

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

Decision

Appellant:	X
Representative:	Chaylene L Gallagher
Respondent:	Canada Employment Insurance Commission
Added Party:	C. S.
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (531414) dated September 8, 2022 (issued by Service Canada)
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Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	April 18, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	June 9, 2023
File number:	GE-22-3226

Decision

[1] **I'm dismissing the Employer's appeal.** This decision explains why.

[2] The Employer hasn't met its onus to show that the actions it reported as the reason for the Claimant's dismissal were **wilful**. There's also not enough to show that it warned him he'd lose his job. So, **his actions don't meet the test for misconduct** under the law.

[3] This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) regular benefits.

Overview

[4] The Claimant applied for EI regular benefits on May 2, 2022. The Commission **first decided** that he'd been dismissed for misconduct and refused him benefits.¹ It **reversed this decision** after he requested a reconsideration.

[5] The **Employer is now appealing** the Commission's reconsideration decision. The Claimant is the **Added Party**. He has a direct interest since he could lose his benefits.

[6] To be misconduct under the law governing EI, the conduct must be **wilful**. This means it was conscious, deliberate or intentional. There's misconduct if the Claimant **knew, or should have known**, that his conduct could prevent him from performing his duties and there was a real possibility that he'd be dismissed because of this.²

[7] **The Employer says** it dismissed the Claimant due to attendance issues and fraudulent activity. It says its principal client (T) complained that the Claimant had acted unethically and refused to work with him. It says the RCMP was also investigating.

[8] **The Claimant says** the Employer dismissed him because of false accusations that he'd brought drugs to work. He says the Employer was looking for ways to get rid of him.

[9] **It's up to the Employer to prove** that it dismissed the Claimant for misconduct, as interpreted under the *Employment Insurance Act* (EI Act). That's the law that applies here.

¹ See section 30 of the *Employment Insurance Act* (EI Act).

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

The Claimant wasn't at the hearing

[10] The Claimant wasn't at the hearing on January 30, 2022, where the Employer first presented its evidence. I adjourned the matter until April 18, 2022, to give the Tribunal more time to reach the Claimant, so he'd have the chance to present his position.³

[11] The law says I must proceed with an appeal as quickly as possible.⁴ So, a hearing can go ahead without a party even if the Tribunal can't reach that party.⁵ But it's in the interests of justice for all parties to attend. In this case, the Claimant (the Added Party) had a direct interest in the proceedings since he was at risk of losing his EI benefits.

[12] As documented on file, the Tribunal made many attempts to reach the Claimant by courier, regular mail and phone. The Tribunal made these attempts before each segment of the hearing. I also delayed starting the hearing on each occasion while the Tribunal tried to reach him. As of the date of this decision, he still hasn't responded to the Tribunal.

[13] The Notices of Hearing sent by courier and mail were returned as undeliverable. So, the Claimant may have moved. The phone number on file is no longer in service. But the emails the Tribunal sent to the Claimant's email address on March 9, 2022, and March 16, 2022, didn't bounce back. So, it's more likely than not that this information is still current.

[14] Despite the Tribunal's emails, the Claimant wasn't at the hearing that I reconvened on April 18, 2022. Since these emails went through, I think it's more likely than not that he was aware of the hearing set for that date.

[15] So, the hearing took place as scheduled, but without the Claimant.

Issue

[16] Did the Claimant lose his job because of misconduct?

³ The Tribunal may reschedule a hearing if that's necessary for a fair hearing. See section 43(3) of the *Social Security Tribunal Rules of Procedure* (Rules).

⁴ See section 6 of the Rules. I must apply these rules flexibly as the circumstance of each case require.

⁵ Section 9(2) of the Rules sets out this point.

Analysis

[17] To answer this question, I must decide two things. First, I have to decide **why** the Claimant lost his job. Then, I have to decide **whether that reason is misconduct** under the EI Act. It's **not my role** to decide if the Employer was right to dismiss the Claimant.⁶

Why did the Claimant lose his job?

[18] I find that the Claimant lost his job because he didn't keep to the firm's **attendance** policy and there'd been complaints that he'd dealt **fraudulently** with customers.

