



Citation: *JZ v Canada Employment Insurance Commission*, 2024 SST 711

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

## Decision

**Appellant:**

J. Z.

**Respondent:**

Canada Employment Insurance Commission

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**Decision under appeal:**

Canada Employment Insurance Commission  
reconsideration decision (636385) dated February 8, 2024  
(issued by Service Canada)

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**Tribunal member:**

Bret Edwards

**Type of hearing:**

In person

**Hearing date:**

April 10, 2024

**Hearing participant:**

Appellant

**Decision date:**

April 16, 2024

**File number:**

GE-24-755

## Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because he attacked his co-worker unprovoked.

[4] The Appellant agrees that he was dismissed after an altercation with his co-worker, but he disagrees that he attacked them. He says he simply put his arm around his co-worker from behind and grabbed them. He did this because his co-worker had been bullying him and his employer hadn't done anything to discipline them, so he felt he had no choice but to take the matter into his own hands.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided the Appellant is disqualified from receiving EI benefits.

## Matters I have to consider first

### The Appellant asked for an interpreter

[6] The Appellant asked for an interpreter as English isn't his first language. At the hearing, the Appellant confirmed that he wanted the interpreter to translate only what he didn't understand.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

[7] So, the hearing was partially conducted through an interpreter to ensure the Appellant could understand and participate in the proceedings.

### **The Appellant asked for a polygraph examiner and for his former co-workers to attend the hearing**

[8] Prior to the hearing, the Appellant asked for a polygraph examiner and for his former co-workers to attend the hearing.<sup>2</sup>

[9] I sent a letter to the Appellant explaining that the Tribunal can't ask for a polygraph examiner or the Appellant's former co-workers to attend the hearing. But I also explained that he could bring witnesses to the hearing to support his testimony if he wished.<sup>3</sup>

[10] At the hearing, the Appellant again brought up his desire to have a polygraph examiner and his former co-workers at the hearing. I reiterated that the Tribunal isn't able to do this. He said he felt his co-workers should have to testify too because they are lying about what happened.

[11] I told the Appellant that I understood his concerns, but that the hearing is his chance to speak with me directly and tell me what happened. He said he understood.

[12] So, the hearing proceeded with no further reference to the above.

### **The Appellant had support people at the hearing**

[13] The Appellant had two support people (family members) with him at the hearing.

[14] At the start of the hearing, I explained to the Appellant that the role of support people is to silently observe the hearing and asked if he understood and was okay with this. He said yes.

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<sup>2</sup> GD6-1.

<sup>3</sup> GD7-1 to GD7-3.

[15] So, the hearing proceeded with the Appellant's support people silently observing the hearing.

## **Issue**

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

## **Analysis**

[17] 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?**

[18] I find the Appellant lost his job because he attacked his co-worker without provocation.

[19] The Appellant and the Commission don't entirely agree on why the Appellant lost his job.

[20] The Commission says the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant attacked his co-worker without provocation on July 4, 2023, which violated their zero-tolerance workplace violence policy.<sup>4</sup>

[21] The Appellant testified that he didn't attack his co-worker on July 4, 2023. He simply grabbed them from behind by putting his arm around their chest. Other co-workers then grabbed him from behind and they all fell to the floor, with him still holding his co-worker. This is also what he told the Commission.<sup>5</sup>

[22] The Appellant testified that he grabbed his co-worker from behind because they had been bullying him and his employer hadn't punished them for their behaviour, so he

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<sup>4</sup> GD3-62, GD3-84.

<sup>5</sup> GD3-56 to GD3-57.

felt he had no choice but to make it clear to his co-worker that they had to stop. A few days earlier (on June 30, 2023), his co-worker had punched him in the face, injuring his lip and tooth.

[23] I also asked the Appellant if his co-worker had attacked him first that day. He said no. This is also what he told the Commission.<sup>6</sup>

[24] I acknowledge the Appellant thinks he didn't attack his co-worker on July 4, 2023.

[25] But unfortunately, I disagree.

[26] I find the Appellant confirmed at the hearing that he grabbed his co-worker from behind and put his arm around their chest on July 4, 2023. In my view, it's reasonable to view the Appellant's actions as an attack since it happened without warning or provocation. I might have reached a different conclusion if the Appellant had been acting in self-defence, but that didn't happen here since it was the Appellant, and not his co-worker, who made the first move that day, as discussed more below.

[27] The Appellant also testified that his employer only decided to dismiss him after they sent him home from work on July 4, 2023 and that his boss later couldn't tell him why he was being dismissed when he asked and said it was the lawyer's decision.

[28] I acknowledge the Appellant's testimony here.

