



Citation: *BP v Canada Employment Insurance Commission*, 2023 SST 1993

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: B. P.
Representative: N. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (596074) dated July 10, 2023
(issued by Service Canada)

Tribunal member: Kristen Thompson
Type of hearing: Teleconference
Hearing date: October 5, 2023
Hearing participants: Appellant
Appellant's representative
Decision date: October 10, 2023
File number: GE-23-2035

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 lost his job. The Appellant's employer said that he was let go because he was absent from work, without a medical note and without giving the minimum 3-hour notice.

[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 doesn't dispute that he was absent from work due to illness. He says that his conduct wasn't wilful, as he had medical justification and tried to give reasonable notice. He says that he didn't know that his conduct would result in dismissal.

Issue

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

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

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.

Why did the Appellant lose his job?

[8] I find that the Appellant lost his job because he was absent from work.

[9] The Commission says that the Appellant lost his job because he didn't follow the employer's absenteeism policy.

[10] The Appellant says he lost his job because he was absent from work, due to illness.

[11] The employer says that the Appellant lost his job because he was absent from work, without medical justification and without giving the minimum 3-hour notice, in the dismissal letter dated April 16, 2023.²

[12] I find that the parties agree that the Appellant lost his job because he was absent from work.

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

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

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Appellant doesn't have to have

² See GD3-45.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁵

[15] 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.⁶

[16] 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.⁷

[17] The Commission says that there was misconduct because the Appellant willingly decided not to follow the employer's absenteeism policy. It says that the Appellant understood that he may be dismissed for not following the policy.

[18] The Appellant says that there was no misconduct because his absence wasn't wilful, as he had medical justification and tried to give his employer reasonable notice that he would be absent. He says that he didn't know that his conduct would result in dismissal.

[19] The Appellant and the employer agree that he was absent from work on the following days:

- January 8, 15, and 22, 2023
- February 5, 6, and 27, 2023
- March 12, 13, 19, and 26, 2023
- April 11, 2023

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The employer issued a written warning, signed by the Appellant, on January 31, 2023. It says that he called in sick. It says he only gave a maximum of 30-minutes notice. It says that a doctor's note will be required for sick days. It says that he must give a minimum of 3-hours notice. It says that the next step is a final notice.⁸

[21] The employer issued a written notice, signed by the Appellant, on February 7, 2023. It says that he called in sick with only a maximum of 30-minutes notice. It says that he agrees to give more notice moving forward, as well as a doctor's note. It says that he will give a minimum of 3-hours notice next time or face dismissal.⁹

[22] The employer told the Commission that the Appellant gave reasonable notice on March 12, 19, and 26, 2023. It said that he didn't give any notice on March 13, 2023.¹⁰

[23] In the final incident, on April 11, 2023, the employer told the Commission that the Appellant called in sick with only 1-hour notice. The employer said that he called in at 1:22 p.m. for his 2:30 p.m. start time.¹¹

[24] The human resources worker told the Commission that the employer didn't receive medical documentation that supported the excessive absences. She says that she spoke with the Appellant via email on April 14, 2023, to explain why he was being dismissed and told him that if he could provide sufficient medical documentation to support the excessive absences, then she would re-evaluate his situation and possibly hire him back. She says the Appellant never emailed her back.¹²

[25] The employer told the Commission that the Appellant was offered the shift starting at 12:30 a.m., as an accommodation, but there was no real improvement in his attendance and reporting his absences.¹³

⁸ See GD3-40 and 41.

⁹ See GD3-44.

¹⁰ See GD3-53.

¹¹ See GD3-36.

¹² See GD3-36.

¹³ See GD3-47.

[26] The Appellant says that he was absent from work due to illness. He says that he has long-term disabilities, Tourette Syndrome and ADHD. He says he has recent stomach issues that cause vomiting and pain.

[27] The Appellant says that on January 31, 2023, he met with his manager. He says that he told his manager about his disability and illness. He says that his manager told him that if he needs any flexibility, to let him know. He says that he told the manager that he was waiting for a medical appointment at the end of March 2023, and will be able to get a doctor's note at that time.

[28] The Appellant says that he met with his manager again on February 7, 2023. His manager told him that he understood the Appellant's situation and to ask for help if needed. The Appellant says that he tried to request accommodation from his manager, including working shift starting at 2:30 p.m. or 4:30 p.m. The Appellant says that the end result was that the manager didn't help him.

[29] The Appellant agrees that he didn't give his employer notice on March 13, 2023. He says that he was too sick to call in. He says that he didn't seek medical assistance; for example, he says that he didn't go to the hospital.

[30] The Appellant says that, in regards to the final incident on April 11, 2023, his illness was all over the place, not consistent, and can come on quickly.

[31] The Appellant says that his conduct wasn't wilful. He says that he tried to give reasonable notice. He says that his intention was to make his shifts. He says that he didn't understand that he needed medical documentation for every date.

[32] The Appellant received a letter from his doctor on March 27, 2023. It says that the Appellant wasn't feeling well and was unable to work from January 30 to February 1, 2023. It says that the Appellant now reports feeling better. It says that the doctor didn't personally examine the Appellant. It says that requiring sick notes is a waste of valuable healthcare resources.¹⁴

¹⁴ See GD3-31.

[33] The Appellant says that he didn't give his employer the letter from his doctor. He says that his manager was on a personal leave. He says that he would report his absences to a supervisor. But he says that the supervisor wasn't in a position to take the letter.

[34] The manager told the Commission that he was on a personal leave at the time the Appellant got a medical letter. The manager said that the Appellant could have given it to a supervisor or put it in his mailbox.¹⁵

[35] The Appellant says that he spoke with the employer's human resources worker on April 14, 2023. He says that he told the human resources worker that he had a doctor's letter and could give it to her. He says that he tried to email his doctor's letter to the human resources worker, but his email was blocked.¹⁶

[36] The Court says that an employee's repeated failure to show up for work is a serious breach of the employment contract. When the Court assessed the evidence in this case, including that the employee had been warned by the employer that absenteeism will result in dismissal, it found that the employee's conduct was wilful. It also said that the Tribunal isn't to consider whether the employer met its duty to accommodate the employee.¹⁷

[37] The Court also says that the role of the Tribunal is to determine whether the appellant's conduct amounted to misconduct. The Tribunal isn't to determine if the dismissal was justified or the appropriate sanction.¹⁸

¹⁵ See GD3-52

¹⁶ See GD6-1 and 2.

¹⁷ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[38] I find that the Commission has proven that there was misconduct, as follows:

- the employer required the Appellant to give it a doctor's note and a minimum of 3-hours notice, when absent
- the employer met with the Appellant and issued warnings on January 31 and February 7, 2023, stating its requirements
- the final notice of February 7, 2023 says that, if the employer's requirements aren't followed, the Appellant will face dismissal
- this final notice clearly communicates the employer's requirements and the consequences for not following its requirements
- on April 11, 2023, the Appellant was absent from work, without a doctor's note and without adequate notice
- although the Appellant had a doctor's note, the Appellant didn't ensure it was provided to the employer and it didn't reflect the absence of April 11, 2023
- 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

[39] I am persuaded by the decisions of the Federal Court. I find the actions of the Appellant to be willful, as he had been warned by the employer that absenteeism, without medical justification and a minimum of 3-hours notice, will result in dismissal. I am not to take into account whether or not the employer accommodated the Appellant and his medical conditions. I am not to assess whether the Appellant's dismissal was justified or appropriate.

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

[40] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

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

[42] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section