



Citation: *JA v Canada Employment Insurance Commission*, 2023 SST 2027

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: J. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (619818) dated October 13, 2023
(issued by Service Canada)

Tribunal member: Greg Skelly

Type of hearing: Teleconference

Hearing date: December 20, 2023

Hearing participant: Appellant

Decision date: December 27, 2023

File number: GE-23-2999

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 not 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 driving in a company vehicle and speeding which was against their safety policy.

[4] Even though the Appellant doesn't dispute that he was speeding, he doesn't think he was going as fast as the employer alleges and that they failed to provide any proof of how fast he was going. The Appellant also says that he didn't know that he could be fired for speeding.

[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?

¹ Section 30 of the *Employment Insurance Act* says that claimants 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 speeding in a company vehicle which was against his employer's safety policy.

[9] The Appellant and the Commission agree on why the Appellant lost his job. While they may disagree on the speed that the Appellant was going, they agree that he was driving above the posted speed limit and that there are standard Life Safety Rules that include not speeding.

[10] I find that the conduct that led to the Appellant being terminated from his job was that he was speeding while driving his employer's vehicle which is against their safety rules.

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

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

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ 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.⁵

[14] 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.⁶

[15] The Commission says that there was misconduct because the Appellant admitted to speeding.

[16] The Commission also says the Appellant admitted to speeding in a company vehicle and whether he was driving at 153 km/h or 140 km/h, that is still way over the posted speed limit.⁷

[17] The Commission says that the Appellant was driving a 2022 Dodge Durango which needs no special training and held a valid driver's license.

[18] The Commission says that the company was safety oriented, and the Appellant knew or ought to have known that breaking the law by significantly speeding could lead to his termination.⁸

[19] The Appellant says that there was no misconduct because the employer didn't submit GPS logs to prove he was speeding, but he also says that he does speed to pass vehicles. And that he did not intend to get fired.⁹

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ See GD4-5.

⁸ See GD4-5.

⁹ See GD2-5

[20] I find that the Commission hasn't proven that there was misconduct. While it is clear to me that the Appellant was speeding, I find that the Appellant had no way of knowing that one instance of speeding with no prior warnings or discipline would lead to his termination.

[21] The Appellant told the Commission that when he passed a truck on the highway, he isn't exactly sure what speed he was going and that it felt like about 140 km/h but doesn't think it was as fast as the 153 km/h that the company is claiming.

[22] Without evidence other than the discussions that the Commission had with the employer (who didn't have access to the electronic monitoring logs at the time of the interview), I accept that the Appellant was speeding at about 140 km/h.

[23] In testimony the Appellant said that he thought it was safe to pass a long haul truck at 30-40 km/h over the speed limit because he did not want to linger in the opposing lane for any longer than he had to. And he believed that this was the safest way to approach the situation.

[24] The Commission was unable to obtain the employer's safety policy and the GPS speed monitoring logs, so we only have what the Appellant and the employer tell us.

[25] In their discussions with the Commission, the employer has been inconsistent on a number of important issues:

- One of the employers staff told the Commission that she thought that the Appellant was going 160 km/h.¹⁰ While another of the employers staff said that he was going 153 km/hr.¹¹

¹⁰ See GD3-25.

¹¹ See GD3-24.

- At one point the employer told the Commission that they would send the documentation to the Commission on their policy and final discipline letter.¹² And later when the Commission asked for the company policy on speeding, any signed agreement with the Appellant and the vehicle logs, they were told that the company was shut down for the season and would not be able to send this important information.¹³
- The employer told the Commission that the company's position is that speeding is non-negotiable¹⁴ however the same person later said that they only flag speeding if it is longer than a minute. So clearly there is some tolerance of speeding by the employer.

[26] The Commission contends that the Appellant was aware of the potential consequences of failing to comply with the safety policies. Without the policies to review, I cannot agree with them.

[27] The employer told the Commission that the GPS logs would show that the Appellant was driving over the speed limit for over a minute but in testimony the Appellant said that it only took about 20 seconds to pass a truck that was going under the speed limit.

[28] The Appellant admits that he was speeding but has been consistent in his discussions with the Commission, in his Notice of Appeal to this Tribunal and in testimony that he didn't know that he could be fired for speeding.

[29] The Appellant told me in testimony that he was not aware of any policy that said he would be fired for speeding. The Appellant also said that he has driven in this manner (speeding in order to pass) with his supervisors in the vehicle and was not spoken to about it. And I believe him.

¹² See GD3-26.

¹³ See GD3-39

¹⁴ See GD3-25.

[30] The Appellant also said at the hearing that he had asked for driver's training on defensive driving as he also drives the companies larger vehicles and was turned down as it was a busy time for his employer.

[31] The Appellant said in testimony that he would have accepted a reprimand, suspension or removal from driving duties and that he was in shock when he was fired for one instance of breaking his company's rules.

[32] The Appellant said at the hearing that he was informally told of an employee who had been fired for not wearing a seatbelt but that the employee was first suspended for the same issue, and he thought he would be treated the same.

[33] The Appellant says in his Appeal to this Tribunal that he did not intend to get fired.¹⁵ And told the Commission that he had no warnings about similar behaviours and didn't think he would be fired for speeding.¹⁶

[34] The Appellant said in testimony that he would expect that for a first instance of breaking a rule that progressive discipline would result. And for this issue I agree with him.

[35] So, I find that the Appellant had no way of knowing that one instance of speeding would lead to his termination. I find that the Appellant could not have known or ought to have known that one infraction of driving at a speed in excess of the posted speed limit could lead to his termination.

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

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

¹⁵ See GD2-5.

¹⁶ See GD3-27, GD3-34 and GD3-37.

Conclusion

[37] The Commission hasn't proven that the Appellant lost his job because of misconduct. Because of this, the Appellant isn't disqualified from receiving EI benefits.

[38] This means that the appeal is allowed.

Greg Skelly

Member, General Division – Employment Insurance Section