



Citation: *AP v Canada Employment Insurance Commission*, 2024 SST 518

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

Decision

Appellant: A. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (610731) dated October 30, 2023 (issued by Service Canada)

Tribunal member: Paula Turtle
Type of hearing: Teleconference
Hearing date: January 30, 2024
Hearing participant: Appellant
Decision date: February 26, 2024
File number: GE-24-104

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 worked as a security guard. He worked for two different security guard companies. I will call the companies S and G. He lost his job. The Appellant's employer S said that he was let go because he worked a shift for a competing security company at the same time he was working for S.

[4] The Appellant says that it isn't the real reason why the employer let him go. The Appellant says that he reported misconduct by his manager to the human resources department (HR). And HR began an investigation.² So, his employer actually let him go as retaliation because the Appellant reported his manager to HR.

[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.

Post-hearing submissions

[6] The Appellant sent in many documents before the hearing. I reviewed those documents carefully. During the hearing, the Appellant explained his position and testified about the facts.

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 GD9-3.

[7] At the end of the hearing, the Appellant said he wanted another hearing date. I told the Appellant that in my view, it was not necessary to hold another hearing. But I gave the Appellant an opportunity to file additional information and submissions.

[8] The Appellant sent in six additional submissions. Some of the submissions repeated what the Appellant said at the hearing. Or they repeated what he had already sent in. But I considered all the additional submissions in making my decision.

Issue

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

Analysis

[10] 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?

[11] I find that the Appellant lost his job because, on November 23, 2022, he worked for another security company at the same time he was working for S. In other words, he was on duty for both companies at the same time.

[12] At the meeting where he was let go, S's management asked the Appellant if he was scheduled to work for another security company at the same time that he was working for S. And he said yes.

[13] The Appellant says that being scheduled to work for two security companies at the same time isn't against the rules. He agrees that actually working for two companies at the same time is against the rules. But he says he didn't do this.

[14] The Appellant says he lost his job because his manager was angry that the Appellant reported him to HR. He says there was no other reason for him to be fired. He

was a good employee. And he says that other employees worked for competitors, and they weren't let go.³

[15] The Appellant says his manager was incompetent. And the employees he worked with were mentally ill and dishonest. There were problems at work. They were the manager's fault. In April 2022, he complained to HR. The manager told the Appellant that he should have spoken to him about his concerns, and not to HR.⁴

[16] Sometimes, you can infer that the reason an employer gives for letting someone go isn't the real reason. The Appellant is asking me to make that inference here.

[17] The Appellant says I can make the inference because he didn't break the rules.

[18] And the Appellant says he was treated differently than other employees. That is because other employees worked for two employers at the same time and weren't let go.

[19] And the Appellant says he was a valuable employee. His manager told him this in January 2022.⁵ And he helped the company. For example, he trained other workers and organized the sites. So, there was no reason to let him go.

[20] The evidence does not support the inference that the Appellant was let go because he reported his manager to HR, for these reasons:

- The Appellant says he didn't break the rules. But he agrees it is against the rules to be on duty for two employers at the same time. As discussed further below, he was scheduled to work and on duty for two employers on the same shift. So, S had a reason to terminate his employment.

³ See, for example, the employees listed at page GD2A-8.

⁴ GD2A-20.

⁵ GD2A-22.

- The Appellant wasn't treated differently than other employees. He told me about other employees who worked for two employers. But they worked for two employers at different times. They didn't work the same shift for two employers.
- The Appellant may have done his job well. But the Appellant's manager also showed some dissatisfaction with the Appellant. For example, he sent the Appellant a text in August 2022 that said: "Leave the cleaners alone. It is not your job to monitor the cleaners. Your report should have read "soap disposal not working" and nothing about the cleaners. Stop".⁶
- The Appellant reported his concerns to HR in April 2022. He was let go in November. If his manager wanted to retaliate against him, he could have done so several months before the Appellant was let go.

[21] I find that the Appellant lost his job because he was on duty for both S and G during the afternoon and evening of November 23, 2022, at the same time.

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

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

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ 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.⁹

⁶ GD12-20. Also see GD9-4, where the Appellant says a client representative said to him that he did a great job, but he "troubled people".

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

[24] 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.¹⁰

[25] 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.¹¹

[26] The Commission says that there was misconduct because the Appellant knew the employer had a rule against working overlapping shifts with another security company at the same time.

[27] The Appellant says he didn't work for both employers at the same time. He stopped working for G part way through his shift. And that was before his shift for S started. So, there was no overlap in shifts and no misconduct.

– **The employer's policy**

[28] S has a policy handbook. The policy handbook says you can't work for a competing security company while you are working for S.¹² The policy also says you can have outside employment. But it can't be with a competitor.¹³

[29] The employer doesn't apply the policy strictly. The employer knows that some of their employees work for other security companies. And they don't get fired for that.

