Citation: *RD v Canada Employment Insurance Commission*, 2023 SST 1956

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (562874) dated January 20, 2023 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	May 30, 2023
Hearing participant:	Appellant
Decision date:	June 19, 2023
File number:	GE-23-431

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 violated the Anti-Harassment and Violence Policy (Policy). The employer is alleging that the Appellant acted inappropriately at a company event on August 11, 2022. The employer first suspended the Appellant then terminated him after an investigation.

[4] The Appellant disagrees. He agrees to some of the incidents that occurred that evening. However, he denies a lot of it and that he was suffering from a hypoglycemic attack. This was not considered, and this is discrimination. He agrees he knew about the Policy, but that the Policy does not include medical emergencies.

[5] The Appellant also states the employer is using this incident as an excuse to let him go. The new company president was looking for ways to get rid of him and is using this as the means to do that.

[6] 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.

---

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

Matter I have to consider first

The employer is not an added party to the appeal

[7] The Appellant`s former employer was sent a letter dated February 14, 2023.[2] This letter asked if the employer wanted to be an added party. To be added as a party, the employer must prove their direct interest in the decision.[3] The employer was asked to provide a reason why they have a direct interest in the decision.

[8] The employer replied by email on February 26, 2023. The employer requested to be added as a party to the appeal. However, the email did not explain how they had a direct interest in the appeal. The employer mentioned they have knowledge of the events and documents submitted. For this reason, the employer mentioned, “I feel it would be prudent to participate as a party in the appeals process.”

[9] I reviewed the appeal file and nothing in it suggests the employer has a direct interest in the appeal. A decision was made that the employer had not proven they have a direct interest in the appeal. For this reason, the employer will not be added as a party to the appeal. This decision was communicated to the employer in an email dated April 26, 2023. The employer was given their appeal rights to this decision.

[10] As of the decision date, no further communication was received from the employer to argue their case.

Issue

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

Analysis

[12] 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

[2] See GD05.
[3] See subsection 10(1) of the Social Security Tribunal Regulations.

lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[13] I find that the Appellant lost his job because his employer believed he violated the Anti-Harassment and Violence policy (Policy).

[14] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant violated the Policy.

[15] The Appellant disagrees. The Appellant says that the real reason he lost his job is that the employer wanted him gone. The new president would reprimand him for trivial things.[4] The president had also bragged he had never had to pay severance as the individuals he let go were always for cause. The president wanted to terminate the Appellant after the Appellant had admitted he suffers from depression following open heart surgery a few years earlier. The medication he was taking was causing him issues and causing his depression.

[16] I find that the Appellant was terminated for a violation of the Policy. The Appellant was terminated immediately after the events of Thursday, August 11, 2022. As explained in the following section, I find that the misconduct is proven. Without the witness statements and the events of August 11, 2022, the employer would not have any grounds to terminate the Appellant.

[17] The Appellant did provide an example of the issues between the president and himself. However, without the incidents of that evening, the examples provided would not trigger a dismissal.

---

[4] The Appellant provided an example. He testified that he had emailed an employee that it is a good thing he came to work that day and asked her to find something. This meant she had work to do that day and therefore had a job. The Appellant says this was meant as a joke. He and the employee had each put smiley faces on their emails. The recipient of this email complained, and the Appellant was warned about this.

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

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

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

[20] 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]

[21] 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.[9]

[22] The Commission says that there was misconduct because there is no reason to believe all the employees present were making false accusations. The employer`s statements were consistent. Evidence suggests that the Appellant harassed other employees. The Commission argues that the Appellant knew the consequences of a violation of the policy.[10]

[23] The disciplinary measures included in the Policy include immediate dismissal without further notice.[11] The Policy defines unacceptable behaviour.[12] The definition to personal harassment in the Policy include the following:

---

[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.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See GD4 page 5.
[11] See GD3 page 40.
[12] See GD3 page 36.

- Unwelcome remarks, jokes, innuendoes, propositions, or taunting about a person`s boy, attire, sex or sexual orientation and/or based on religion
- Suggestive or offensive remarks
- Offensive jokes or comments of a sexual nature about an employee
- Unwelcome language related to gender
- Physical contact such as touching, patting, or pinching, with an underlying sexual connotation.

[24] The Appellant says that there was no misconduct because:

- The termination was unfair and discriminates against a person with a disability. The Appellant is a Type 1 diabetic who has been insulin dependent for decades. He requires a pump to administer insulin.
- His actions can be explained by very low blood sugar levels he was experiencing at the time. The Appellant says that his medical condition is out of his control. Had he suffered something else such as an epileptic seizure, fell and hit someone he would not have been terminated.
- He denies many of the witness statements.
- The president had bragged that he had never paid a severance as had always terminated employees for cause.
- The events that led to his dismissal were in a bar setting. Everyone was joking and laughing.

