Citation: *MO v Canada Employment Insurance Commission*, 2023 SST 1985

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. O.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (624435) dated November 1, 2023 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	**IN WRITING**
Decision date:	December 29, 2023
File number:	GE-23-3088

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 had damaged or improperly prepared parts, had been warned and suspended in the past over these issues, and continued to perform poorly on the job over six months to a year.

[4] The Appellant acknowledged that he had some performance issues, but so had other employees. The issues arose after he was injured in an automobile accident at work in 2022. The Appellant's main focus was on not losing the EI benefits because of the label 'misconduct'.

[5] 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.

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

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

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 not performing his job to the required standards, causing lost time to correct his errors, or lost product that had not been properly processed by the Appellant.

[9] The Commission said that the Appellant lost his job due to performance issues, and that those issues amounted to misconduct. That was based on evidence from the employer. The Appellant did not contest that there were performance issues. He referred to a workplace accident that caused some injuries in September 2022 impacting his performance. He referred to other employees having similar performance issues.

[10] I find that the employer dismissed the Appellant because of his performance issues related to damaging parts being produced or repaired. I will review the facts in some detail, as they will be relevant in assessing whether the performance issues amounted to misconduct that disqualified the Appellant from receiving EI benefits.

[11] The Appellant worked for the employer who produced and repaired airplane turbine parts. The Appellant was a general labourer. His role in the process involved processing new parts, or repairing used parts, for the turbines. The employer placed a high priority on quality review of the parts, to ensure they would function properly and safely. The Appellant had worked for the employer for nine years at the time of his dismissal.

[12] When he applied for EI benefits on September 11, 2023, the Appellant stated that he was let go because the employer considered him unsuitable for the work. This was because of unsatisfactory performance, or inability to perform some duties.

[13] The employer provided information to the Commission by telephone and by sending documents. The employer referred to documented performance issues that

had been addressed but continued to the point that the employer saw the conduct as wilful actions by the Appellant. Those actions resulted in losses to the employer. The employer dismissed the Appellant because of wilful misconduct. The Appellant had worked for the employer for over ten years and was no stranger to the work he was doing during that period. These performance issues had been ongoing for six months to a year.

[14] The Appellant knew that after he finished sandblasting a part, he had to blow the part with high-pressure air to remove all dirt. He failed to do this, despite the presence of dirt on the part being obvious. This happened a number of times. He allowed the part to move on to the next step in the process. That failure could have led to the part being scrapped at a loss of at least $5,000.00. The last incident involving this problem resulted on May 9, 2023, in a written reprimand and a one-day suspension.

[15] On August 11, 2023, the employer gave the Appellant a written coaching/counselling session. The document gives the same reason as the May 9th reprimand, failing to follow or perform job duties as instructed. It sets out the Appellant's failure to properly perform an operation involving glass beads on 15 parts. It required him to make sure the operation has been done correctly before he moved parts on to the next step.

[16] Both of those documents from May 9 and August 11, 2023, state that if the problem is not corrected, or another offence occurs, "you will be subject to further disciplinary action, up to and including termination." The Appellant confirmed the May 9th and August 11th warning, suspension and coaching session in a conversation with the Commission.

[17] The final incident that led to the Appellant's dismissal was his failure to rotate two parts while sandblasting them. This occurred on August 14, 2023, and is set out in the dismissal letter of August 29, 2023. The Appellant left the parts in one spot while being sandblasted. That led to surface erosion on the parts. The Appellant then hung the parts wrong way around to hide the erosion and sent them on to the next step. The employer said that the Appellant was being dishonest in trying to hide the problem. The

Appellant also was not complying with the employer's policy that employees report a mistake when it happens. The parts had to be scrapped.

[18] The employer dismissed the Appellant on August 29, 2023. The letter set out the performance deficiencies mentioned above. These deficiencies led to increased costs for the employer, scrapping of parts, and the risk of deficient parts failing during use in customer aircraft engines.

[19] The employer provided copies of warnings given to the Appellant. The documents are accompanied by photographs of the affected parts the Appellant worked on. The exact problem with the parts is difficult to tell from the photographs.

[20] The Commission made its decision on October 5, 2023, to disqualify the Appellant from receiving EI benefits because he had lost his employment as a result of his misconduct. The Appellant filed his request for reconsideration of that decision. His reason for the request was, "I believe I am eligible because I paid into employment insurance for 9 years, also I have bills to pay it is difficult to look for another job, please consider in the time of need."