[30] But you can't work for two different security companies on the same shift.¹⁴ And the Appellant knew this was against the rules. He told me at the hearing that working for two different companies on different shifts is ok. But working two shifts with different employers at the same time is not.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹² See GD3-37.

¹³ See GD3-74.

¹⁴ See GD3-67.

[31] The Appellant knows about the employer's rules. He said in his application for benefits that S has a rule against working for its competitors. He had no choice but to violate the policy because S did not give him enough hours to work.

[32] The Appellant knew he shouldn't work for two different employers on the same shift. He told me this.

[33] And the Appellant did some things on the day the employer said he worked for both S and G at the same time. He thought by doing those things, it meant that he was not working G after about 4:00 PM. So, he wouldn't be on duty for two employers at the same time. This also tells me that he knew it was against the rules.

[34] I find that the Appellant knew it was against the employer's rules to work for two different security companies on the same shift.

– **The Appellant worked for two different security companies at the same time.**

[35] On November 23, 2022, the Appellant was scheduled to work for both S and G. Both companies provided security services to different clients at the same building.

[36] The Appellant denies he worked two shifts for different employers at the same time on November 23, 2022. He says he did things to get off the schedule for G after about 4:00 PM that day.

[37] The Appellant was still working for G after 4:00 PM on November 23, 2022. And he started working for S at about 4:00 PM that day.

[38] Around this time, the Appellant was not happy working at S. He was unhappy with how the other guards worked. They harassed him. He found the environment to be toxic. He decided to quit S and work full-time for G.¹⁵

[39] Then, on November 20, 2022, his boss told him the worker who harassed him was leaving.¹⁶ This made the Appellant think about staying with S.

¹⁵ See GD3-46 and 62.

¹⁶ See GD3-81.

[40] On November 21, 2022, G sent the Appellant his shift schedule. On November 23, 2022, he was scheduled to work for G from 2:00 PM to 10:00 PM. And on the same day, he was scheduled to work for S from 4:00 PM to midnight.

[41] So, he knew on November 21, 2022, that he had overlapping shifts with S and G.

[42] The Appellant was experiencing financial pressure. He was helping to support his mother. So, he was working a lot. He worked about 10 shifts a week for both S and G. He was not sleeping well.

[43] On November 23, 2022, the Appellant reported for his shift with G at about 1:45 PM. He couldn't get into the building because he didn't have the right pass. At about 2:30 PM the site superintendent let him in. He began his work for G.

[44] The Appellant took two uniforms to work with him that day: one for S and one for G. He knew he couldn't work for both employers at the same time. He had to decide who to work for. He decided during his shift for G that he would keep working for S.

[45] The Appellant's shift for S started at 4:00 PM on November 23, 2022. At 3:54 PM he put on his S uniform and reported for duty with S.

[46] The Appellant explained why he decided he was going to keep working for S during his shift for G, which was just before his shift for S started. He said:

- His boss told him the employee who was harassing him wouldn't be at the site anymore.
- He couldn't decide earlier on November 23, 2022, because he was delayed getting on the site.
- G has a rule that you have to give a week's notice if you want a day off.
- He was very tired and wasn't sleeping well.

[47] The Appellant explained that a guard can't leave a site without security. So, you have to phone G's control centre and ask to be removed from the schedule. He called

the control centre twice on November 23, 2022. He called first at 4:00 PM. But he couldn't speak with anyone or leave a message. Then he called again at 6:24 PM.¹⁷ He spoke to someone. He said he wanted to be removed from the schedule. The operator told him to speak to his local office the next day. The operator didn't tell the Appellant he was removed from the schedule.

[48] So, the Appellant was still on the schedule for G after 4:00 PM on November 23, 2022.

[49] G issued a record of employment to the Appellant. The ROE says the last shift for which he was paid was November 20, 2022. G didn't pay him for any of the work he did for G that day.

[50] G terminated the Appellant's employment by letter dated November 29, 2022, just as S had done. G's termination letter makes a mistake about the name of the other security company the Appellant was working for. But this error doesn't affect my decision.

[51] The Appellant agrees he worked for G from 2:30 to 3:54 PM on November 23, 2022. He says he didn't work for G after 3:54 PM on November 23, 2022, because:

- He phoned G's control centre to say he wanted to be removed from the shift.
- G didn't pay him for that shift.
- The ROE that G issued says the last shift he worked was November 20, 2022.
- He didn't do any work for G after 3:54 PM on November 23, 2022.
- He took off his G uniform and put on his S uniform. He worked for S.

¹⁷ See GD10-6.

