



Citation: *AE v Canada Employment Insurance Commission*, 2023 SST 870

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

Decision

Appellant: A. E.
Representative: Ayesha Jabbar

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (556083) dated December 1, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference

Hearing date: June 5, 2023

Hearing participants: Appellant
Appellant's representative
Appellant's support person
Interpreter

Decision date: July 13, 2023

File number: GE-23-7

Decision

[1] I am granting A. E.'s appeal.

[2] I find her employer violated her right to be free from discrimination in employment when it dismissed her.

[3] So the Canada Employment Insurance Commission (Commission) hasn't proven she lost her job because of misconduct. In other words, she didn't cause her unemployment.

[4] This means the Commission should pay her Employment Insurance (EI) benefits, as long as she meets all other conditions of eligibility for those benefits.¹

Overview

[5] A. E. (the Appellant) lost her job as housekeeper with a supportive housing provider for seniors (employer). It was a unionized job.

[6] Her employer said it let her go because she falsified records saying she completed her work duties when she didn't. This breached the employer's policies.

[7] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct under the *Employment Insurance Act* (EI Act). So the Commission didn't pay her EI regular benefits.

[8] The Appellant says there is no misconduct. She says her employer lied to the Commission. She always did her job duties. She never made up records. She says her employer harassed her and discriminated against her—this is the real reason it terminated her. She filed a grievance challenging her termination, which she won.

[9] I have to decide if the Appellant lost her job because of misconduct under the EI Act.

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

Matter I have to consider first

Documents sent to the Tribunal after the hearing

[10] At the hearing, the Appellant said she filed a grievance challenging her employer's termination of her employment. That grievance settled—and she won. The Appellant's Representative said she hadn't sent the settlement agreement to the Tribunal because she thought the confidentiality section said she wasn't allowed to do that. When I asked her, she said she hadn't checked this with the union's lawyer.

[11] I told the Appellant I thought the grievance might be relevant to her EI appeal. So I set a deadline for her to submit the grievance if she wanted to do that. And I suggested her Representative might want to speak to the union lawyer.

[12] I said they could refer to the settlement agreement during the hearing.

[13] The Representative sent the Tribunal the settlement agreement by the deadline.² And the Tribunal sent it to the Commission and gave it an opportunity to respond.

[14] I will accept the grievance the Appellant sent to the Tribunal after the hearing, for three reasons:

- I gave her the opportunity to send it in
- it is relevant to the two legal issues I have to decide—the reason her employer dismissed her and whether that reason is misconduct
- it would not be unfair to the Commission because the Commission had an opportunity to respond

[15] So I will consider the grievance when I make my decision.

² See GD8.

Issue

[16] Did the Appellant lose her job because of misconduct?

Analysis

[17] To answer this question, I have to decide two things:

- the reason the Appellant lost her job
- whether that reason to be misconduct under the EI Act.

The reason the Appellant lost her job

[18] I find that the Appellant lost her job because her employer discriminated against her.

[19] The Commission has to prove that the Appellant lost her job because of misconduct. It must prove to the Tribunal the employee's alleged misconduct was **the reason** for the dismissal **not the excuse** for it.³ 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 her job because of misconduct.⁴

– What the law says about settlement agreements in misconduct cases

[20] The Appellant says the settlement agreement proves her employer didn't dismiss her for the reason it told the Commission. She says it dismissed her for another reason, which isn't misconduct under the EI Act.

[21] The law says I need to consider the settlement agreement.

³ See *Minister of Employment and Immigration v Bartone*, A-369-88; *Davlut v Canada (Attorney General)*, A-241-82, leave to SCC refused [1983] SCCA 398. Courts have referred to this part of the legal test for misconduct as the **causal relationship** between the conduct the employee is accused of and their loss of employment. See for example *Canada (Attorney General) v Cartier*, 2001 FCA 274; *Canada (Attorney General) v Brissette*, A-1342-92 (FCA).

⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[22] The mere existence of a settlement agreement doesn't determine whether an employee was dismissed for misconduct.⁵ The Tribunal has to assess the evidence—including what the settlement agreement says—and come to a decision.

[23] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence **that would contradict what the employer told the Commission about the reason it dismissed the employee** when the Commission investigated that issue.⁶

[24] Finally, the Tribunal is not bound by what the employer, an appellant, or another party says about the grounds used to dismiss an employee.⁷

– **What the Commission, the Appellant, and the settlement agreement say**

[25] The Commission accepted the evidence the employer gave to it.⁸ The Commission says that evidence shows the Appellant didn't perform her duties. And she falsified her daily worksheet. Her conduct breached the employer's policies and her employment contract. The Commission argues she committed misconduct when she signed off that she performed her duties when she wasn't. She should have known doing that could result in discipline, including termination of her employment.

[26] The employer told the Commission it had received complaints from residents. That's how it found out the Appellant wasn't performing her duties. But it couldn't give the complaints to the Commission because this would violate residents' confidentiality.⁹

⁵ See *Canada (Attorney General) v Morris*, A-291-98, leave to SCC refused, [1999] SCCA No 304; *Canada (Attorney General) v Boulton*, A-45-96 (FCA); *Canada (Attorney General) v Perusse*, A-309-81 (FCA).

⁶ See *Canada (Attorney General) v Morrow*, A-170-98 (FCA); *Canada (Attorney General) v Boulton*, A-45-96 (FCA).

