking longer breaks than his employer allowed. The Commission says he reasonably should have known he could lose his job by doing this. So, the Commission says the Appellant can't get EI benefits.

[5] The Appellant disagrees. He says he rarely took longer breaks, and if it happened, it was an accident. He says his employer acted too harshly by firing him. He says they should have given him a warning first. He also says that everyone else took longer breaks too. And the Appellant says his employer actually fired him because the supervisor didn't like him, and because he had made a complaint about safety.

## Issue

[6] I have to decide if the reason the Appellant lost his job is misconduct. To make this decision, I have to look at several questions:

- Why did the employer fire the Appellant?
- Did the Appellant take longer breaks than his employer allowed?
- Were the Appellant's actions misconduct, under the meaning of the law?

## Analysis

### Why did the employer fire the Appellant?

[7] I find that the employer fired the Appellant because he often took longer breaks than the employer allowed.

[8] The Appellant and the Commission disagree on the reason the employer fired the Appellant.

[9] The Commission says the Appellant lost his job because he regularly took longer breaks than the employer allowed. The Commission says the employer monitored his break times for a few weeks and discovered that he took longer breaks nearly every day. He didn't clock in or out correctly at the start and end of his breaks. The employer considered this to be time theft.

[10] The Appellant disagrees. He says he rarely took longer breaks than allowed. He says it was an accident when it happened. He says the real reason for his dismissal is because the supervisor didn't like him. He says that he had just made a complaint about safety and working conditions when the employer fired him.

[11] When there are conflicting statements, I have to make a decision on the balance of probabilities. This means I have to look at the Appellant's statements and the Commission's statements and decide what is more likely to be true.<sup>1</sup>

[12] I think the Commission and the employer's statements are more likely to be true. I find it likely that the employer fired the Appellant because they thought he was taking longer breaks than he was allowed.

[13] The employer has always said that they fired the Appellant because he was taking long breaks. And the dismissal letter says they are firing the Appellant for time theft. The Appellant agrees that his employer had a meeting with him and told him the reason for his dismissal was because the employer thought he was taking long breaks.

[14] Aside from the Appellant's statements, I have no evidence showing me that the real reason for the Appellant's dismissal was because his supervisor didn't like him. There isn't evidence, aside from the Appellant's statements, showing me that the employer dismissed him because he made a complaint about safety in the workplace.

[15] So, I find it more likely that the reason for the Appellant's dismissal was because the employer thought he was taking long breaks without permission.

[16] Now, I have to decide if the Appellant actually committed this action at work. In other words, did he take longer breaks than his employer allowed? And did he do it as often as his employer says he did?

### **Did the Appellant take longer breaks than his employer allowed?**

[17] I find it likely that the Appellant took longer breaks than his employer allowed. I also find it likely that this happened regularly. I think the employer is more credible than the Appellant.

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<sup>1</sup> The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

[18] There is conflicting evidence in the appeal file about whether the Appellant took long breaks. There is also conflicting evidence about how often the Appellant took longer breaks.

[19] The Commission says I should believe the employer. The employer told the Commission that the Appellant regularly took longer breaks than he was allowed. The employer said he often didn't clock in or out at the beginning and end of his breaks. The employer said they tracked the Appellant for a few weeks before dismissing him, and he took longer breaks nearly every day for three weeks.

[20] The Appellant disagrees. He says he might have accidentally taken longer breaks because he forgot to clock in or out at the start of his break. But he says if it happened, it was an accident. He says it didn't happen as often as the employer says it did.

[21] I think the employer is more credible. I choose to believe the employer's statements. I have made this decision on a balance of probabilities.

[22] I agree that the employer doesn't have records or video footage of the Appellant taking longer breaks. But the employer has always given the same explanation of the Appellant's actions. They spoke to the Commission more than once, and each time, they said the Appellant often took longer breaks than allowed. They said he didn't always clock in or out at the beginning and end of his breaks. They gave the Commission specific details about the days this happened. They even gave the Commission details about the length of the Appellant's breaks.

