



Citation: *VR v Canada Employment Insurance Commission*, 2023 SST 1844

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

## Decision

**Appellant:** V. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (595883) dated June 22, 2023 (issued by Service Canada)

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**Tribunal member:** Emily McCarthy

**Type of hearing:** Teleconference

**Hearing date:** September 7, 2023

**Hearing participant:** Appellant

**Decision date:** September 18, 2023

**File number:** GE-23-1910

## 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.<sup>1</sup>

## Overview

[3] The Appellant, V. R., lost his job as a driver. The Appellant's employer said that he was let go because he sexually harassed the employee of a customer on his delivery route. This was contrary to the employer's Workplace Violence, Harassment and Sexual Harassment Policy.<sup>2</sup>

[4] The Appellant says that he never sexually harassed anyone. He didn't know why he was let go. Even if he had harassed someone, he says the employer should have given him a warning and transferred him to a different route. He says he was arguing with his employer about his route and was asking for a raise. He raises this a possible reason for why he was let go.

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

## Issue

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

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

<sup>2</sup> The Commission didn't provide a copy of this policy, but the employer said it was put in place after Bill 167 (sic): see GD3-25.

## Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide three things. First, I have to determine why the Appellant lost his job. Then, I have to decide whether the Appellant engaged in that conduct that was the reason for his dismissal. Lastly, I have to determine whether the law considers that reason to be misconduct.

### Why did the Appellant lose his job?

[8] 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.

[9] The employer said the Appellant was dismissed for sexual harassment.<sup>3</sup> It told the Commission that on March 23, 2023, a customer sent a complaint about a driver by email. The complaint said "We are having issues with the delivery driver for [...] saying inappropriate things to a female staff member of a sexual nature. Please can we have him removed from this route ASAP."<sup>4</sup>

[10] The employer says that same day (March 23, 2023) it got a call from the police saying that they had gotten a complaint from a woman who had interacted with one of the employer's drivers. The employer investigated. It used GPS and a licence plate number provided by the police, to figure out that the driver referred to in the police complaint was the Appellant.<sup>5</sup>

[11] The next day, on March 24, 2023, the employer fired the Appellant. The termination letter says that he was let go because he violated the employer's policy when he verbally sexually harassed an employee of a customer.<sup>6</sup>

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<sup>3</sup> See GD3-18.

<sup>4</sup> See email dated March 23, 2023, sent at 1:11 p.m. found at GD3-30.

<sup>5</sup> See GD3-28.

<sup>6</sup> See termination letter dated March 24<sup>th</sup>, 2023, found at GD3-20.

[12] The Appellant disagrees that he did anything wrong. At the hearing, he initially said he was told to leave because of harassment. Later during the hearing, he said he wasn't told why he was fired. They just told him verbally and asked him to leave. At first, he said he didn't get the termination letter. When asked why the termination letter says it was delivered in person,<sup>7</sup> he said he was shown a paper by his employer. They read it to him at the meeting, but he didn't understand it because of a language barrier. He was told he did something wrong and had to go home.

[13] The Appellant testified that he was having a dispute with his employer about the route he was assigned to and the changes to his routes. He also says that he was asking for a raise. This was the argument he referred to in his Notice of Appeal.<sup>8</sup>

[14] I am not satisfied that his dispute about his route or his pay caused him to lose his job. I accept that the Appellant was arguing with his employer about these two issues. But the evidence doesn't show that he was fired for this reason. He said at the hearing that he was willing to do what his employer asked him to do and would go back to work if asked.

[15] The Commission has shown that sexual harassment is the real reason the Appellant was let go. The Appellant was fired the day after the employer got a complaint about one of its drivers sexually harassing a customer's employee and was contacted by the police. They identified the Appellant as the driver in question. The language of the termination letter shows that the reason he lost his job was sexual harassment. This is supported by the timeline of events, the email from the customer, and the evidence of the employer's investigation of the complaint.

### **Did the Appellant do what the employer said he did?**

[16] The Commission has shown that it is more likely than not that the Appellant verbally sexually harassed a customer's female employee.

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<sup>7</sup> See GD3-20.

<sup>8</sup> See GD2-6.

[17] At the hearing the Appellant said he knows that sexual harassment is very serious and against the law. He would not have done this.

[18] Because he said he didn't know why he was fired, at the hearing we went over the reasons the employer gave to the Commission for letting him go.<sup>9</sup> He said he didn't do anything wrong. He said he was the "number one" driver for the company and all his customers liked him. He loved his job. Even now he is ready to go back to work.

[19] But the employer's documentation is specific, detailed and includes the original email from the customer describing the incident.<sup>10</sup> The employer identified the Appellant as the driver assigned to the route that made deliveries to that customer.<sup>11</sup>

[20] The Commission also included a summary of the employer's communication with the police about a complaint made against one of its drivers on March 23, 2023. The police gave the employer a license plate number.<sup>12</sup> Using GPS tracking and the victim's recollection of the license plate, the employer figured out that the Appellant was the driver referred to in the police complaint.<sup>13</sup> This conclusion was consistent with the complaint made by email sent by the customer.