[21] The Appellant provided documents in support of his position. One was a worker's compensation employer's report of injury. The Appellant was struck by a motor vehicle while walking on the employer's parking lot on the evening of September 22, 2022. He suffered injuries to his left elbow and shin, and his lower lip. Another was a pharmacy's information sheet dated October 24, 2022, for a narcotic pain reliever prescribed to the Appellant. Another was the Commission's "Fired (Dismissed)" form from the Appellant dated November 1, 2023. The Appellant stated that he was able to perform all his duties while still coping with pain from the September 22, 2022, incident. He referred to "these basic incapabilities to carry out duties effectively leading to my dismissal." He gave no further explanation. On August 29, 2023, the Appellant filed a worker's continuity report with the worker's compensation board. He stated that there have been changes to the work he has been doing, namely, "work leading to misconduct unemployed with [employer] since August 29, 2023." He noted medication for minor pain goes away and comes back.

[22] In a conversation with the Commission, the Appellant discussed those documents he provided. He did not lose his job due to the physical injury from the September 22, 2022, incident. He agreed that he was not too ill to do his work or felt the work was too hard after that injury. This is confirmed on the "Fired (Dismissed)" form dated November 1, 2023, where the Appellant stated, "I was able to perform all duties as production worker but still coping with pain injury from motor vehicle accident…"

[23] The Appellant told the Commission that he had damaged some work involving expensive products. It was part of his job to monitor quality. If he did not monitor properly, the products would be damaged. He did not do this intentionally or on purpose. He had received two or three warnings and a suspension. He tried to correct the situation by talking to his supervisor, telling the supervisor that he could do better.

[24] Overall, I accept the Commission's evidence of the events leading up to the dismissal of the Appellant from his job. The Appellant does not contest what happened, other than saying that his actions were not intentional or on purpose.

[25] I do not accept the employer's statement that the Appellant's conduct was misconduct. My role is to determine if the Commission has proven misconduct by the Appellant based on the four factors of misconduct for EI purposes set out under the next heading. A finding of misconduct can only be made on clear evidence, not on speculation or supposition, and not on the basis of the employer's opinion.[2]

[26] I do not accept that the injuries the Appellant suffered in the September 2022 accident in the employer's parking lot were a relevant factor in assessing the Appellant's conduct up to the time of his dismissal. This conclusion is based on a number of reasons. First, this matter was only raised by the Appellant at the time of the dismissal, when he filed the worker's compensation continuity report. Second, in his later conversation with the Commission and in his November 1, 2023, "Fired (Dismissal)" form, he said that he was not too ill to do his work or felt the work was too hard after that

[2] See *Crichlow v Canada (Attorney General)*, A-562-97.

injury. He said that he did not lose his job because of the injuries, and he was able to perform all his duties as a production worker while coping with pain from the injuries. Third, the only evidence of the impact of the injuries on the Appellant is one prescription for narcotic pain reliever given on October 24, 2022. Fourth, the Appellant provided no medical evidence of the potential impact of the injuries on his work performance after the injuries. Fifth, the Appellant told the Commission he did not consult a health professional about his capacity to do his job and did not speak to the employer about not being able to fully perform his job because of the injuries.

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

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

[28] 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] Misconduct also includes conduct that of such a careless or negligent nature that the employee wilfully disregarded the effects his actions would have on job performance.[5] 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.[6]

[29] There is misconduct if the Appellant knew or should have known both 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.[7]

[30] 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.[8]

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Tucker*, A-381-85.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[31] The Commission says that there was misconduct because the Appellant's actions were wilful and were so negligent that they showed a disregard for the employer's business and undermined the employer's trust in the Appellant. The Appellant knew or should have known that his actions would result in dismissal. His actions caused his dismissal.

[32] The Appellant says that there was no misconduct because his actions leading to damaged parts were not intentional. The other reasons he put forward in support of his appeal are not relevant to determining whether there was misconduct. Those reasons will be dealt with at the end of this decision.

[33] I find that the Commission has proven that there was misconduct, because it has proven all four of the factors in misconduct.

[34] **Was the conduct wilful?** Yes.

[35] The Appellant admitted that he did damage some work on expensive parts. He admitted he was responsible for the quality or his work. He admitted that for some reason he did not catch it on time and that it caused damage. He did not do this on purpose. The problem would be caught further down the production line.

