[TRANSLATION]

Citation: *RS v Canada Employment Insurance Commission*, 2024 SST 367

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. S.
Representative:	Martin Savoie
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (603906) dated September 26, 2023 (issued by Service Canada)

Tribunal member:	Manon Sauvé
Type of hearing:	In person
Hearing date:	February 29, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	March 6, 2024
File number:	GE-23-2806

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant lost his job because of misconduct. This means that the Appellant isn't disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant has worked as a forklift driver for a commercial beer brewer since 2022. On May 10, 2023, he was let go because he went against the employer's alcohol policy.

[4] He applied for EI benefits with the Commission. After an investigation, the Commission refused to pay him benefits because he lost his job for misconduct.

[5] The Commission says that the Appellant went to work under the influence of alcohol. The Appellant admitted to drinking two beers before going to work. Because of his tasks, he could have put his co-workers at risk. He went against the employer's zero-tolerance policy.

[6] The Appellant disagrees. The Commission hasn't shown that the act of drinking two beers before his shift amounts to misconduct. The Appellant says that he wasn't under the influence of alcohol when he went to work. He didn't violate the employer's policy.

Issue

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

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

Analysis

[8] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to decide 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?

[9] I note that the Appellant has worked for a commercial beer brewer since July 2022. His job is to transport crates using a forklift.

[10] On May 10, 2023, he showed up for work before his shift, which began at 10 p.m. He chatted with co-workers while drinking a few cups of coffee.

[11] During his shift, a co-worker dropped several cases of beer. Although it wasn't part of his duties, he helped his co-worker pick up the cases that had spilled.

[12] Around midnight, his supervisor called him for a meeting. According to the supervisor, co-workers had noticed that he smelled of alcohol. The Appellant was put on leave because he could not drive his forklift under the influence of alcohol.

[13] The Appellant met with his supervisor. He explained that he had had two beers between 4:00 p.m. and 6:30 p.m. during his dinner. His union representative was with him at this meeting. His supervisor told him that he could not work after consuming alcohol. He had to go home. His supervisor asked him not to start again.

[14] When the Appellant went to work the next day, he was given a dismissal letter. He was accused of going against the employer's policies and procedures on alcohol consumption. This behaviour isn't tolerated, and it is a serious misconduct.

[15] When he testified before the Tribunal, the Appellant maintained his version of the facts. But he denied telling his employer that it wasn't the first time he had had a beer before going to work.

[16] He also acknowledged that he had completed training on the alcohol policy. When asked whether he knew what the expression [translation] “under the influence of alcohol” meant, he answered, “no.” And no one had told him what the expression meant.

[17] The union representative also testified at the hearing. He confirmed that the Appellant had a meeting on May 10, 2023. The representative attended the meeting, which took place in an office. He was close to the Appellant. He didn’t smell alcohol, the Appellant didn’t have difficulty speaking, and his actions were normal. Also, the Appellant’s supervisor didn’t mention that he would be let go. He asked the Appellant not to start again.

[18] The Appellant completed training on the alcohol policy when he was hired. Each year, he had to complete an updated training. When asked about the meaning of the expression “under the influence of alcohol,” used by the employer in the policy, he said that no one had told him what it meant. He understands that there is zero-tolerance for consuming alcohol in the workplace. No one told him he wasn’t allowed to consume alcohol before going to work. What he understood was that he could not go to work under the influence of alcohol—in other words, over the limit the law allows.

[19] The union secretary also testified at the hearing. He has worked for the employer for 25 years. He has been union secretary for three years. He completed the training and understood that he could not consume or be under the influence of alcohol at work. He agrees with the union representative that you should not exceed the allowable limit.

[20] The Commission says that the Appellant violated his employer’s policy by consuming alcohol a few hours before going to work. The employer’s policy says that going to work under the influence of alcohol, consuming alcohol during working hours (except as permitted by the policy), or committing any other violation of this global policy on employee responsibility for alcohol consumption may result in disciplinary action,

including termination of employment.[2] So, the Appellant went against the zero-tolerance policy.

[21] The Appellant's representative says that the Appellant didn't commit the act he is accused of, namely going to work under the influence of alcohol.

[22] First, the employer didn't ask the Appellant to take a test to find out his alcohol level. The alcohol policy allows the employer to test an employee. Was he actually under the influence of alcohol?

[23] Second, the employer didn't provide the names of the people who noticed the smell of alcohol on the Appellant.

