



Citation: *JJ v Canada Employment Insurance Commission*, 2023 SST 1937

Social Security Tribunal of Canada

General Division – Employment Insurance Section

Decision

Appellant:

J. J.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (566217) dated March 10, 2023
(issued by Service Canada)

Tribunal member:

Bret Edwards

Type of hearing:

Videoconference

Hearing date:

August 29, 2023

Hearing participant:

Appellant

Decision date:

September 5, 2023

File number:

GE-23-1128

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means 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 permission: he didn't show up for work after asking for the day off and being told no.

[4] Even though the Appellant doesn't dispute that this happened, he says that he thought he might still be able to get the day off even after his employer said no and didn't think he would be let go for being absent from work without permission.

[5] The Commission initially decided the Appellant didn't lose his job because of misconduct, which meant he qualified for and received EI benefits.

[6] The Appellant's employer then asked the Commission to reconsider its decision. Upon reconsideration, the Commission decided the Appellant lost his job because of misconduct. This meant the Appellant is now disqualified from receiving EI benefits and has an overpayment for the benefits he received before the Commission changed its decision.

Issue

[7] 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

[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 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?

[9] I find the Appellant lost his job because he was absent from work without permission.

[10] The Appellant and the Commission agree on why the Appellant lost his job. The Commission says the reason the Appellant's employer gave is the real reason for the dismissal.² The employer told the Commission that the Appellant was dismissed for being absent from work without permission.³ The Appellant agrees this is the reason he was let go.⁴

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

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

[12] To be misconduct under the law, the conduct has to be wilful. This means 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

² GD4-5.

³ GD3-32.

⁴ GD3-33 and hearing recording.

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.

[13] 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

[14] I only have the power to decide questions under the *Employment Insurance Act* (Act). I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[15] The Commission has to prove 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.¹⁰

[16] The Commission says that there was misconduct because the Appellant took time off work that he knew he wasn't approved for with the knowledge that it might disadvantage his employer, and he should have known that he could be let go for this reason.¹¹

[17] The Appellant says that there was no misconduct because he thought his employer might still give him the day off even after they said no, and he didn't think he would be let go because he felt he had a good reason (helping his disabled parents) for being absent from work without permission.¹²

[18] I sympathize with the Appellant, but I find the Commission has proven there was misconduct for the following reasons.

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

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ GD4-5.

¹² GD2-5.

[19] First, I find the Appellant's actions were wilful.

[20] The Appellant's employer told the Commission that the Appellant asked on Thursday (June 2, 2022) for a day off from work the following Monday (June 6, 2022) to go on a camping trip with his family. They told him no, he couldn't have the day off, because the owner already needed the day off to deal with some family matters. They are a small company with just a few employees, so there wouldn't have been anyone in the office if the Appellant also took the day off.¹³

[21] The Appellant's employer also told the Commission that the Appellant then texted on Saturday (June 4, 2022) to say his parents couldn't cancel the campground reservation and he wouldn't be able to come to work on Monday. He then didn't come to work as scheduled.¹⁴

[22] The Appellant says that he told his employer he needed the day off to help his parents (who are both disabled) on a camping trip. When he asked for the day off, his employer said no because the owner needed that day off too.¹⁵

[23] The Appellant says that after being told no, he then told his employer he would try to find a solution (specifically finding someone else to help his parents or getting them to change their camping trip). His employer said okay and to just let them know, so he thought this meant there was still some wiggle room for him to get the day off.¹⁶

[24] The Appellant also says that he thought he might still be able to get the day off because there were times before when he had helped his employer when they needed someone to cover a shift. Since his employer is a small company with just a few employees, he thought they might be able to return the favour and cover his shift in this case even though they had said he couldn't have the day off.¹⁷

¹³ GD3-32.

¹⁴ GD3-32, GD3-36.

¹⁵ GD2-5, GD3-33.

¹⁶ GD2-5 and hearing recording.

¹⁷ See hearing recording.

[25] The Appellant says he tried to get his parents to change their camping trip, but it wasn't possible for them to cancel the reservation. He then texted his employer on Saturday to say he couldn't make it to work on Monday. He didn't hear back on Saturday or Sunday, so he assumed everything was okay. His employer then texted and called on Monday and was upset that he didn't show up.¹⁸ There is evidence on file of these texts on Saturday and Monday between the Appellant and his employer.¹⁹

[26] I acknowledge the Appellant feels he still might have been able to get the day off even after his employer told him no when he asked because he got that impression from what happened afterwards.

[27] But I don't agree with the Appellant that his employer actually said anything afterwards that should have given him the impression that he could still get the day off. As noted above, the Appellant says that after being told he couldn't have the day off he told his employer he would check to see if he could change his plans so he could show up on Monday, and they said okay. I find the fact the Appellant's employer said okay should have made the Appellant realize that they were simply reacting to what he had just said about trying to change his plans since they had just told him he couldn't have the day off and likely hoped he would be able to show up on Monday as planned.

[28] I also don't agree with the Appellant when he says he thought he could still have the day off because his employer didn't respond to his text on Saturday. In my view, he shouldn't have immediately jumped to this conclusion. As noted above, he and his employer both say he had already been told he couldn't have the day off. And it should have occurred to him that there might have been many possible reasons why his employer hadn't responded to his text, including the fact that he sent the text on the weekend, outside work hours.²⁰

[29] And I don't agree with the Appellant when he says he thought he could still have the day off because he hoped his employer would cover his shift just as he had done for

¹⁸ GD2-5, GD3-33, hearing recording.

