



Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 1681

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

Decision

Appellant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (585460) dated April 28, 2023
(issued by Service Canada)

Tribunal member: Emily McCarthy

Type of hearing: **IN WRITING**

Decision date: August 16, 2023

File number: GE-23-1431

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

Overview

[3] The Appellant, M. D., lost his job. His employer, X, said that he was let go because he violated its Company Standards Policy² by sleeping on duty in a forklift while it was running (a safety violation). He was also warned about smoking in non-designated areas on company property.

[4] The Appellant says that he didn't sleep in the forklift. He was warming up because it was a cold day, and it was easier than going inside. He says he had no problems and didn't get a written warning that day. He also denies smoking.

[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.

Matter I have to consider first

The Appellant didn't provide more arguments

[6] The Appellant asked me to hold the hearing in writing. Before going ahead, I asked him whether he wanted to add any information to his appeal now that he had a copy of the reconsideration file and the Commission's submissions. I asked him to reply by August 1, 2023.

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

² See GD3-31 to 32.

[7] The Appellant never replied. So, I went ahead with a hearing in writing, and I have made my decision based on the information in the file.

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 must 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] The Appellant was let go because the employer concluded that he had violated the Policy. His termination letter sets out three violations:

- sleeping on duty
- violating safety measures while operating power equipment
- smoking on company premises while not in a designated area³

[11] In addition, the Appellant's Record of Employment says he was let go for "Violation of Company Policies."⁴

³ See GD3-40.

⁴ See GD3-23.

[12] The Appellant denies sleeping on the job and sleeping while operating power equipment. He also says that he didn't smoke. He says he has been wrongly accused. This means he doesn't agree with what the employer says he did.⁵

[13] I find that the Commission has proven that the Appellant was let go because he fell asleep on duty which was against the employer's Company Standards Policy (para. X, p.). He also went against the employer's Safety Measures while Operating Power Equipment. The Company Standards Policy also says that associates must comply with all published policies and procedures of the Company.⁶

[14] The employer's Company Standards Policy says that going against it can lead to termination.⁷ The employer's Procedure on Progressive Discipline⁸ says serious safety violations are Class A violations which can result in immediate termination after an investigation.⁹

[15] The Commission's evidence includes statements from the employer and the employer's well-documented investigation file.¹⁰

[16] The Appellant told the Commission that he got into the forklift to warm up. He didn't fall asleep. He was just keeping warm.¹¹ Someone knocked on the door, and he got out.¹² He says there are cameras that would be able to show that he didn't sleep.¹³

[17] The Appellant also told the Commission he doesn't understand why other employees said he was sleeping when he wasn't. He also told the Commission that he wasn't sick or feeling unwell when he got into the forklift.¹⁴

⁵ See GD2-4.

⁶ See GD3-32.

⁷ See GD3-32.

⁸ See GD3-33 to 39.

⁹ See GD3-39.

¹⁰ See GD3-43 to 57.

¹¹ See GD3-58.

¹² See GD3-64.

¹³ See GD3-58.

¹⁴ See GD3-58.

[18] The evidence shows that it is more likely than not that on January 6, 2023, the Appellant fell asleep in a running forklift. The Commission provided a copy of Rona's investigation file which includes:

- An email dated January 6, 2023, at 8:21 p.m., from a manager on duty saying that at 5:40 p.m., he saw that the Appellant had taken the forklift to his car in the staff parking lot. Later that same evening, at 7:20 p.m. the manager found the Appellant asleep in the running forklift. He woke him and sent him home.¹⁵
- A statement from shipping (January 9, 2023) that says they got a call from another shipping employee telling them that the Appellant had been seen sleeping in the forklift at 7:11 p.m. The writer called the manager on duty, who said that someone had gone to wake the Appellant. The writer got another call 10 minutes later saying the Appellant had fallen asleep again.¹⁶
- A statement from an employee (January 9, 2023) saying that a fellow shipping employee had called to say that the Appellant had fallen asleep in the forklift.¹⁷
- A statement from another shipping employee (January 9, 2023) saying they found the Appellant asleep in the forklift. They woke him, contacted a manager, and found the Appellant asleep again 10 minutes after calling the manager.¹⁸
- Notes from a conversation between three Rona employees and the Appellant on January 9, 2023, during a meeting about what happened on January 6, 2023. The Appellant is said to have acknowledged that he understood the forklift policy and to sleeping in the forklift.¹⁹

¹⁵ See GD3-45 to 46.

¹⁶ See GD3-47.

¹⁷ See GD3-48.

¹⁸ See GD3-49.

¹⁹ See GD3-50 to GD3-55.

[19] The employer provided three separate accounts of the January 9, 2023, follow up conversation between three employees and the Appellant. According to all three statements, the Appellant admitted to falling asleep and said he was very tired. He is also reported to have said that he understood that this was a serious safety issue.²⁰

[20] The investigation file is well documented. I prefer the account of events that is found in the written employee statements to those made by the Appellant to the Commission. The written statements are consistent, were made at the time of the incident and were made by several employees including peers and managers. This is why I prefer them to the Appellant's statements.

