Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 2067

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (570418) dated February 6, 2023 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	In person
Hearing date:	April 17, September 8, October 5, 2023
Hearing participant:	Appellant
Decision date:	October 31, 2023
File number:	GE-23-474

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 with Loblaws. The Appellant's employer said that he was let go because he made inappropriate comments and violated the company's code of conduct workplace policy (workplace policy). It said he made derogatory comments to and about his colleagues about people from Quebec, immigrants, people of colour, people who identify as LGBTQ, and accused his co-workers of fraud, collusion and working in organized crime.

[4] The Appellant disputes some parts of this. His says false statements were made against him because he tried to defend himself against a physical assault and because co-workers in his store were engaged in fraud and organized crime. He doesn't necessarily deny some of the things he said, but he says that the evidence against him was improperly obtained and went against his rights under his employer's collective bargaining agreement.

[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.

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

Matters I have to consider first

Procedural Issues

[6] The Appellant's first hearing was scheduled for April 17, 2023. The Appellant attended the in-person hearing at a Service Canada centre as scheduled according to the Notice of Hearing. However, the hearing was converted to a case conference for various reasons as I will explain.

[7] At the start of the hearing converted to a case conference, the Appellant took the position that the Tribunal had no jurisdiction to hear the appeal because the hearing was scheduled more than 45 days after the appeal was filed. The Appellant filed his appeal on February 6, 2023, and the hearing was scheduled on April 17, 2023. While I offered to hear the Appellant's submissions on the issue of service standards and the effect of any delay on the Appellant's appeal, the hearing did not proceed that day, so I did not hear those submissions.

[8] After the hearing converted to a case conference, I wrote to the Appellant and provided a link to the Tribunal's service standards on the website. I informed him that the General Division aims to provide a final decision within 45 days from the filing of an appeal 80% of the time. I also explained that there were a number of exceptions to service standards. I also advised that there was no law or regulation that required the Tribunal to meet its service standards. I also explained that declining to hear the Appellant's appeal because of the delay in hearing his appeal would not assist the Appellant as it would deny the Appellant the right to appeal the Commission's reconsideration decision.

[9] At the hearing converted to a case conference, the Appellant also took the position that he should be offered alternative dispute resolution prior to a hearing. I asked the Appellant if he wanted to adjourn so that I could ask the Commission if they were open to a settlement conference. The Appellant would not make a decision as to whether or not he wanted an adjournment. Post-case conference, I wrote to the Commission to ask if they would consider a settlement conference. The Commission

declined. I communicated that to the Appellant and also advised him that the General Division has no other alternative dispute resolution processes available.

[10] Finally, at the hearing converted to a case conference, the Appellant would not accept my Tribunal identification as appropriate identification. The Appellant was allowed to see my identification but also took a photo of my identification without my permission. He suggested that it was possible I was an imposter from a different country and had no authority to conduct the hearing. At this point I ended the case conference.

[11] Post-case conference the Appellant wrote to the Tribunal several times and made certain demands including that I provide my passport and work permit in order for the hearing to go ahead. I advised that the Tribunal identification would be the only identification he would be shown and that he was not permitted to take a photo of that identification.

[12] The next hearing was scheduled for September 8, 2023. The Tribunal was unable to contact the Appellant by telephone in the weeks prior to the hearing. Several attempts were made. One week before the hearing, the Tribunal converted the hearing from an in person hearing to a videoconference hearing. The Appellant was informed that this change was made because the Appellant would be given a unique log-in code which would provide the Appellant with additional certainty that the Tribunal member assigned to the case was the person hearing the matter. The day of the hearing the Appellant contacted the Tribunal and said that he had not agreed to a hearing by videoconference and that he would not be attending the hearing as a result. The Appellant's communication also alleged his Charter rights had been violated and that it was a violation of privacy for his hearing to be conducted through Zoom due to the fact that Zoom is not a Canadian company and has servers outside the country.

[13] The Appellant did not attend the hearing. The Tribunal scheduled a new hearing for the Appellant, this time in person. Prior to the hearing, the Tribunal asked the Appellant if he wanted to pursue a Charter argument. The Appellant had until September 21, 2023, to advise the Tribunal if he would like to pursue his Charter argument. The Appellant did not respond to the Tribunal.

[14] The Appellant was also advised of a number of items prior to the hearing. This included that the hearing would be for 90 minutes, with the final 30 minutes were reserved for the Tribunal's questions, that another member of the Tribunal would be observing the hearing, that no identification other than Tribunal identification would be shown, and various other directions so that the hearing could be run smoothly and efficiently.