[23] In contrast, the Appellant has given conflicting statements about whether he ever took longer breaks. He has given vague statements about how often it happened.

[24] On his application for EI, he said it hadn't happened at all in the prior six months before the employer dismissed him. Then, he told the Commission that it had happened, but only sometimes. During the reconsideration process, he said it happened often, but that other employees did it too. And at the hearing, he said he couldn't

remember how often he took longer breaks. He also said if it happened, it was by accident. He said other employees did it too.

[25] So, the Appellant has made vague and conflicting statements about whether he took long breaks and how often it happened. In contrast, the employer has always said the same thing about how often the Appellant took long breaks. So, I think the Appellant's statements are less reliable than the employer's statements.

[26] I choose to rely on the employer's statements. I find it likely that the Appellant often took longer breaks than the employer allowed. I find that he did it at least 13 times in his last three weeks of employment. I find it likely that he didn't clock in or out at the beginning and end of his breaks.

[27] Now, I must decide if the Appellant's actions – taking longer breaks without permission – are misconduct under the meaning of the law.

### **Did the Appellant lose his job because of misconduct, under the meaning of the law?**

#### **– What is the meaning of misconduct under the *Employment Insurance Act*?**

[28] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> 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.<sup>4</sup>

[29] 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.<sup>5</sup>

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[30] 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.<sup>6</sup>

– **Is the reason for the Appellant’s dismissal misconduct?**

[31] The Commission says the reason for the Appellant’s dismissal is misconduct. The Commission says he knew about his employer’s policy on breaks. The Commission says he acted deliberately or carelessly when he took long breaks. And the Commission says he should have known that he could lose his job because of his actions.

[32] The Appellant disagrees. He says that his employer should have warned him before firing him. He says that the employer’s decision to fire him was too harsh. He also says other employees took long breaks.

[33] I agree with the Commission. I find that the Appellant lost his job because of misconduct, under the meaning of the law.

[34] At the hearing, the Appellant agreed that he knew about his employer’s expectation about breaks. He said he was entitled to one long break. He agreed that the employer expected him to clock in and out at the beginning and end of the long break. He also agreed that he was allowed two short breaks, one in the morning and one in the afternoon.

[35] So, I find that the Appellant knew about his employer’s expectations about taking breaks.

[36] I understand that the Appellant says that, if he took longer breaks, it was an accident. But I don’t think this is credible. This is because I think it is likely that the Appellant took longer breaks most days. I think it happened too often for it to be an accident. So, I think the Appellant was either acting deliberately, or he was acting so carelessly that it seemed like he didn’t care what would happen to his job. I think he

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<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

reasonably should have known that he was putting his job at risk by taking long breaks without his employer's permission.

[37] The Appellant also argues that his employer should have given him a warning before firing him. But case law says I can't look at whether the employer acted too harshly by firing the Appellant. I can't consider whether the employer should have taken other steps first before firing him.<sup>7</sup> Even if other employees took long breaks as well, I am only looking at the Appellant's own actions.<sup>8</sup>

[38] My only role is to decide if the Appellant lost his job because of his own misconduct. And I think the reason he lost his job is misconduct, for the following reasons:

- The Appellant knew his employer's expectation about taking breaks.
- Even though he knew the policy, he took longer breaks than the employer permitted.
- His actions were deliberate, or at least so careless that it didn't seem like he cared about the effect his actions would have on his job.
- He reasonably should have known that he could lose his job because of his actions.
- His actions – taking longer breaks than permitted – led directly to his dismissal.

[39] So, for these reasons, I find that the Appellant lost his job because of misconduct.

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<sup>7</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107, paragraphs 22 and 23.

<sup>8</sup> See *Fleming v Canada (Attorney General)*, 2006 FCA 16, paragraph 10.



## **Conclusion**

[40] I am dismissing the Appellant's appeal. I find that he lost his job because of misconduct, under the meaning of the law. This means he can't get EI benefits.

Amanda Pezzutto

Member, General Division – Employment Insurance Section