



Citation: *OW v Canada Employment Insurance Commission*, 2023 SST 2045

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

Decision

Appellant: O. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (595288) dated July 7, 2023 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: September 26, 2023

Hearing participant: Appellant

Decision date: October 3, 2023

File number: GE-23-2119

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 he was let go because he violated its Business Conduct policy and Workplace Harassment and Violence Prevention policy when he harassed and threatened two of his co-workers.

[4] The Appellant doesn't dispute that there was an incident between him and co-workers. But he says his employer didn't have cause to dismiss him from his job. He says the employer didn't properly investigate and address complaints he made of workplace harassment against him.

[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?

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

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

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 of his conduct with two of his co-workers.

[9] The Commission says the reason the employer gave is the reason for the dismissal. In a termination letter, the employer said it dismissed the Appellant because he acted in an aggressive and hostile manner towards two of his co-workers.

[10] The Appellant agrees that his employer dismissed him from his job for the reasons it listed in its termination letter. But he says that his conduct is being taken out of context. He says he just had a discussion with two co-workers.

[11] The Appellant disputes exactly what happened in the incident described by his employer. But since he agrees that the employer dismissed him for the reasons listed in the letter, I find that the Appellant's employer dismissed him because of his conduct in an incident between him and his co-workers.

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

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

[13] 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.

[14] 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

[15] The law doesn't say I have to consider how the employer behaved.⁶ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.⁷

[16] 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

[17] I can decide issues under the Act only. It is not for me to decide whether his employer wrongfully dismissed the Appellant.⁹ I can consider only one thing: whether what the Appellant did is misconduct under the Act.

[18] The Commission says there was misconduct because the Appellant because he admitted his actions and was warned before about his behaviour.

[19] The Appellant says there was no misconduct because his employer didn't properly investigate his complaints of harassment that he experienced and raised with the employer. He also says the incident with his co-workers was taken out of context.

[20] I find that the Commission has proven that there was misconduct, because the Appellant should reasonably have known that his conduct with his co-workers could result in his dismissal.

[21] The Appellant's employer dismissed him on April 23, 2023. When he first spoke to the Commission, the Appellant referred to past incidents that he was disciplined for.

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

⁶ See section 30 of the Act.

⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

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

He said his employer dismissed him for cause. So, the Commission denied his application for benefits.

[22] After he asked the Commission to reconsider its initial decision, the Appellant said he felt that the employer had used previous incidents to support dismissing him after the last incident. He sent the Commission a copy of the letter his employer sent him, dismissing him from his job. The letter refers to the previous incidents, but it also gives a summary of the findings of the employer's investigation of the last incident.

[23] According to the letter, the Appellant harassed and threatened two co-workers. It describes the Appellant's behaviour and statements the employer found that the Appellant made. The employer concluded that the Appellant had violated its Business Conduct and Workplace Harassment and Violence Prevention policies. It states that the Appellant's actions in this last incident represent a culminating pattern where he takes little accountability for his actions.

[24] I asked the Appellant what happened at work that led his employer to dismiss him. He referred to his termination letter and read portions of it. I asked him if he disputed what the employer laid out in the letter. The Appellant said he did.

[25] The Appellant explained that in the previous incidents, he had met with his manager and human resources (HR) personnel to discuss the incidents, and they were all dealt with and resolved. He testified that he doesn't understand why the employer brought forward the previous incidents and used them against him to support his dismissal.

[26] I asked the Appellant about the previous incidents. He said he had gone to one of his employer's retail stores. The agent in the store refused to serve him. He said he "flailed" his hands in frustration and left. The Appellant said he was at the store as a customer, but the employer said he was on company premises.

[27] I asked the Appellant if he disputed yelling over the intercom as the employer had written in the termination letter. He first said that he didn't need to yell over the intercom, and to him, it wasn't a big deal. He added that he returned to the store and

the employees in the store didn't have a problem with this second visit to the store. But the Appellant then agreed that he yelled over the intercom.

[28] The Appellant testified about warnings he had received for not completing assigned tickets. He said his employer had assigned him work to be done on overtime. But the Appellant said he had done work other than what the employer had assigned. He said that although he wasn't a manager, he understood what needed to be done. He said he had been working this way, doing what needed to be done, ever since he got to the department. But December 2022 was the first time he was disciplined.

[29] I asked the Appellant what happened on March 20, 2023. He said that the events of the last incident are being taken out of context. He testified that he was doing his work, another colleague questioned the quality of his work, and he simply responded by saying he was doing his work and that was it. He denied doing so loudly. He added that he didn't make any threats or make any bodily motion towards them.

[30] I asked the Appellant if everything his employer had written in its summary of findings was false. The Appellant repeated that everything was taken out of context. He said that he felt that his co-workers were being aggressive towards him or at least disruptive towards what he was doing at work.