The Appellant asked me to adjourn (that is, pause) the appeal

[15] On May 3, 2023, after the hearing converted to a case conference, the Appellant wrote to the Tribunal and asked that his hearing date be deferred until at least July 4, 2023, so that he could pursue a judicial review at Federal Court against the Commission. I requested proof of his application.

[16] On June 16, 2023, the Appellant provided proof of his Federal Court application and requested a further deferral of his hearing before this Tribunal for one year to June 16, 2024.

[17] I declined his request for a year-long postponement of his hearing.

[18] On July 4, 2023, the Appellant wrote back to the Tribunal and said that he would be attending Federal Court in July 2023 and would update the Tribunal about his progress by July 26, 2023.

[19] On July 26, 2023, the Appellant advised the Tribunal that his Federal Court application had been dismissed. On August 4, 2023, the Appellant wrote again to advise that he was contesting the Attorney General's right to dismiss his Federal Court application without a hearing.

[20] On August 10, 2023, given that his Federal Court application had been dismissed, I proceeded to schedule the Appellant's next hearing date which was scheduled for September 8, 2023.

[21] The hearing proceeded in person on October 5, 2023.

Issue

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

Analysis

[23] 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?

[24] I find that the Appellant lost his job because his employer dismissed him after multiple violations of the employer's workplace policy. The employer says it has a zero tolerance for abuse or name-calling and that the Appellant was using derogatory language and was not treating others with respect in the workplace.

[25] The Commission agrees with the employer's position. It said that the evidence shows that the employer terminated the Appellant because of workplace misconduct. The evidence includes records of reprimands for inappropriate comments, and witness statements that the Appellant verbally accosted co-workers, used derogatory language towards drivers, and engaged in name-calling. The Commission noted that although the Record of Employment (ROE) said that the Appellant quit, all the evidence, including statements by the Appellant and the employer, indicate that the Appellant was dismissed.

[26] The Appellant doesn't dispute that he was dismissed. He noted that his ROE said that he quit, but he agreed that he was dismissed. The Appellant strongly disagrees with the Commission's evidence. He says that all the evidence collected by the Commission is in violation of his rights under his employer's collective agreement. Nevertheless, he agrees he was dismissed on December 10, 2022, by his employer for breaching the workplace policy.

[27] I find that the Appellant was dismissed by his employer because he breached his employers workplace policy. The parties agree. This is because:

a) The Appellant, the Commission and the employer say that the Appellant was dismissed because the employer says the Appellant breached the workplace policy due to the use of inappropriate language in the workplace.

b) Although the ROE says that the Appellant quit his job, there is no evidence to support voluntary leaving. The evidence shows that the Appellant was dismissed on December 10, 2022, for continuing to use inappropriate language in the workplace.

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

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

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

[30] 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]

[31] 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]

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[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.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[32] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Questions about whether the Appellant was wrongfully dismissed in violation of a collective bargaining agreement aren't for me to decide.[7] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[33] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[8] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[34] In response to Mr. McNamara's arguments, the FCA stated that it has consistently held that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[35] The Commission says that there was misconduct because:

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[7] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

a) The employer provided evidence that the Appellant was aware of its policy, was warned his behaviour was inappropriate, and that the Appellant continued his behaviour despite knowing the consequences:

   i) The employer confirmed that the Appellant was aware of the policy and had checked that he had read the workplace policy during the online orientation.

   ii) The employer reprimanded the Appellant for his behaviour. He received warnings on August 25, August 27, September 1, September 3, November 7, and November 24, 2022. He was then suspended for 5 days. He was dismissed on December 10, 2022.

   iii) All the warnings were due to verbal altercations or discriminatory comments made by the Appellant about other employees.

   iv) All the warnings included a warning that said any further such behaviour would lead to disciplinary measures including termination.

   v) The Appellant read and was given a copy of the workplace policy after the first incident.

   vi) The employer says that the workplace policy says that inappropriate conduct or comments and are prohibited and cause for termination.

b) The employer provided written statements from five different employees and a chronology by the manager outlining the various incidents that show that the Appellant did the following:

   i) August 27 was involved in verbal altercations with a delivery truck driver and asked the black driver if he was Eddie Murphy.

   ii) September 1 called a new employee creepy and weird. The new employee identified as a member of the LGBTQ community and quit because they felt unsafe around the Appellant.

iii) September 3 the employer and union steward met with the Appellant for over an hour to review respect in the workplace. The Appellant expressed that there was a conspiracy of anti-maskers, a union conspiracy, and a mafia conspiracy against him. He said there was a mass fraud going on at the store. He said he should have a full-time job because he is from Ottawa and a Canadian citizen. The Appellant was informed that the employer had zero tolerance for inappropriate language. The meeting was documented as a verbal warning.