[19] In making this finding, I've had to rely mainly on the Employer's evidence since the Claimant's made no submissions since his reconsideration request. I've considered all the Employer's evidence as it provided in the following different formats.

[20] **The letter of termination** dated May 2, 2022, documents the following issues as the reasons for the Claimant's dismissal:

- Being **late or missing work** on six dates between April 7, 2022, and April 29, 2022, "with no communication" (note: the absence on April 27, 2022, was "**with** approval").
- Committing **time fraud** on April 14, 2022, when he arrived at the office mid-afternoon and asked Head Office to adjust his arrival time to 9:30 am.
- **Falling asleep** while assisting a customer on April 28, 2022.
- Violating the company's **staff safety policy** after co-workers complained they didn't feel safe with him because they'd seen drugs in his backpack.
- Customer **fraud complaints**: accessing a friend's account multiple times (noted on January 30, 2022); activating services without a customer's consent (April 21, 2022); advising a customer to deactivate their account and reactivate in a spouse's name (April 21, 2022, **coached** on this issue on January 15, 2022).
- Violating the **use of company property** policy by having his own and friends' IDs on his laptop (elsewhere described as creating fake vaccination certificates)

⁶ *Canada (Attorney General) v Marion*, 2002 FCA 185.

[21] The Employer later told the Commission that the Claimant was also dismissed for **stealing** serial numbers for a phone and a watch that were the company's property.⁷ During this call with the Commission, the Employer said the incident that prompted the termination was the alleged **drug possession** reported by co-workers.

[22] **In its appeal**, the Employer gave its reasons for the dismissal as follows:

- "Multiple breaches in policy resulting in termination according to our policy manual were breached, signed acknowledgement by Christopher and continued to happen (*sic*)."
- "Counts of theft, fraud and staff safety were uncovered by our **internal** investigation."

[23] The Employer's appeal contains excerpts from the company's Policy Manual relating to the above three issues: theft, fraud and staff safety.

[24] **At the hearing**, the Employer's Director of Operations testified that it didn't dismiss the Claimant for poor performance, improper use of his laptop, possession of drugs at work (staff safety) or any of the other reasons it had previously given for his termination.

[25] **The Employer** says the Claimant's dismissal was already in motion based on other issues. It says it dismissed the Claimant due to **poor attendance** and **fraud investigations** by T and by the RCMP. The Employer says T would no longer work with the Claimant. So, he couldn't do his job.⁸

[26] **The Claimant has** said the Employer dismissed him because he was earning more than his managers.⁹ I see no evidence to support this argument.

[27] So, I'm accepting the Employer's **sworn testimony** as the final word on why it dismissed the Claimant. I've also put weight on this testimony because it was given with the benefit of legal counsel.

⁷ See GD3-37 and GD3-40.

⁸ The Employer gave this testimony with the benefit of legal counsel.

⁹ The Employer must show that the alleged misconduct was the real reason for the dismissal, and not an excuse (see *Davlut v Attorney General of Canada*, A-241-82).

[28] That's why I find that the Claimant lost his job due to poor attendance and fraud allegations by T. So, these are the only issues I'll consider.

Are the reasons for the Claimant's dismissal misconduct under the law?

[29] No. There's **not enough evidence** to prove that the reasons for the Claimant's dismissal amount to **misconduct under the EI Act**. An employer may decide that a dismissal amounts to misconduct under its internal policies and procedures. But that's not necessarily the same as misconduct under the law that governs EI.

[30] To be misconduct under that law, the conduct has to be **wilful**. This means conduct that was **conscious, deliberate or intentional**.¹⁰ Misconduct also includes conduct that's so reckless it's almost wilful.¹¹ A claimant doesn't have to intend to do something wrong for the behaviour to be misconduct under the law.¹²

[31] There's misconduct if the Claimant **knew or should have known** that his conduct could prevent him from performing his duties and there was a real possibility that he'd be dismissed because of this.¹³ In other words, a key question is: **was he warned that he'd be dismissed if the named conduct continued?**

[32] **The Employer has the burden of proof** to show that the Claimant's actions amounted to misconduct under the EI Act. It has to prove this on a balance of probabilities.¹⁴ This means it must show it's **more likely than not** that the Claimant lost his job because of misconduct.