- The bar tab was only $63 after tax.[13] The Appellant testified that he is 210 pounds and this would not be enough for the Appellant to be inebriated. He testified that he had not consumed alcohol other than what was on the bar tab.

- This is the first such incident in his career. He would not suddenly start doing something like this. Prior to this, he had been employed for 39 years without any incident.

- The Appellant had admitted to his employer that he may need to take time off because of depression because of medication he was taking following a previous heart surgery. Since then, the employer wanted to get rid of him.

[25] The Appellant testified that he knew about the policy. He agreed that a person who is inebriated and did what was alleged should be fired. He read the incident reports and would come to this conclusion. However, the problem is that the cause was something that was out of his control. His blood sugar levels were low and caused this. He has been a type 1 diabetic for decades and his insulin pump at the time would cause him to have hypoglycemic reactions.

[26] The Appellant argues his actions were caused by a hypoglycemic attack with very low blood sugar levels. This causes a person to appear drunk. The Appellant provided a note from his doctor with the side effects of a hypoglycemic attack.[14]

[27] In addition, the Appellant argues that many of the incidents did not happen. Some were fabricated. As an example, he did not touch a complainant`s breast.[15] Even by accident. He wanted to get her a chair and grabbed her elbow to help her up. He agrees he kissed some people on the head. He denies pinching people`s buttocks.

---

[13] See GD3 page 72. The amount before taxes is $56.
[14] See GD08 page 3. The Appellant`s doctor included the symptoms of an attack as per Diabetes Canada. Some examples are sweating, anxiety, difficulty concentrating, confusion, weakness, drowsiness, difficulty speaking, dizziness. The full list of 15 symptoms is mentioned in GD08.
[15] See GD3 pages 54-56. This is an incident report signed by A.S.

[28] The Appellant testified that the employer stopped any communication between employees and the Appellant. For this reason, he is unable to find any witnesses. In addition, he would not want to put anyone`s job at risk.

[29] The Appellant considered filing a lawsuit, but the employer stopped everyone from talking to the Appellant. This makes obtaining witnesses difficult.

[30] I agree the Appellant had no wrongful intent. However, wrongful intent need not be proven. The Appellant says the employer discriminated against him. The Social Security Tribunal can't decide whether an employer discriminated against an Appellant or should have accommodated them under human rights law.[16] The recourse for the Appellant would be via the appropriate forum such as a human rights tribunal.

[31] I can't decide whether an employer discriminated against an Appellant or should have accommodated them under human rights law.[17]

[32] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable. I also can't determine if an Appellant's dismissal or suspension was justified. The Tribunal has to determine whether the Appellant's conduct amounted to misconduct within the meaning of the EI Act.[18]

[33] I find that the Commission has proven that there was misconduct. As stated previously, to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful.

[34] Before me, I have 6 different signed statements. They were from 5 employees and a partner to one of the employees. The Appellant argues this was a coordinated effort by the employer to get rid of him. I am not convinced that 6 different signed

---

[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[17] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

statements with similar corroborating statements including a nonemployee is something that is likely to have been fabricated. I am putting a lot of weight to these statements. The statements are signed and would be subject to serious ramifications if found to be fabricated.

[35] The Appellant testified that his friend commented on his sweating and the Appellant states this can be a sign of low blood sugar. It is on the list of symptoms the doctor provided. The Appellant also testified that he returned to his room to change his shirt and tested his sugar levels at the time. He determined he was OK to return to the restaurant/bar as his sugar levels were acceptable.

[36] There is also a statement from one of the co-workers where the Appellant tested his sugar levels, and they were also good at the time. The level was found to be 8.1.[19] This signed statement puts this at approximately 10:30 p.m.

[37] This would be two separate times when his sugar levels were tested and were found to be acceptable. The Appellant testified that sugar levels below three is where symptoms appear.

[38] The statements suggest the Appellant was appearing drunk when his blood sugar was found to be acceptable. I came to this finding by comparing the timeline of the statements. See GD3 page 54, 55, 70 and 71 as an example.

[39] I prefer the Commission's evidence for a few reasons. There are 6 signed statements for one. These are from different people. The statements support each other as well.

[40] The Appellant is arguing that many of the alleged incidents did not occur. He recalls some and denies others. On the other hand, he is arguing his low blood sugar was the cause of his actions.

---

[19] See GD3 pages 70 and 71.

[41] I find there was no ill intent on the part of the Appellant. However, consuming alcohol with a known long-standing condition is reckless and it approaches wilfulness.

[42] For the reasons set out above, I find the Appellant more likely than not caused his own unemployment.

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

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

Conclusion

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

[45] This means that the appeal is dismissed.

Marc St-Jules
Member, General Division – Employment Insurance Section