[52] The Appellant says he was in a difficult situation. He decided to keep working for S just minutes before his shift started.

[53] The Appellant says he only planned to work for one of his two employers that day. He says he took a long time to decide which employer he would work for. I do not accept that the Appellant couldn't make up his mind about whether to keep working for S until just before his shift started on November 23, 2022.

[54] The Appellant's explanation for why it took a long time to decide he was going to keep working for S is not credible. His manager told him the harassing employee would no longer be at the site. And so, he changed his mind about quitting S. But his manager told him this at 9:34 AM on November 20, 2022. So, after he knew this, he had three days before November 23, 2022, to change his schedule or quit working for G.

[55] The other explanations also lack credibility. The Appellant said he couldn't decide earlier on November 23, 2022, because he was delayed getting on the site. And G has a rule that you have to give a week's notice if you want a day off. And he was very tired and wasn't sleeping well. None of these things are reasons for not deciding earlier that he was going to work for S and not G.

[56] I find that the Appellant planned to work for both S and G at the site (and at the same time) on November 23, 2022. And he decided just before 4:00 PM that it would be too risky to do that.

[57] The Appellant says he didn't plan to work for both. He just couldn't make up his mind until the last minute. But, even if he didn't plan to work for both S and G, he was reckless in not making up his mind until it was too late to get off duty for G.

[58] He knew it was against the rules to work for both employers at the same time. So, he tried to make it look like he didn't work for G after 4:00 PM that day.

[59] I do not accept the Appellant's argument that he didn't work for G after 4:00 PM on November 23, 2022. First of all, he didn't even speak to the control centre until 6:00 PM, which was two hours after he started to work for S. And then, the control centre

didn't tell the Appellant he was relieved from his duty for G. So, he continued to be on duty for G after 4:00 PM that day.¹⁸ The things he did that day (like taking off his G uniform and doing the patrols for S) only mean he wasn't doing the work that G assigned him to do.

[60] The Appellant didn't do anything to end his employment with G until November 24, 2022. Then, he told G that he quit.¹⁹

[61] The Appellant says G didn't pay him for working on November 22, 2023. So, he says this means he didn't work for G that day. But G didn't pay the Appellant that day for any work. And the Appellant agrees he worked for G until just before 4:00 PM. So, the fact that he wasn't paid doesn't mean that he didn't work.

[62] G's ROE doesn't help the Appellant. That's because it doesn't say the last day he worked for G was November 20, 2022. It just says that was the last day they paid him.

[63] The Appellant said at the hearing and in his submissions afterwards²⁰ that G was not a competitor to S. G and S both provided security services in the same market. And the Appellant himself described them as competitors in his notice of appeal.²¹ I find that they were competitors.

[64] I find that the Appellant was on duty for S and G at the same time, between 4:00 PM and 10:00 PM on November 23, 2022. And this was against the rules.

– **The Appellant's misconduct was deliberate or reckless**

[65] The Appellant worked for both S and G (off and on) for several years. So, he knew how to avoid working for both employers at the same time. But he did not do this on November 23, 2022.

¹⁸ The Appellant didn't speak to the control centre until 6:24 pm, more than two hours after his shift for S had started.

¹⁹ See GD2-10, GD2A-14.

²⁰ See GD9-3.

²¹ See GD2A-8.

[66] After he was scheduled for overlapping shifts, the Appellant could have fixed that problem before November 23, 2022. He could have quit working for G before then. Or he could have called in sick or asked the control centre before his shift started (instead of in the middle of his shift) to get off the schedule. But he didn't do any of those things.

[67] The Appellant says G has a rule that you had to ask a week in advance to change your schedule. But employees get sick and have family emergencies at the last minute before their shifts. So, there must be exceptions to this rule. And the Appellant's own evidence showed there is a process for calling the control centre to be relieved from duty.

[68] The Appellant says he was in a difficult situation. And he had to make a difficult decision. But being in a difficult position does not mean your conduct is not deliberate.

[69] The Appellant knew it was against the rules to be on duty for both employers at the same time. So, he tried to make it look like he was not working for both.

[70] The Appellant's conduct in getting scheduled to work for two employers, and not taking steps to ensure that he wasn't going to be on duty for both at the same time, was deliberate or reckless. And then, trying to make it look like he wasn't on duty for G after 3:54 PM on November 23, 2022, was also deliberate or reckless.

[58] I find that the Commission has proven that there was misconduct. The Appellant knew that the rules meant he couldn't be on duty for two employers at the same time. He was on duty for two employers at the same time. There were things he could have done to avoid that. But he didn't do any of those things. This means that he wilfully or recklessly broke the rules.

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

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

Conclusion

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

[61] This means that the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section