[33] Considering the severe penalty that follows a finding of misconduct—loss of EI benefits—I can only make this finding based on **clear evidence**.¹⁵ I can't rely on the Employer's opinion alone.

[34] For the following reasons, I find that I don't have that clear evidence.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹² See *Attorney General of Canada v Secours*, A-352-94.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁵ See *Crichlow v Attorney General of Canada*, A-562-97.

Were the Claimant's actions wilful, did they stop him doing his job and was he warned that he'd be dismissed?

[35] I find there's insufficient evidence that the Claimant's actions met this test on the two reasons why the Employer says it dismissed him: **lateness** and **fraudulent activity**.

[36] I've also noted an anomaly. The Employer says the Claimant signed a document acknowledging "termination **if this continued which it did continue**," but the evidence only shows he signed his acceptance of the rules in the Policy Manual when he started his job. There's no evidence that he'd signed any warnings about his conduct since that.

Attendance

[37] I find that **chronic lateness** is the attendance issue in this appeal. The Employer hasn't provided evidence that missing days of work was a chronic problem too. The termination letter only listed a one-day absence without approval and a one-day absence with approval.

[38] The Claimant denied in his reconsideration request that he'd been chronically late. He said there was a culture of lateness in the workplace. He argued that he'd been more prompt than most other employees.

[39] Whatever the behaviour of other employees, I note that the Claimant signed the company's Policy Manual when he was hired. That document says employees have a duty to be on time and can be dismissed for not respecting this rule. Employers have the right to expect their employees to show up for work and be on time.

[40] I accept the Employer's evidence that the Claimant was often late, as its records show.¹⁶

[41] I'm not condoning the Claimant's lateness, but I question whether the Employer has proved that it was **wilful**, that is, conscious, deliberate or intentional.

¹⁶ See the list of late arrivals in the Employer's GD07 file.

[42] The Employer says the company was aware that the Claimant was struggling with mental health issues after recovering from an addiction. It says it wanted to help him.¹⁷ The following evidence proves this.

[43] The Employer has documented erratic behaviour. It's said the Claimant sometimes appeared incoherent and troubled. It's reported that he fell asleep at work on more occasions than the one it listed. It's given examples of some bizarre communications that he sent reporting a break-in at the store that had never happened.

[44] On April 27, 2022, a few days before the Claimant's dismissal, the Employer's records state that it decided in consultation with the District Manager "to offer time off or altered work tasks to ensure we could provide the best support in the hopes to eliminate anything that could assist in the decline of his [the Claimant's] mental health (*sic*)."¹⁸

[45] Given this awareness of the Claimant's difficulties, I find that the Employer **hasn't proved it's more likely than not** that his lateness was **wilful**. Lateness due to a health condition isn't wilful conduct. That's the **first part of the test for misconduct under the EI Act**.

[46] There's also no evidence that the Claimant's lateness stopped him doing his work. Employees have a duty to ensure that their actions don't prevent them from performing their work duties. **That's the second part of the misconduct test**.

[47] At the hearing, the Employer dismissed the Claimant's argument that he'd been a top performer but conceded that his work performance had been acceptable. On that occasion, the Director of Operations confirmed that poor performance wasn't the reason for the Claimant's dismissal.

[48] On the Claimant's **lateness**, the Employer's evidence of multiple late arrivals ranges from March 2, 2021, to April 28, 2022. This means that it tolerated the Claimant's late arrivals for over a year before it dismissed him. It also tolerated infractions of its

¹⁷ Case law says it's wilful to be late or absent due to drug or alcohol addiction. But the Employer's said it didn't dismiss the Claimant for allegedly having drugs in his backpack. So, addiction isn't an issue here.

¹⁸ See the Employer's summary of events at GD3-44.

policy that “purposely submitting inaccurate adjustments to time clock may result in disciplinary actions, including termination.”¹⁹

[49] As well, texts in the evidence between the Claimant and a manager suggest a lax approach to his attendance issues. These messages range from “It’s not like you to want to miss work,” “Take the time you need,” and “It’s totally OK.”²⁰

[50] **Case law says an employee hasn’t committed misconduct where an employer, by its inaction, tolerates practices that contravene its own policies.**²¹

[51] There’s also no proof that the Claimant received a written warning that he’d be dismissed if his lateness continued. Only **one** of the three handwritten Notices of Warning in the evidence mentions lateness. It’s a **first verbal warning** on March 18, 2021, over a year before the Employer dismissed him.²²

[52] There are only two more handwritten warnings on file. One is a **first verbal warning** on March 30, 2021, for failing to complete store cash out properly at the end of the business day. The last one is a **first verbal warning** dated December 19, 2021, for letting a customer leave the store with a device before activation was complete.