[24] Finally, at the meeting with his union representative and supervisor, the Appellant didn't smell of alcohol and his behaviour was normal.

[25] The employer's zero-tolerance policy and the many exceptions concern the consumption of alcohol in the workplace. Obviously, an employee can't go to work under the influence of alcohol. The policy doesn't specifically say that an employee can't drink alcohol before their shift. What it says is that you can't go to work under the influence of alcohol.

[26] So, did the Appellant go to work under the influence of alcohol? On a balance of probabilities, I find that it is more likely than not that the Appellant wasn't under the influence of alcohol when he went to work.

[27] In making my finding, I considered the evidence on file and the credible testimony of the Appellant, the union representative, and the union secretary. The union representative who was with the Appellant at the meeting had direct access to the Appellant. He didn't detect a smell of alcohol. And I don't have evidence to the contrary.

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[2] GD3-34 and GD3-30 to 39

[28] Also, the Appellant testified that he had helped a co-worker clean up spilled beer. He may have gotten beer on his clothes, which could explain the smell that his co-workers allegedly detected.

[29] In addition, the employer's policy says that employees must consume responsibly and with moderation and ensure that their judgment, performance, and safety are never compromised at work.[3] Employees are prohibited from consuming alcohol during working hours, with some exceptions.[4] A drug test may be required when there is a reasonable suspicion that the employee may have taken illicit drugs or be intoxicated. Being intoxicated within the meaning of the law means that the person's level of intoxication is over the legal limit for driving a vehicle in the given territory.[5]

[30] The policy also says that going to work under the influence of alcohol [or] consuming alcohol during working hours may result in disciplinary action and the loss of employment. So, the question remains whether the Appellant was under the influence of alcohol at work. It is important to understand that the zero-tolerance policy isn't about alcohol consumed before going to work. It is about not being under the influence of alcohol.

[31] Larousse French dictionary defines the expression [translation] "under the influence" as being enslaved to something (drugs, alcohol, etc.), to a group, or subjected to ideological or psychological manipulation.[6]

[32] In my view, the Commission didn't prove this. There is no evidence that the Appellant was actually under the influence of alcohol. And there is nothing in the employer's policy that says that a person can't reasonably consume alcohol at any time during a meal and go to work a few hours later. There is no zero-tolerance for

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[3] GD3-31
[4] GD3-33 paragraph B
[5] The level is 80 milligrams of alcohol per 100 millilitres of blood. See, for example, section 320.14(1) of the Criminal Code, R.S.C., 1985, c. C-46
[6] https://www.larousse.fr/dictionnaires/francais/influence/42976#180074

consuming alcohol outside of work. It is for this reason that the employer is asking for judgment and to follow the laws outside the workplace.

[33] I find that the Commission hasn't proven the facts alleged against the Appellant. A finding of misconduct can only be made on the basis of clear evidence and not merely of speculation and suppositions.[7] In this case, both the Commission and the employer relied on comments from co-workers without verifying the alleged facts.

[34] In addition, misconduct is a violation of the law, of a regulation, or of an ethical rule, and may mean that an essential condition of employment is no longer met.[8] We have to look at the facts. We can't simply adopt the employer's finding of misconduct. An objective assessment is required to determine whether misconduct was the real cause of the loss of employment.[9]

[35] An employer's subjective assessment of the type of misconduct that justifies dismissal can't be considered binding on the Tribunal and can't meet the Commission's burden of proof.[10]

[36] The Commission hasn't shown that the Appellant violated a rule, law, or regulation. The employer argues that the Appellant went against the rules, without providing evidence to the Commission. The employer relied on statements from anonymous co-workers; it didn't test the Appellant. In addition, the union representative who was at the meeting didn't smell alcohol on the Appellant or find that he was under the influence of alcohol. Letting a person go because of misconduct is a serious matter with significant consequences. The Commission can't simply agree with the employer when it hasn't provided clear evidence.

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[7] *Crichlow v Canada (Attorney General)*, A-562-97
[8] *Canada (Attorney General) v Brissette*, A-1342-92
[9] *Meunier v Canada Employment and Immigration Commission*, A-130-96
[10] *Fakhari v Canada (Attorney General)*, A-732-95

[37] I don’t need to consider whether the Appellant’s actions amount to misconduct. The Commission hasn’t proven that the Appellant went against the employer’s policy. It can’t simply agree with the employer’s claims.

[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.

Manon Sauvé
Member, General Division – Employment Insurance Section