[21] At the hearing the Appellant was asked what he remembered happening on March 23, 2023. But he said nothing happened. During the hearing, we reviewed the email from the customer complaining about a driver saying inappropriate things of a sexual nature. The sender was named, and he was asked about it.<sup>14</sup> He said that he made deliveries to 20 locations, and he didn't remember anything from that day.

[22] The employer's notes about what the police said to it on March 23, 2023, were reviewed with the Appellant as were the steps the employer took to find out which driver the police were talking about.<sup>15</sup> He denied that any wrong behaviour happened.

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<sup>9</sup> See GD3-16, GD3-18 and GD3-20.

<sup>10</sup> See GD3-29.

<sup>11</sup> See GD3-29 and GD3-30.

<sup>12</sup> See GD3-28.

<sup>13</sup> See GD3-28.

<sup>14</sup> See GD3-30.

<sup>15</sup> See GD3-28.

[23] The Appellant wasn't able to tell me what happened or explain why the customer complained on March 23, 2023.

[24] I prefer the contemporaneous email from the customer and the other documentation from the employer provided by the Commission to the complete denials made by the Appellant.

[25] I find that the Commission has shown it is more likely than not that the Appellant verbally sexually harassed a customer's female employee on March 23, 2023.

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

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

[27] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>16</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>17</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>18</sup>

[28] 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>19</sup>

[29] 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>20</sup>

[30] The Commission says that there was misconduct because the Appellant's inappropriate behaviour caused him to lose his job. He was given two letters with

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<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>17</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>18</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>19</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>20</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

warnings about unacceptable conduct towards customers (although not of a sexual nature). He ought to have known that further unwanted or inappropriate behaviour could result in disciplinary action or termination.<sup>21</sup>

[31] The Commission sent the two warning letters the employer gave to the Appellant which said he behaved in an unacceptable manner when he asked customers for leftover food or discounts on food.<sup>22</sup>

[32] The warning letters also explained that a Delivery Driver must "...uphold the image" of the employer as he is "...a representation of the company". These letters say that if further unacceptable behaviour occurs the Appellant could be disciplined or terminated.<sup>23</sup>

[33] The Appellant said he didn't get earlier warnings about unacceptable behaviour. He says there was an issue about asking for food at restaurants. He never received the warning letters. But the employer told the Commission that the letters were on his employment file and were signed by him.<sup>24</sup> The letters have a signature that looks like "V. R."<sup>25</sup>

[34] The incident on March 23, 2023, was serious enough that the woman called the police. That same day, the customer sent a complaint asking that the driver be removed from his route for making sexually inappropriate comments. The employer figured out that the Appellant was the subject of these complaints.

[35] So, based on this I conclude that the Appellant's behaviour on March 23, 2023, falls within the type of behaviour that he was warned could lead to his dismissal in the two earlier letters. His conduct was willful or so reckless that it amounts to wilfulness.

[36] The Appellant was aware or should have been aware that any further unacceptable behaviour could lead to him losing his job. He had already been given two

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<sup>21</sup> See GD4-4

<sup>22</sup> See GD3-31 and GD3-32.

<sup>23</sup> See GD3-31 and GD3-32.

<sup>24</sup> See GD3-25.

<sup>25</sup> See GD3-31 and GD3-32.

warnings for different types of unacceptable conduct.<sup>26</sup> He testified that he knew sexual harassment was unacceptable.

[37] The Commission has shown the Appellant should have known that further unacceptable behaviour could result in him losing his job. The employer said he was fired for going against its policy on sexual harassment. The Commission didn't provide the employer's sexual harassment policy. But I don't need the policy to find that the Appellant knew (or ought to have known) that sexually harassing a customer's employee was unacceptable behaviour which could result in him losing his job. Even if he was unaware of the policy, he was given two warning letters which said that he could be dismissed if he behaved again in an unacceptable way. One of the letters refers to "harassing customers".<sup>27</sup> This means the Commission has shown that he did something that caused him to lose his job.

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

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

### **Other matters**

[39] At the hearing the Appellant said that his employer could have transferred him to a different route or given him a warning.

[40] I understand that the Appellant thinks that firing him was too severe. He explained at the hearing that he was a good driver who was appreciated by his boss. He thinks his employer could have taken other steps, short of dismissing him.

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<sup>26</sup> See GD3-31 and GD3-32.

<sup>27</sup> See GD3-32.



[41] The courts have said that it isn't for the Tribunal to determine whether dismissal was an appropriate sanction.<sup>28</sup> I am limited to deciding if the conduct that led to the Appellant's dismissal was misconduct within the meaning of the *Employment Insurance Act*.<sup>29</sup> I cannot decide if the measures taken by the employer were appropriate or too harsh.

## Conclusion

[42] The Commission has proven that it is more likely than not that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving Employment Insurance benefits.

[43] This means that the appeal is dismissed.

Emily McCarthy

Member, General Division – Employment Insurance Section

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<sup>28</sup> See *Canada (Attorney General) v Caul* 2006 FCA 251.

<sup>29</sup> See *Canada Attorney General v Marion* 2002 FCA 185; *Canada (Attorney General) v Macdonald* A-12-96.