



Citation: *MK v Canada Employment Insurance Commission*, 2023 SST 1904

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

Decision

Appellant: M. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (570802) dated March 30, 2023 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: In writing

Decision date: August 2, 2023

File number: GE-23-1365

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) agrees that the Appellant didn't lose his job because of misconduct (in other words, he didn't do 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 of his behaviour.

[4] Even though the Appellant doesn't dispute that he was let go, he says it isn't the real reason why the employer let him go. The Appellant says the employer actually let him go because he refused to sign an agreement saying he was voluntarily resigning his position.

[5] The Commission didn't accept the employer's reason for the dismissal. So, it decided that the Appellant didn't lose his job because of misconduct. Because of this, the Commission decided that the Appellant isn't disqualified from receiving EI benefits.

Matter I have to consider first

The Appellant wasn't at the case conference

[6] The Tribunal invited the Appellant to a case conference to confirm his intention to go ahead with an appeal of the Commission's reconsideration decision.² This is because the Commission overturned its initial decision. The Commission decided in the

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

² Section 37 of the *Social Security Tribunal Rules of Procedures* says the Tribunal can hold a conference with the parties to talk about the appeal.

Appellant's favour, that he didn't lose his job because of misconduct. This means that the Appellant can get EI benefits.

[7] The Appellant sent a letter to the Tribunal. He said he could not join the case conference because his telephone line is compromised. But he confirmed that he is appealing the Commission's reconsideration decision.

[8] The Appellant didn't say what form of hearing he prefers. And he has telephone challenges and questionable computer access. So, since the Commission has decided in the Appellant's favour, the hearing proceeded as a hearing in writing.³

Issue

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

Analysis

Why did the Appellant lose his job?

[10] I find that the Appellant lost his job because he refused to sign a separation agreement his employer prepared.

[11] The Commission didn't say why it thinks the Appellant lost his job. The employer told the Commission that it dismissed the Appellant because of his behaviour. But the Commission reversed its initial decision and decided that the reason the Appellant lost his job is not because of misconduct.

[12] The Appellant says the reason he lost his job is that he refused to sign the separation agreement from his employer.

[13] The Commission's only evidence from the employer is two statements that it dismissed the Appellant due to his behaviour. The employer was given an opportunity to submit documents to the Commission about the dismissal, but it didn't do so.

³ Section 2(1) of the *Social Security Tribunal Regulations* says the Tribunal has to hold the hearing in the format requested by an appellant.

[14] The Appellant sent the Commission a copy of a letter his employer sent him. It's a follow-up letter to an earlier letter telling the Appellant that his employment would end. The letter referred to a separation agreement that the Appellant didn't respond to.

[15] The Appellant told the Commission that his employer sent him a letter that served as a mutual separation agreement that the employer wanted him to sign. By signing the letter, the Appellant said he would be agreeing to voluntarily resigning his position. So, he refused to sign the letter.

[16] The Commission asked the Appellant about what the employer might be referring to about his behaviour. The Appellant declined to say because his lawyers are dealing with the issue.

[17] After its initial decision, the Commission tried without success to get more information from the employer. The employer didn't respond to voicemail messages and a letter.

[18] I give more weight to the Appellant's evidence than to the statement from the employer about the reason he lost his job. I find that if the Appellant had behaviour issues that the employer could not tolerate, it could have simply dismissed the Appellant. But the employer didn't do this.

[19] The employer wanted the Appellant to sign a separation agreement to end his employment. When the Appellant didn't respond to its request that he do so, the employer dismissed the Appellant. So, I find that this is the reason the Appellant lost his job.

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

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

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.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

[22] 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.⁷

[23] 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

[24] Both the Commission and the Appellant say there wasn't misconduct. I agree with this. I accept the Appellant's evidence as fact that his employer wanted him to sign a separation agreement to have him agree to voluntarily retire. There is no evidence from the Commission based on statements from the employer that contradict what the Appellant said. So, I have no reason to disbelieve the Appellant's statements.

[25] The Appellant told the Commission that when he got the separation agreement letter, he called the employer the next day to get details. He said the employer could not give him more information and just told him he had two days to sign the letter. He said he didn't know he was at risk of being dismissed. The Appellant said he had taken time off work and was ready to return, but the employer didn't let him return.

[26] From the above, I don't find that the Appellant knew or should have known that his employer was likely to dismiss him if he didn't sign the separation agreement. I don't find that his behaviour was wilful. I don't find that not signing the agreement constitutes misconduct.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.

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

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

Conclusion

[28] The Commission agrees that the Appellant didn't lose his job because of misconduct. It overturned its initial decision as a result. Because of this, the Appellant isn't disqualified from receiving EI benefits.

[29] Since the Appellant appealed the Commission's reconsideration decision that was decided in the Appellant's favour, this means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section