[29] But I find the available evidence clearly shows the Appellant was dismissed for attacking his co-worker without provocation. His termination letter, dated July 6, 2023, says he was dismissed for this reason<sup>7</sup>, and he told the Commission<sup>8</sup> and confirmed at the hearing that he got this letter. And a letter he received from his employer's lawyer, dated July 19, 2023, says the same thing.<sup>9</sup>

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<sup>6</sup> GD3-61, GD3-85.

<sup>7</sup> GD3-25 to GD3-26.

<sup>8</sup> GD3-58.

<sup>9</sup> GD3-43.

[30] I also find there's no evidence to show the Appellant was dismissed for any other reason. He hasn't provided any evidence to counter what the termination letter and the letter from his employer's lawyer say. And, as discussed above, he confirmed that he did in fact grab his co-worker from behind on July 4, 2023, which is why his employer says he was dismissed.

[31] Based on the available evidence, I therefore find that the Appellant was dismissed for attacking his co-worker unprovoked.

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

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

[33] The *Employment Insurance Act* (EI Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal is misconduct under the EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[34] Case law says that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>10</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>11</sup> 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.<sup>12</sup>

[35] 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.<sup>13</sup>

[36] Case law also says that my role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Appellant. Instead, I

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<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>11</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>12</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

have to focus on what the Appellant did or didn't do and whether that amounts to misconduct under the Act.<sup>14</sup>

[37] The Commission has to prove the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Appellant lost his job because of misconduct.<sup>15</sup>

[38] The Commission says there was misconduct because the Appellant attacked his co-worker without provocation and knew about his employer's zero-tolerance workplace violence policy, so she should have known he could be dismissed for his actions.<sup>16</sup>

[39] The Appellant says there was no misconduct because he was only trying to stop his co-worker from bullying him and his employer had taken sides with his co-worker.<sup>17</sup>

[40] The Appellant's employer told the Commission<sup>18</sup>:

- They dismissed the Appellant for violating their zero-tolerance workplace violence policy.
- The Appellant had a previous short history of verbal and physical conflict with his co-worker. After the second to last incident, they had warned them to stay away from one another.
- But the Appellant then attacked his co-worker from behind. He put his hands around them and tried to choke them.
- Other employees witnessed the last incident and confirmed the Appellant's co-worker did nothing to provoke the attack.
- They had no choice but to take immediate action. He attacked his co-worker unprovoked with multiple witnesses and they had to intervene to stop him.

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<sup>14</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>15</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>16</sup> GD4-5.

<sup>17</sup> GD2-4.

<sup>18</sup> GD3-24, GD3-62, GD3-84.

[41] The Appellant says<sup>19</sup>:

- His co-worker was bullying him. His employer took sides with the bully.
- His conflict with his co-worker arose because he is Chinese and his co-worker is Vietnamese and there's a long-standing history of conflict between the groups.
- The managers are Vietnamese too and they supported his co-worker because of that.
- He had three incidents with his co-worker. The first was in early June 2023, the second was on June 30, 2023, and the last was on July 4, 2023.
- In early June 2023, he and his co-worker had an argument. They pushed him and he pushed back. His supervisor overheard it and told them to stop.
- On June 30, 2023, his co-worker pushed him from behind. He pushed them back. They then punched him in the mouth, injuring his lip and tooth.
- After that incident, he had a meeting with his manager, supervisor, and the security guard. They told him to keep his distance and would let him know what they were going to do after the July 1 holiday weekend. He wasn't allowed to report them to the police.
- On July 4, 2023, he worked his first shift after the holiday weekend. He asked his manager, supervisor, and the safety chair if they decided what to do about his co-worker. They said they still weren't sure and that nothing had been settled yet.
- He was upset that his employer hadn't decided to discipline his co-worker even though they had injured him. And he really wanted his co-worker to apologize to him and to make it clear that they had to stop bullying him.
- He then went over to where his co-worker was working. He grabbed them from behind by putting his arm around their chest.
- Someone then grabbed his neck from behind, so he and his co-worker fell to the ground.

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<sup>19</sup> GD2-4, GD3-28 to GD3-29, GD3-56 to GD3-58, GD3-61, GD3-85.



- His employer told him to go home afterwards, and his boss called him the next day to say he was terminated. He then got the termination letter a few days later.
- His employer is lying about what happened. He didn't attack his co-worker, he only grabbed them from behind because his employer wasn't doing anything to punish his co-worker, so he felt he had to stand up for himself.
- His employer didn't act fairly. They didn't discipline his co-worker even though they injured him. And they dismissed him even though he never injured his co-worker.

[42] I sympathize with the Appellant, but I find the Commission has proven that there was misconduct for the following reasons.