[36] The employer disciplined the Appellant for his lapses. He had failed a number of times to clean out the sand in parts after sandblasting. He failed to prepare 15 parts correctly. He was told to ensure that the operation had been done correctly before sending parts to the next operation. After that, he had damaged two blades by excessive sandblasting on a small area for a duration well outside the standard task expectations. The Appellant then hung the parts on a rack shelf to move on to the next step. The parts were hung so that the damaged surface was hidden. Since the parts had to be cleaned by compressed air after the sandblasting, the Appellant would have noticed the damage to the parts. He did not report the damage to his supervisor or team leader as required.

[37] The Appellant had nine years of experience on this job. He knew the requirements for performing the work. He knew the need to complete those

requirements (such as cleaning sand off parts before sending them on). He knew the employer's policy that employees report a mistake when it happens. The Appellant failed on a number of occasions to complete the requirements, and to report mistakes to his supervisor or team leader.

[38] The Appellant says that his actions were not done on purpose. If they were done on purpose, that would prove wilfulness by way of conscious, intentional or deliberate actions. Even if they were not done on purpose, they would still be wilful as being of such a careless or negligent nature that the employee wilfully disregarded the effects his actions would have on job performance.[9] He failed to properly prepare or clean parts before sending them to the next step. He failed to report mistakes in his work. He said that problems would be caught at the next step in the process. That statement shows non-compliance with the employer's policies. It also shows a deliberate disregard of the effects of his carelessness with preparation and cleaning of parts on his job performance, and the negative impact on the employer from having to correct his work, or scrap parts as unusable or unsafe.

[39] **Did the Appellant know or should he have known that his conduct could get in the way of carrying out his duties toward his employer.** Yes.

[40] The Appellant knew the requirements of his job from his nine years of experience. He had been disciplined a few times over the deficiencies in meeting the requirements. He had signed that he completed the blasting of sand from the parts when he had not done that. He had been warned about this issue before. He failed to complete an operation on 15 parts. This was caught on an inspection after he completed the parts and sent them on. He was warned that he had to ensure that the work was done correctly before moving parts to the next step. He signed the disciplinary forms setting out these deficiencies and corrective actions needed.

[41] From those incidents, the Appellant would have known that his conduct would get in the way of carrying out his duties to the employer. His duties required that the

[9] See *Attorney General of Canada v Tucker*, A-381-85.

properly complete his work on the parts and clean them before moving them to the next step. He was warned that he had to carry out his duties or face further discipline. That warning reinforced the importance of carrying out his duties properly.

[42] **Did the Appellant know that there was a real possibility of being let go because of that conduct.** Yes.

[43] The warnings on the discipline forms were clear. If the problem noted was not corrected immediately, or another problem occurred, the Appellant "will be subject to further disciplinary action, up to and including termination." The Appellant signed those forms. Three days after signing the August 11, 2023, form, he excessively sandblasted two parts and sent them to the next step. The parts had to be scrapped.

[44] **Was the conduct the cause of the dismissal.** Yes.

[45] The Appellant's failure to carry out his work duties properly was the cause of his dismissal. There is no evidence of any other cause for the dismissal.

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

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

Appellant's other reasons in support of his appeal

[47] The Appellant raised several reasons in support of his appeal. I cannot take these reasons into account in deciding the issue of misconduct in this appeal.

[48] First, the Appellant argued that he had paid into EI for nine years, so should receive EI benefits. That is not correct. Employment insurance is not an automatic benefit. Like any other insurance scheme, you must meet certain requirements to qualify, such as having enough hours of employment and having an interruption of earnings. You must also not be disqualified from receiving EI benefits. Payment of EI premiums alone does not qualify anyone to receive EI benefits.

[49] Second, the Appellant notes his financial need for benefits. He has no other sources of income and no chance of employment elsewhere without further training. Financial need is not one of the requirements taken into account when deciding if a claimant qualifies to receive EI benefits.

[50] Third, the Appellant said that other employees had performance issues too. This appeal had to be decided on the basis of the Appellant's conduct, not on what other employees did or did not do.

[51] Fourth, the Appellant said that he always tried to do his work, kept his area tidy, always went above and beyond, and got a raise on his annual review. Those are certainly positive matters. But in deciding whether there was misconduct for EI purposes, I have to look at the conduct the Commission alleges was misconduct. I am not allowed to take into consideration the employee's positive matters and deduct them from the alleged misconduct in order to reach a decision. I have to focus only on the alleged misconduct.

Conclusion

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

[53] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section