¹⁹ GD3-49 to GD3-55.

²⁰ The Appellant sent the text on Saturday at 7:26am. See GD3-49 to GD3-51.

them in the past. Again, he and his employer both say he had already been told he couldn't have the day off. In my view, it therefore should have occurred to him that his employer had no obligation to actually return the favour and cover his shift in this case, especially since they didn't have an equal working relationship.

[30] Instead, I find the evidence shows the Appellant was consciously absent from work without permission. He asked his employer for the day off and was told no, but he decided to take the day off anyway, which shows his actions were wilful. This was a deliberate action on his part since he and his employer both agree that he was told he couldn't have the day off. And as discussed above, there's not enough evidence to show that the Appellant should have felt that he might still be able to get the day off after his employer had told him no.

[31] Second, I find the Appellant knew or should have known that being absent from work without permission could lead to him being let go.

[32] The Appellant's employer told the Commission that they weren't willing to use progressive discipline with the Appellant in this case because they felt he had betrayed their trust after they told him he couldn't have the day off and he didn't show up for work anyway, so it was grounds for termination right away.²¹

[33] The Appellant says he didn't know he would be let go for being absent from work without permission. He says his employer never told him that this could happen, and he wasn't aware of any policies they had about it.²²

[34] The Appellant also says he didn't think he would be let go for being absent from work without permission. He says he can understand being let go if he had taken the day off for another reason (like hanging out with friends), but not for helping his disabled parents on a camping trip. He says he had no choice but to put family ahead of work in

²¹ GD3-32, GD3-36.

²² See hearing recording.

this case, and it would have been more appropriate for his employer to give him a couple days off or deduct his wages in some way.²³

[35] The Commission says the Appellant should have known he would be let go for being absent from work without permission because he took time off work that he knew he wasn't approved for, even while knowing this would be detrimental to his employer.²⁴

[36] I agree with the Commission.

[37] I acknowledge the Appellant's employer never told him he could be let go for being absent from work without permission and didn't appear to have a policy about this either.

[38] But I find this doesn't mean the Appellant couldn't have still known he could be let go for being absent from work without permission. He and his employer both say that there were not many employees working there, so it should have occurred to the Appellant that his employer would view his actions as serious since his absence could have left them short-handed and jeopardized their operations that day.

[39] I also acknowledge the Appellant feels his employer shouldn't have let him go because he had a good reason for being absent from work.

[40] Even if the Appellant feels he had a good reason for not showing up to work, I find this also doesn't mean he couldn't have still known he could be let go for being absent from work without permission. It was entirely possible for him to believe both things at the same time, especially as he says his employer told him that he couldn't have the day off when he asked.

[41] So, I find the evidence shows the Appellant knew or should have known that he could be let go for not following his employer's policy.

²³ GD2-5 and hearing recording.

²⁴ GD4-5.

[42] I acknowledge the Appellant says his employer acted unfairly in dismissing him for being absent from work to help his disabled parents instead of allowing to keep his job and disciplining him in some other way.

[43] Unfortunately, I find this issue isn't relevant here. As discussed above, the Act and the Court say that I must focus on the Appellant's (and not the employer's) actions when analyzing misconduct. This means I can only look at what the Appellant did or didn't do leading up to his dismissal.

[44] In other words, I can't look at whether the Appellant's employer acted unfairly for the reasons he says. If the Appellant wants to pursue these arguments, he needs to do that at another tribunal or decision-making body, as he appears to have already done.

[45] The Appellant says that he appealed his dismissal to the Ontario Labour Relations Board (OLRB) and it decided in his favour. He says the fact he won his appeal before the OLRB shows he didn't commit misconduct and that he qualifies for EI benefits.²⁵

[46] Unfortunately, I disagree. I note that I'm not bound by any OLRB decisions. They aren't based on the Act in any way, which means they focus on a different type of law from what I look at.

[47] In other words, while I acknowledge the Appellant won his appeal before the OLRB, I find this isn't relevant here. Instead, the only thing that is relevant is whether the Appellant's actions are misconduct under the Act and based on what the case law says, as discussed above, which I have found they are. So, I don't give the OLRB decision much weight here.

[48] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he was absent from work without permission), his actions were wilful, and he knew or should have known that his actions would lead to him being let go.

²⁵ GD11-1 to GD11-11.

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

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

[50] While I sympathize with the Appellant, who now faces a large overpayment, I don't have the power to erase it, unfortunately.²⁶ The law doesn't allow me to do so, even if find the circumstances are unfair. The overpayment is still the Appellant's responsibility to repay.²⁷

[51] These options are available to the Appellant:

- He can ask the Commission to consider writing off the debt because of undue hardship.²⁸ Should the Commission deny this request, the Appellant can appeal to the Federal Court.
- He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or other debt relief measure.²⁹

Conclusion

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

[53] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section

²⁶ See *Canada (Attorney General) v Villeneuve*, 2005 FCA 440.

²⁷ Sections 43 and 44 of the *Employment Insurance Act* state that an appellant bears the responsibility for an overpayment.

²⁸ Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship were an Appellant to repay it.

²⁹ That's the phone number found on the Notice of Debt that was sent to the Appellant.