[31] I again asked the Appellant if what the employer had written in the letter was true or false. I asked what he meant when he said that everything was taken out of context. The Appellant said a question was asked challenging the credibility of the work he was doing. He said he spoke to the work he was doing as professionally as he could. He added he thought there was nothing to it, he walked back to his desk, and that was it.

[32] Concerning the threatening statements the employer quoted in its termination letter, the Appellant said that his co-workers' behaviour toward him needed to end. He said this was causing him anxiety and that's why he needed to see a psychologist. The Appellant said he told his co-workers that the behaviour they were directing towards him was trash and it needed to end.

[33] The Commission's notes say the Appellant acknowledged that he might have reacted more sternly than he should have in the final incident. It continues that the Appellant said he does not outright dispute any of the details in the employer's termination letter, but feels his conduct was far less severe than the investigation determined.

[34] I asked the Appellant if he had said what the Commission's notes show, what he meant by this. He said taking into consideration his anxiety and what he was going through, maybe his anxiety was triggered. He added that maybe he should have waited and had a meeting with his manager and the co-workers.

[35] I find from the Appellant's response above that the Appellant's conduct with his two co-workers was likely closer to what his employer detailed in its letter than a simple discussion as the Appellant first said. I understand the Appellant's frustration at what he says was his co-workers' questioning his work. But I'm not persuaded by his testimony that he simply had a discussion with them.

[36] I give a lot of weight to the Commission's notes that show the Appellant didn't outright dispute any of the details in the employer's termination letter. The Appellant didn't dispute having said this. Rather, he said that maybe his anxiety was triggered as an explanation for his conduct. So, I give less weight to his testimony that when he is anxious, there's nothing expressed outwardly.

[37] I acknowledge that the Appellant said that his conduct was taken out of context. He feels that his conduct wasn't as severe as the employer described. But I find it more likely that his conduct was at least disrespectful and threatening to his co-workers.

[38] The Appellant sent the Tribunal a copy of his employers Business Conduct and Workplace Harassment and Violence Prevention policies. The first policy says the company is committed to ensuring that employees are treated with respect and dignity. It continues that the company has a zero-tolerance policy towards any disrespectful behaviour in the workplace. When asked about this, the Appellant testified that he believed that no company would tolerate disrespectful behaviour.

[39] The second policy says the employer would take disciplinary measures it deems appropriate, up to and including dismissal. The Appellant confirmed that he knew this. He added that the employer's HR department also held meetings about this.

[40] I find from the Appellant's evidence that he knew how his employer required him to do his job and what behaviour was expected versus not acceptable. The Appellant testified that he was warned that he needed to stick to his assigned tickets and that only. He got a written warning for yelling over a retail store income. I also find from his testimony that he knew the possible consequences of violating the employer's policies. So, I find he should have known that engaging in disrespectful, threatening behaviour would likely lead to his dismissal.

[41] In his notice of appeal, the Appellant said his employer didn't address his complaints about workplace harassment he experienced and raised in February 2023. I asked the Appellant about this. He said that after the final incident and following the other incidents, he felt that he was being targeted. He felt that in the final incident, questioning the quality of his work where he was just doing his job was disruptive and unprofessional.

[42] I asked him when he complained about harassment to his employer. The Appellant said he spoke about it with the investigators who investigated the complaint made by his co-workers. He reiterated what had happened in previous incidents.

[43] I asked the Appellant again when he had complained to his manager. He referred to one-on-one meetings with his manager. He had said he wasn't saying that someone complaining about him not doing his assigned tickets was harassment. He explained that he was in a situation where he was doing his work, but was continually being sent to HR.

[44] I don't find from the Appellant's testimony that he complained to his employer about harassment. I found his responses about when he had complained were inconsistent. In his notice of appeal, he said he complained in February 2023. At the

hearing he first said he complained to the employer's investigators. After that he referred to one-on-one meetings with his manager.

[45] I accept that the Appellant may have been upset about past discipline and may have said so to his manager and to the employer's investigators. But I'm not satisfied that he experienced harassment that the employer didn't address.

[46] The Commission said the Appellant should have known that his conduct could lead to his dismissal because he had previously been warned about inappropriate behaviour. In response to this, the Appellant said that in the incident where he yelled over the intercom, he wasn't at work. He said he feels like the employer was building a case of him being angry or aggressive. He added that in the last incident, he should have taken a pause and asked to sit down with his manager and his co-workers.

[47] The Appellant testified that he had addressed the employer's concerns about past conduct, and said the employer was satisfied. Whether this is true, the employer issued verbal and written warnings for his conduct. So, I find that the Appellant should have known that he would face discipline, up to dismissal, if he again violated the employer's policies.

[48] I find that the Appellant's conduct was so reckless that it was almost wilful. I find that he knew of his employer's zero tolerance policy for disrespectful behaviour and that he would likely face discipline for his conduct with his co-workers. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

Conclusion

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

[51] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section