⁷ See *Canada (Attorney General) v Morris*, A-291-98, leave to SCC refused, [1999] SCCA No 304; *Canada (Attorney General) v Boulton*, A-45-96 (FCA); *Canada (Attorney General) v Perusse*, A-309-81 (FCA).

⁸ See the Commission's representations at GD4-6.

⁹ See Commission's notes of its call with the employer at GD3-21.

[27] The employer used code M (dismissal or suspension) on the original record of employment.¹⁰

[28] The employer says the Appellant refused to sign the letter of termination when her employer asked her to. Because she said she needed to see her lawyer and have the document translated.¹¹

[29] The Appellant told the Commission her employer made up the information about neglecting her duties—in other words, her employer was lying.¹² In her reconsideration request (filled out by her union rep) she said she is grieving the termination based human rights (harassment and discrimination) concerns.¹³

[30] The Appellant testified at the hearing using a professional interpreter because English isn't her first language. She testified that until the day it fired her, her employer never raised an issue about her not doing her duties or making up reports. She said these reasons were "fabricated."

[31] She testified that coming from an Arab culture, elderly people have a certain place in society. So she always treated the residents with compassion and respect. She said her employer never disciplined her and gave her good performance reviews. She trained four housekeepers when they started. She was shocked when she was fired. There was no investigation. And she says her employer fired her after she complained to the executive director about another employee, who was calling and texting her repeatedly about providing medical documents to show she was away recovering from COVID. She complained about this "harassment."

¹⁰ See GD3-44.

¹¹ See the termination letter at GD3-216, including the employer's note about the Appellant refusing to sign it.

¹² See the Commission's notes of its call with the Appellant, who used her husband to translate, at GD3-42.

¹³ See GD3-47. See also the letter of support the union wrote to try to help the Appellant get EI benefits, at GD3-49. That letter says the same thing as the reconsideration request.

[32] I have reviewed and considered the terms of the settlement agreement. Here are the terms that provide new facts (evidence) that contradict what the Commission says about the reason the Appellant lost her job:¹⁴

- it resolves all issues arising out of grievor's employment, end of that employment, and the grievance
- employer shall pay the grievor \$10,000 as general non-pecuniary damages in regards the grievor's claims of harassment and discrimination in violation of the Ontario Human Rights Code, and not for loss of income
- termination is rescinded and grievor deemed to have been permanently laid off, and the employer will issue a new record of employment reflecting permanent lay-off
- the parties agree the settlement meets the substantive and procedural provisions of section 45.1 of the Human Rights Code

[33] The employer gave the Appellant the revised record of employment, which she sent to Tribunal.¹⁵

[34] The Commission says the revised record of employment doesn't alter the evidence presented in the file. The Appellant hasn't presented any new facts that show the previous evidence on file is incorrect.¹⁶

¹⁴ See GD8.

¹⁵ See GD6.

¹⁶ See the Commission's supplementary representation, GD7.

– **The conduct alleged by the employer wasn't the reason the Appellant lost her job**

[35] The conduct alleged by the employer wasn't the reason the Appellant lost her job—it was an excuse.

[36] I accept and prefer the Appellant's evidence about this issue to the Commission's evidence, for the following reasons:

- the Appellant testified with a professional interpreter at the hearing and, for the first time, was able to explain in detail the events that led up to her dismissal and say why she disagreed with the evidence the employer gave the Commission
- the Appellant was forthcoming and detailed in her testimony, and I have no reason to doubt what she said
- the Appellant's evidence is consistent—she said the same thing to the Commission and the Tribunal, and her story didn't change over time
- the employer didn't provide the Commission with the alleged complaints or reports the Appellant allegedly falsified, or any other documentary evidence it hadn't itself created to support and document the Appellant's termination
- the settlement agreement provides new evidence that directly contradicts the Commission's evidence from its investigation (and position taken by the Commission as a result of its investigation)
- I have no reason to doubt the settlement agreement is authentic

- the settlement agreement supports the Appellant’s evidence and argument that her employer’s termination of her employment is discrimination under Ontario’s *Human Rights Code* because:
 - the Appellant was successful in her grievance
 - the settlement specifically refers to the harassment, discrimination, and the *Human Right Code* and says it resolves the grievance the Appellant brought on those grounds
 - the employer agreed to pay her a significant amount of money—for a case based on human rights law—in general damages to compensate her for discriminating against her
 - the settlement doesn’t include a standard “no admission of liability” to the protect the employer

[37] Based on the evidence I have accepted, I find the real reason she lost her job was because her employer discriminated against her. In other words, her employer fired her for reasons that violated her right to be free from discrimination in employment guaranteed under Ontario’s *Human Rights Code*.

[38] So I also find the Commission hasn’t proven a **causal relationship** between the conduct the Appellant is accused of and her loss of employment.¹⁷

[39] This means the Commission hasn’t proven the Appellant was dismissed for misconduct under the EI Act.

[40] So I don’t need to consider whether the reason the Appellant lost her job is misconduct under the EI Act.

¹⁷ See *Canada (Attorney General) v Cartier*, 2001 FCA 274; *Canada (Attorney General) v Brissette*, A-1342-92 (FCA).

Conclusion

[41] The Commission hasn't proven the Appellant lost her job for a reason the EI Act considers to be misconduct.

[42] This means the Appellant can get EI benefits, so long as she meets all other conditions she needs to meet.

[43] So I am granting her appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section