[43] I find the Appellant committed the actions that led to his dismissal and that his actions were intentional.

[44] As discussed above, the Appellant told the Commission and confirmed at the hearing that he attacked his co-worker without provocation. He says he just grabbed them from behind by putting his arm around their chest, but I've already found that it's reasonable to call this an attack because he made the first move and did it without warning.

[45] I acknowledge the Appellant and his co-worker had previous incidents and his co-worker punched him in the face during one of those incidents.

[46] But I find the Appellant's co-worker didn't initiate the last incident on July 4, 2023, which is what led to the Appellant being dismissed. This is because the Appellant confirmed that he grabbed his co-worker from behind without provocation that day. Because of that, I can't conclude that the Appellant acted in self-defence during the final incident. Instead, his actions show that he made a conscious and deliberate decision to attack his co-worker.

[47] I also acknowledge the Appellant says that his employer didn't enforce their policy against his co-worker after they punched him in the face and injured him.

[48] And I acknowledge the Appellant says that his employer took his co-worker's side even though they were bullying him because his co-worker is Vietnamese (like most of the management) and he is Chinese.

[49] I believe the Appellant when he says his co-worker was bullying him. I have no reason to doubt what he says. And it is certainly possible from hearing his testimony that his employer may have taken his co-worker's side during the dispute.

[50] Even so, I find the Appellant's arguments aren't relevant here because they relate to things his employer did or didn't do. As discussed above, case law says that I must focus on the Appellant's (and not the employer's) actions when analyzing misconduct. This means I can only look at what the Appellant did or didn't do leading up to his dismissal.

[51] In other words, I can't look at whether the Appellant's employer acted unfairly for the reasons he says, unfortunately. If the Appellant wants to pursue these arguments, he needs to do that at another tribunal or decision-making body.

[52] And I acknowledge that the Appellant says he didn't injure his co-worker on July 4, 2023 and just felt he had to take matters into his own hands because they were bullying him and his employer had taken their side, not his.

[53] I believe the Appellant when he says this. But I find the fact that he didn't injure his co-worker and wanted to take matters into his own hands doesn't change the fact that he grabbed them from behind without warning, which shows his actions were conscious and deliberate and he wasn't acting in self-defence that day.

[54] I also find the Appellant should have known that he could be dismissed for attacking his co-worker unprovoked.

[55] The Appellant's employer told the Commission that they had a zero-tolerance workplace policy, which the Appellant violated when he attacked his co-worker, so they had to dismiss him for that reason.<sup>20</sup>

[56] The Appellant told the Commission<sup>21</sup> and confirmed at the hearing that he knew his employer had a zero-tolerance workplace policy. Since he knew this, I find he should have known that he could be dismissed for attacking his co-worker by grabbing them from behind without provocation.

[57] I acknowledge the Appellant's employer's policy says more than one thing about what could happen to employees who violate the policy.

[58] More specifically, I note that one part of the policy says that employees who violate the policy will face "discipline of increasing severity", starting with a verbal warning for a first violation and ending with termination for a fifth violation.<sup>22</sup>

[59] But I also note that another part of the policy says that if it's determined that an employee "has engaged in workplace harassment/violence, appropriate corrective action will be taken, up to and including immediate dismissal for cause" and that "corrective action will be determined on a case-by-case basis."<sup>23</sup>

[60] Based on this evidence, I find the wording of the policy shows the Appellant's employer had different options for disciplining employees who violated the policy. They could choose to use progressive discipline or could immediately dismiss an employee instead if they wished. And they could make this decision based on the specific circumstances of each situation.

[61] In other words, even if the Appellant's employer's policy says more than one thing about what could happen to employees who violate the policy, I find it still makes clear that employees could be immediately dismissed for violating the policy. Because

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<sup>20</sup> GD3-84.

<sup>21</sup> GD3-10, GD3-85.

<sup>22</sup> GD3-69 to GD3-70.

<sup>23</sup> GD3-75.

of this, I find it should have occurred to the Appellant that he could be dismissed for his actions. This was one of the possible outcomes of violating the policy, so he should have been aware that it could potentially happen to him.

[62] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he attacked his co-worker without provocation), his actions were intentional, and he knew or ought to have known that his actions could lead to him being dismissed.

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

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

[64] The Appellant also testified that he was being bullied and had no option but to do what he did, and that the government has no support for people in that situation.

[65] I acknowledge the Appellant's argument and sympathize with his frustration. And, as I said above, I believe him when he says he was being bullied.

[66] But unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. In this case, for the reasons I've set out above, the Appellant doesn't meet those requirements because he lost his job because of misconduct.

### **Conclusion**

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

[68] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section