[53] There are other dates and infractions on the Employer’s typed list where there’s **no corresponding evidence of a Notice of Warning, verbal or written.**

[54] The Claimant’s said he’d had **training** conversations but never knew they were warnings he’d be dismissed. And the Employer has referred to **coaching** on some issues.

[55] This makes it more likely than not that there were coaching sessions rather than formal meetings where the Employer warned the Claimant that he’d be dismissed. According to the Employer’s list, the Claimant was only told on one occasion that it was a final warning. This was a conversation on March 13, 2022, about assisting friends with their accounts on his days off.

¹⁹ See GD3-63.

²⁰ See GD7-244 to GD7-246.

²¹ CUB 72063, confirmed by *Attorney General of Canada v Gagné*, 2010 FCA 237.

²² See these three Notices of Warning at GD7-216 to GD7-221.

[56] There are **no documented warnings about lateness after March 2021**, only mentions in the Employer's list of lateness starting in March 2022.

[57] Being aware that there's a **real** possibility of being dismissed is the **third part of the misconduct test**. Since the Claimant wasn't warned and his lateness was mostly tolerated, it doesn't meet the test for misconduct under the EI Act.

[58] Next, I'll look at the alleged fraudulent activity.

Fraudulent activity

[59] The Employer hasn't met its onus to show, on a balance of probabilities, that the Claimant wilfully engaged in fraudulent activity. There's insufficient evidence about the fraud allegations to show that his actions met the test for misconduct under the EI Act.

[60] I've based this finding on the following considerations:

- The evidence shows that T **reinstated** the Claimant's work credentials after investigating him for improper or unethical dealings with customers. I find it unlikely that T would have reinstated the Claimant's access if its investigations had uncovered fraud.
- There's no evidence that the RCMP followed through with an investigation. There's the name and badge number of an officer who'd made initial enquiries but that's not enough to show that the Claimant acted fraudulently.
- The Employer only gave its employees a mild rebuke on April 11, 2022, for one of the actions it described as fraud in the Claimant's case: "Hey guys, effective immediately, we are not to tell existing customers to cancel services and sign up in a spouses/friend/acquaintances name (*sic*)."²³
- This wording supports the Claimant's argument that managers had previously tolerated this practice, if not actively encouraging it.
- There's no verbal or written Notice of Warning in the evidence about fraud.

²³ See GD7-231

- A text dated April 18, 2022, two weeks before the Claimant's dismissal, thanks him for his efforts: "Hey! Store looks good, inventory balanced and so did Cashout (*sic*), even your desk is tidy. Thank You!"
- An employee who is praised like this is unlikely to know that he's in danger of being dismissed.

[61] So, I find that the Employer hasn't shown that the Claimant performed fraudulent acts **wilfully**. Since T reinstated him, the Employer hasn't shown that the Claimant's actions **stopped him doing his job**. There's also no evidence that the Employer **warned** him he'd be **dismissed** over his dealings with T's customers. And he couldn't have known from the mainly positive interactions with his managers that he'd be dismissed.

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

[62] I find that the Claimant didn't lose his job because of misconduct, as interpreted under the EI Act.

[63] The Employer says it brought this appeal not because it wants the Claimant to lose his EI, but because he's started civil proceedings for wrongful dismissal. As I emphasized at the hearing, my only role is to decide whether the reasons for the Claimant's dismissal amount to misconduct under the EI Act. I make no finding on whether he was wrongfully dismissed.

Conclusion

[64] The Employer hasn't met its onus to show, on a balance of probabilities, that the Claimant lost his job because of misconduct under the EI Act. So, he's not disqualified from receiving EI regular benefits.

[65] This explains why I'm dismissing the Employer's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section