



Citation: *HP v Canada Employment Insurance Commission*, 2024 SST 196

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

Decision

Appellant: H. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (613581) dated September 22, 2023 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: In person

Hearing date: January 16, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: January 22, 2024

File number: GE-23-2977

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because he didn't follow the workplace violence and harassment policy.

[4] 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.

[5] The Appellant disagrees. He says that there was no misconduct because his actions weren't wilful, as he was acting in self-defence. He says he was following the policy, by bringing his concerns to management.

Issue

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

Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to 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.

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

Why did the Appellant lose his job?

[8] I find that the Appellant lost his job because the employer says that he didn't follow the workplace violence and harassment policy.

[9] The Commission and the employer say that the Appellant lost his job because he didn't follow the workplace violence and harassment policy.

[10] The Appellant agrees that, in part, he lost his job because the employer says that he didn't follow the workplace violence and harassment policy. He says that the other reason why he lost his job is because he filed several grievances against the employer.

[11] In his application for benefits, the Appellant says that he was let go because the employer accused him of violence or inappropriate behaviour.²

[12] The Appellant testified that he was let go, in part, because the employer says that he didn't follow the workplace violence and harassment policy. He says that the other reason why he lost his job is because he filed several grievances, including a grievance that says that he has been subjected to violence or harassment at work.

[13] The employer issued a Record of Employment (ROE) saying that the Appellant was dismissed.³

[14] The employer also issued a dismissal letter. It says that the Appellant was dismissed because he didn't follow the workplace violence and harassment policy.⁴

[15] I find that the Appellant lost his job because the employer says that he didn't follow the workplace violence and harassment policy. I rely on the Appellant's application for benefits, along with the ROE and dismissal letter issued by the employer. At the hearing, the Appellant agreed that at least part of the reason why he was let go is

² See GD3-7 and 8.

³ See GD3-20.

⁴ See GD3-58 and 59.

because the employer says that he didn't follow the workplace violence and harassment policy.

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

[16] The reason for the Appellant's dismissal isn't misconduct under the law.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[18] 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.⁸

[19] 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.⁹

[20] The Commission says that there was misconduct because:

- the Appellant was aware of the workplace violence and harassment policy and the consequences for not following the policy
- although the Appellant says he acted in self-defence, his act of violence goes against the policy
- the Appellant's act was wilful and deliberate

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the Appellant knew or should have known that he could lose his job for going against the policy

[21] The Appellant says that there was no misconduct because his actions weren't wilful, as he was acting in self-defence. He says he was following the policy, by bringing his concerns to management.

[22] The employer issued a dismissal letter, dated July 4, 2023. It says it investigated the events of June 27, 2023. It says that there was a physical altercation between the Appellant and a co-worker. It says that the Appellant admitted to physically striking the co-worker. It says that the Appellant's behaviour escalated the situation.¹⁰

[23] The employer told the Commission that it investigated the events of June 27, 2023. It says that multiple witnesses saw the Appellant and co-worker punch each other. It says that the employer has zero-tolerance to workplace violence and harassment.¹¹

[24] The employer's workplace violence and harassment policy says:¹²

- the policy applies to all employees
- workplace violence and harassment includes physical force, threats of physical force, verbal abuse (swearing, insults or condescending language), and any behaviour that demeans, embarrasses, humiliates, annoys, or alarms
- the employer will take whatever steps are reasonable to protect its workers from workplace violence and harassment
- employees must report any situation of workplace violence and harassment, including bringing the matter immediately to the attention of their supervisor

¹⁰ See GD3-58 and 59.

¹¹ See GD3-23.

¹² See GD3-52 to 57.

- the employer will investigate and act on all complaints of workplace violence and harassment
- employees that don't follow the policy may be subject to disciplinary action, including dismissal
- the employer will not tolerate any form of retaliation against a person who reports workplace violence or harassment

[25] The Appellant worked for the employer for 17 years as a crane operator or a labourer.

