



Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 2014

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

Decision

Appellant: J. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (606259) dated July 26, 2023 (issued by Service Canada)

Tribunal member: Greg Skelly

Type of hearing: In person

Hearing date: October 10, 2023

Hearing participant: Appellant

Decision date: October 13, 2023

File number: GE-23-2321

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 as a portable fire extinguisher technician at X. The Commission said that he was let go because he went to a health care provider building and removed 10 lb fire extinguishers and left 5 lb fire extinguishers in their place, which left the building with half of the fire safety protection and was against code.²

[4] The Appellant says that the decision to fire him was based on a vendetta against him by the company owner.³

[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.

² See GD3-24.

³ See GD2-1.

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 breached his employer's policies on the proper replacement of fire extinguishers according to the National Fire Protection Association (NFPA) code.

[9] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that there were several incidents in the workplace that led to the Appellant's dismissal.⁴

[10] The employer told the Commission that on June 8, 2018, the Appellant received a 2-day suspension for not performing fire extinguisher inspections as per NFPA code.⁵ And that on November 15, 2021, the Appellant received a two week suspension from work for not returning fire extinguishers that were removed from service among other issues.⁶

[11] The employer told the Commission that they provided incident report forms to the Appellant which he signed. And the employer supplied these forms to the Commission.

[12] The employer told the Commission that the final incident was where the Appellant removed 10 lb fire extinguishers for service and left 5 lb extinguishers in their place. The employer said this was against the NFPA code, was a serious issue and could turn into a huge liability.⁷ So they fired the Appellant.

⁴ See GD3-24.

⁵ See GD3-71.

⁶ See GD3-80.

⁷ See GD3-41.

[13] The Appellant disagrees. The Appellant says that the real reason he lost his job is that the employer had a vendetta against him.⁸

[14] The Appellant says that his company turns a blind eye to certain requirements during the course of business.⁹ And that his employer was trying to extort him and get him to quit.¹⁰

[15] The Appellant also says that his employer used a heavily manipulated paper trail to disguise their intentions to fire him and that they went out of their way to persecute him and leave others alone.¹¹

[16] The Appellant did agree in testimony that he had the two suspensions, and that the suspension letters said that further violations may result in termination.

[17] The Appellant also said at the hearing that he did leave the 5 lb extinguishers at the office building in place of the 10 lb extinguishers that he removed for servicing. And that he knew this was against the fire code.

[18] I find that the Appellant was terminated for breaching the employer's policy of following the NFPA code on the replacement of fire extinguishers.

[19] I find this because:

- It is what the Appellant put in his application for regular EI benefits.¹²
- It is what the employer told the Commission.¹³
- It is what the Appellant told the Commission.¹⁴

⁸ See GD2-1 and GD3-30.

⁹ See GD3-10.

¹⁰ See GD3-30.

¹¹ See GD7-2.

¹² See GD3-9.

¹³ See GD3-24, GD3-41, GD3-84, GD3-85 and GD3-86.

¹⁴ See GD3-39 GD3-83, GD7-3.

- It is what is noted on the Appellant's termination letter.¹⁵
- And it is what the Appellant said at the hearing.

[20] I find the evidence that the employer provided to the Commission credible. They provided written warnings and explanations to the Appellant and the Appellant had the experience and training to know that the fire extinguisher replacement was against the fire code.

[21] The evidence that the employer provided to the Commission is convincing and given the amount and type of documents provided, I am placing more weight on their information.

[22] In his application for regular EI benefits, the Appellants says that he was terminated due to misconduct.¹⁶ And while he may not agree with the reasoning behind the termination, the fact remains that is why he was fired.

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

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

[24] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁸ 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.¹⁹

[25] 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.²⁰

¹⁵ See GD2-13.

¹⁶ See GD3-8.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁹ See *Attorney General of Canada v Secours*, A-352-94.