[21] This means I have concluded that on January 6, 2023, the Commission has shown that it is more likely than not that the Appellant fell asleep in a running forklift.

[22] Sleeping on duty is prohibited by the employer's Company Standards Policy²¹. The employer says that sleeping while operating equipment (in a running forklift) is a violation of its Safety Measures²². Safety violations fall into Class A violations as set out in the Procedure on Progressive Discipline. The employer let him go because he went against the Company Standards Policy, and he committed a serious safety violation when operating equipment.

[23] There isn't enough evidence to show that the Appellant smoked in non-designated areas after receiving the Progressive Discipline Form on November 15, 2022.²³ This means that the Commission hasn't proven that the Appellant was let go for smoking on the employer's property in a non-designated area.

²⁰ See GD3-50 to GD3-55.

²¹ See GD3-32.

²² See GD3-22, GD3-43, GD3-50 and GD3-55. I note that the Commission did not provide a copy of the employer's Health and Safety Policy.

²³ See GD3-41 and GD3-42.

[24] So, I have concluded that the Appellant was let go because he was sleeping while on duty contrary to the Company Standards Policy. I also accept that sleeping in a running forklift was contrary to the employer's Safety Measures for Operating Power Equipment.

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

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

[26] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁵ 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.²⁶

[27] 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.²⁷

[28] 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.²⁸

Was the Appellant's conduct wilful?

[29] The Appellant's conduct was wilful.

[30] The Commission has established that on January 6, 2023, the Appellant intentionally got into a running forklift to warm up and fell asleep while on duty.

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

²⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁶ See *Attorney General of Canada v Secours*, A-352-94.

²⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[31] The investigation file provided by the Commission shows that the Appellant got into the forklift to warm up. He fell asleep and was woken up by a shipping employee. Ten minutes later he was again found sleeping in the forklift by the same employee.²⁹

[32] The Appellant knew he had fallen asleep in the forklift, but he stayed in it and fell back asleep.

[33] In the investigation notes the Appellant is reported by three individuals as saying on January 9, 2023, that he was very tired and knew he shouldn't sleep in the forklift.³⁰

[34] In speaking to the Commission, the Appellant denied feeling ill or being intoxicated on January 6, 2023. He got into the forklift to get warm because it was easier to warm up that way than go into the store.³¹ He says that he has been wrongly accused.

[35] I prefer the documented accounts provided by the Commission to the statements made by the Appellant. The written statements were made at the time of the incident, they are consistent in their accounts, and were written by several different employees including peers and managers.³²

[36] Looking at all the evidence, I find the Commission has proven that is more likely than not that the Appellant deliberately got into a forklift to warm up and then fell asleep while it was running. He was woken up by another employee but, although he knew he had been asleep, he stayed in the running forklift and went back to sleep. The Commission has proven his conduct was so reckless as to be wilful.

²⁹ See GD3-49 and GD3-47.

³⁰ See GD3-50, GD3-53 and GD3-55.

³¹ See GD3-58.

³² See GD3-43 to 57.

Should the Appellant have known that he could be fired for falling asleep in the forklift?

[37] The Appellant should have known that falling asleep in a running forklift would cause his dismissal.

[38] The Commission says that the Appellant:

- was aware of the Company Standards Policy
- committed two Class A violations (sleeping on duty and violating safety measures)
- should have known his actions could result in his termination

[39] The evidence shows that the Appellant got a written warning for smoking in a non-designated spot on the employer's property in November 2022. This behaviour went against the Company Standards Policy, and he got a warning as part of progressive discipline under the Procedure for Progressive Discipline. I therefore find that no later than November 2022 he was made aware of the employer's Company Standards Policy - some months before the forklift incident.³³

[40] The Appellant says that he didn't have any problems or get any letter or warnings on January 6, 2023. The Company Standards Policy, however, explains that inappropriate conduct can result in disciplinary action up to and including termination without notice. The Progressive Discipline Procedure shows that serious safety violations can result in an investigation that could lead to immediate suspension or termination.³⁴

[41] I have concluded that the Appellant should have known that sleeping on duty and sleeping while operating equipment (forklift) was behaviour that could cost him his job.

³³ See GD3-41 to 42.

³⁴ See GD3-39.

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

[42] The Appellant lost his job because of misconduct.

[43] I find that the Commission has proven that the Appellant got into a running forklift and fell asleep while on duty. He was aware of the Company Standards Policy. He knew or should have known that sleeping on duty and committing a serious safety violation could lead to him losing his job. Ultimately, the act of sleeping while on duty in a running forklift did result in his dismissal.

Other issues

[44] The Appellant argues that he was wrongly dismissed. This isn't something that I can decide. The Tribunal's role is limited to deciding whether the Appellant was let go for misconduct within the meaning of the *Employment Insurance Act*.

[45] This means that the Tribunal doesn't have to determine whether the dismissal or penalty was justified. It only has authority to determine whether the Appellant's conduct amounted to misconduct within the meaning of the law.³⁵

Conclusion

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

[47] This means that the appeal is dismissed.

Emily McCarthy

Member, General Division – Employment Insurance Section

³⁵ See *Canada (Attorney General) v Marion*, 2002 FCA 185.