[26] The Appellant says that the following took place on June 27, 2023:

- the Appellant was sweeping
- the Appellant asked his supervisor if his coworkers could put the cement reveal over the side of the bed, instead of throwing it back into the bed, as it would make it easier for those sweeping
- a co-worker approached the Appellant and his supervisor, and verbally attacked the Appellant by swearing, calling him lazy, and saying "you don't do anything"
- the supervisor told the Appellant to go back to work, and the Appellant started to walk away
- the co-worker picked up some reveal, knocked the Appellant to the ground, and threw the reveal at him
- the co-worker punched the Appellant in the head and ribs repeatedly
- the Appellant told the co-worker to stop hitting him several times
- the co-worker wrapped his hand in the Appellant's vest, so he couldn't get away

- the Appellant pushed the co-worker and punched him once in self-defence, as he was getting hurt and couldn't get the co-worker off
- another co-worker came in-between the two, ending the altercation
- the Appellant's supervisor was present during both the verbal attack and physical altercation, he didn't intervene, and he told the Appellant to go back to work

[27] The Appellant says that, had his supervisor diffused the situation when he was verbally attacked by the co-worker, the physical altercation wouldn't have happened.

[28] The Appellant disagrees with the employer's statement that his behaviour escalated the situation. He says that he was talking to his supervisor about his concern. He says that it was reasonable for him to request to have his co-workers put the cement reveal over the side of the bed.

[29] The Appellant says that he is aware of the workplace violence and harassment policy, and the consequences for not following the policy. He says that he attended an annual meeting in January 2023, where the employer reviewed the policy with its employees.

[30] The Appellant says that he didn't breach the policy. He says that his actions weren't wilful. He says that he didn't start the altercation. He says that he didn't go to work with intent. He says that he acted in self-defence.

[31] The Appellant says that he was being bullied in the workplace, since 2022. He says that the bullying started because his co-workers accused him of writing a letter to management that said that his co-workers were horseplaying around the crane. They also accused him of calling the Ministry of Labour about the crane.

[32] The Appellant submitted reports to his employer, including a grievance, where he says that the employer failed to provide the Appellant with a harassment-free work

environment, due to verbal abuse.¹³ He says that the employer had its employees apologise to him for their abusive comments, but the employees weren't disciplined, and the harassment continued.

[33] The Appellant says that he sought help from his doctor, due to the bullying. He submitted a letter from his doctor that says the Appellant is unable to work December 6, 2022, to January 3, 2023, due to mental health.¹⁴

[34] The Commission relies on a case from the Federal Court of Appeal. In this case, the claimant lost his job after slapping a co-worker who insulted a member of his family. The Court said it isn't relevant to consider that the claimant acted on the spur of the moment or because he was provoked. It said that the claimant should have known that his conduct could lead to his dismissal.¹⁵ I think this case can be differentiated, based on the facts, as the claimant in this case wasn't acting to defend his own physical safety like the Appellant.

[35] While I'm not bound by decisions of the Umpire, there is a particular decision which is very similar to the facts in this case. In that decision, the Umpire said that self-defence, without the use of excessive force, isn't misconduct. In this case, the claimant was physically struck by his co-worker and struck back in defense. The Umpire said that the employer's determination that the claimant violated a zero-tolerance policy against fighting doesn't determine misconduct. It says that the claimant wasn't the aggressor.¹⁶ I'm persuaded by this decision and I'm adopting its reasoning.

[36] I find that the Appellant didn't follow the employer's workplace violence and harassment policy, as he pushed and punched a co-worker. The Appellant agrees that he engaged in this conduct.

[37] However, I find that the Commission hasn't proven that there was misconduct, because the Appellant's actions weren't wilful, as he was acting in self-defence. His

¹³ See GD2A-25, 30 and 35.

¹⁴ See GD2A-15 and 17.

¹⁵ See *Canada (AG) v Kaba*, 2013 FCA 208.

¹⁶ See CUB 69100.

actions were purely a natural defence response versus a deliberate act. I rely on the Appellant's testimony, which I find to be credible and consistent with the appeal file. My findings are based on the following:

- the Appellant tried to stop the altercation by telling the co-worker to stop hitting him
- the Appellant wasn't able to walk away from the situation, as the co-worker had a hold on his vest
- the altercation took place in front of the Appellant's supervisor, who didn't intervene
- the Appellant's supervisor also didn't intervene when the Appellant was verbally attacked by the co-worker preceding the physical altercation, which appears to be against the employer's policy to take whatever steps are reasonable to protect its workers from workplace violence and harassment
- the Appellant acted in self-defence, to protect himself from further harm, as his employer wasn't taking action to protect him
- his actions of pushing and punching the co-worker once, weren't an excessive use of force

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

[38] Based on my findings above, I find that the Appellant didn't lose his job because of misconduct.

Conclusion

[39] The Commission hasn't proven that the Appellant lost his job because of misconduct. Because of this, the Appellant isn't disqualified from receiving EI benefits.

[40] This means that the appeal is allowed.

Kristen Thompson
Member, General Division – Employment Insurance Section