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[26] 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.²¹

[27] I have to focus on what the Appellant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.²² I can't consider whether the employer's policy is reasonable, or whether his termination was a reasonable penalty.²³

[28] I can only decide whether there was misconduct under the EI Act.

[29] I can't make my decision based on other laws.²⁴ I can't decide whether an appellant was constructively or wrongfully dismissed under employment law.

[30] And I can't deal with other matters unrelated to this claim such as previous discussions regarding fuel cards, company vehicles or the treatment of other staff.

[31] The Commission says that there was misconduct because the Appellant was warned that he could be dismissed and that he was terminated after a final incident of breaching the fire code regarding the replacement of fire extinguishers.²⁵

[32] The Commission also notes that the Appellant had previous warnings for similar behaviour and those warnings said that he may be terminated if the behaviour is repeated.²⁶

²¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²² See sections 30 and 31 of the EI Act.

²³ See *Paradis v Canada (Attorney General)*, 2016 FCA 1282; *Canada (Attorney General) v McNamara* 2007 FCA 107.

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. In limited circumstances, the Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*. Those circumstances are when an appellant is challenging the EI Act or regulations made under it, when an appellant is challenging the *Department of Employment and Social Development Act* or regulations made under it, and when an appellant is challenging certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't doing that.

²⁵ See GD4-4.

²⁶ See GD4-5.

[33] The Commission says that that there was a causal relationship between the Appellant's conduct and his dismissal.²⁷

[34] While the Appellant does not deny replacing the 10 lb extinguishers with 5 lb replacements, he says that his employer turns a blind eye to certain requirements during the course of business.²⁸ And that he feels that he was let go for something that is common practise in his workplace.²⁹

[35] The Appellant also strongly felt that his employer had a vendetta against him, didn't like him and tried to extort him in other areas of his employment.³⁰

[36] At the hearing the Appellant produce a witness that said that using the under sized fire extinguishers as loaners is common in the industry.

[37] The Appellant provided the Commission with a memo from his employer dated May 3, 2022, that explains the companies difficulty with loaner Fire Extinguishers and notes that some jobs are on hold due to not having enough loaner³¹ fire extinguishers.

[38] So clearly the Appellant knew that rather than using under sized fire extinguisher replacements which was against the code, he could have put the job on hold until he could gather the appropriate type of replacement fire extinguishers.

[39] I find that the Commission has proven that the Appellant's dismissal was misconduct under the law.

[40] The Appellant confirmed in testimony that he knew the NFPA code and knew that leaving 5 lb extinguishers in place of 10 lb extinguishers was a violation of that code.

²⁷ See GD4-5.

²⁸ See GD3-10.

²⁹ See GD3-39.

³⁰ See GD3-39.

³¹ See GD3-35.

[41] He also acknowledged in testimony that he had received previous suspensions and warnings for code and performance related issues and that those documents said further incidents of failure to perform service in accordance with the required standard will be grounds for termination.

[42] While the Appellant feels that his employer was out to get him, the courts have told us that tribunals must focus on the conduct of the Appellant, not the employer.³²

[43] And while the Appellant believes that other employee's may have done the same thing and not been terminated, my responsibility is to review the facts of the case before me.

[44] I make the following findings in support of my decision:

- The Appellant knowingly breached his employer's standard (NFPA code) by replacing 10 lb fire extinguishers with 5 lb fire extinguishers.
- The Appellant was aware of the NFPA code.
- The Appellant was aware that he had previous warnings and suspensions for breaching his employers' policies and standards.
- The Appellant was aware that the previous warnings and suspensions included a warning that future failures to perform service in accordance with the required standard will be grounds for termination.
- While others may knowingly breach the fire code in his industry, I believe the employer that this could be a liability issue for his company.
- The previous negative interactions between the Appellant and the employer are not a factor in the determination of misconduct.

³² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[45] So, I find that the Appellant knew or ought to 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.

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.

Conclusion

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

[48] This means that the appeal is dismissed.

Greg Skelly

Member, General Division – Employment Insurance Section