iv) September 21 the union representative touched the Appellant on the shoulder while saying good morning. The Appellant berated and yelled at her for touching him. He also berated her for her Quebecois heritage. He said he hated people from Quebec and Quebec culture. The union representative apologized and was left in tears. The employer warned the Appellant about using such language or speaking negatively about a person's heritage. Employee Assistance Plan was offered.

v) November 7 the Appellant was yelling at a delivery truck driver and was acting aggressively. The truck driver said he would call the police if the Appellant didn't calm down. The Appellant told the employer he was very calm.

vi) November 21 the manager on duty was called by the Appellant to the back room because the Appellant said a delivery truck driver had touched him. The driver said he touched the Appellant's back as he was trying to pass him in a tight spot. Two employees said that the Appellant called the driver a "faggot" several times while pointing at him and screaming. They described his action as in a complete state of rage. The Appellant told the employer he was calm.

vii) November 24 the assistant manager and the union steward met with the Appellant to let him know he was being suspended pending an investigation regarding the incident with the truck driver on November 21. The Appellant

pulled out his passport and showed it saying he was born in Canada. He was irate and was walked out of the store.

viii) November 29 the employer and a union representative met with the Appellant to advise him he would be suspended for 5 days. He was again told name-calling was unacceptable and could result in termination. He was told he would no longer be dealing with receiving as part of his job duties. He was again offered Employee Assistance. The Appellant said he would file a grievance. He told the union representative that he had a problem with her because she was not born in Canada.

ix) December 5 the Appellant informed his manager that he had a problem with the union representative because she was not born in Canada. He said he should have a full-time job over immigrants he said were likely working without a visa. On the same day, the Appellant told another employee that the union representative was having a sexual relation with his manager. The Appellant told another colleague about his belief in this sexual relationship and ranted about a conspiracy and the mafia. He approached a third employee and expressed negative views about Quebec people. He also talked about the mafia and conspiracies. He told a fourth employee that a truck driver was part of the mafia and that the Appellant was going to call the police. The employees each said that the Appellant appeared unstable and disoriented. They report that the Appellant was making them uncomfortable and fearful. The employer met with the Appellant and asked him to leave. He continued to say inappropriate things about lesbians having sex together, his colleagues' sexual orientation, disliking people because they were French or Quebecois. He also said he wanted to call immigration authorities on the third-party cleaning service hired by the employer because the third-party cleaning service hired illegal immigrants. He also said a colleague was hired by the mafia to steal all his hours.

x) December 10 the Appellant was terminated for continuing to show aggressive behaviour, saying discriminatory, and derogatory comments about co-workers and staff members despite the employer's review of expectations and his knowledge of the workplace policy.

[36] The Appellant says that there was no misconduct. He says:

a) There was collusion amongst his colleagues because they were possibly involved in organized crime or the mafia. They did not like the Appellant because he made sure employees were following the rules therefore making fraud more difficult to do. In particular, on the day he was terminated he was recording violations from delivery trucks and he was reporting tampering. He says he was told not to do that. He suspects there was systematic fraud at the store and that this is the reason for the allegations against him.

b) He was terminated after a second major incident. He says he was the victim of a physical assault when a delivery truck driver touched his back. He said his reaction to the physical assault was justified because it was self-defense. He said he cleared his physical safety and then there was a lot of yelling. Prior to that the truck driver took his photo without his permissions. He felt this was an attempt to "dox" him. He was worried organized criminals were planning an assault on him. He said that he grieved this incident with his union because he was fully justified in defending himself.

c) That the Commission does not have five witnesses who were present for that incident and therefore the Commission lacks the appropriate burden of proof to show that the incident occurred as it says it did. He says only himself and the truck driver were present.

d) That he had a right to express his concern that his union representative was in a sexual relationship with his manager because it meant he could not hand his grievance to his union representative because she was compromised.

e) That he told people about the sexual relationship but that those employees had no right to report his comments to management because it violated the employer's collective bargaining agreement with regard to the collection of evidence. This is because managers are not supposed to use a warning against an employee without it being documented in writing and sent to the employee within 7 days. He says he only received the Nov 24, 2022, warning in writing and it was not the same document as the one included in the Commission's evidence.

f) That he is not anti-French because he is half-Quebecois and has relatives in Quebec.

g) That he never used the word "faggot" and that he was wearing a mask and one of his colleagues was deaf so couldn't have heard what he said.

h) The evidence collected by the Commission was in violation of his collective agreement rights and therefore is illegal and should not be considered.

i) The Commission forced him to testify against himself when it called him as part of its investigation. He did so under protest. He believes it was a self-incriminating interrogation and against his rights.

j) There was no clear evidence as to why he was terminated. The Commission expanded its scope and included unsubstantiated allegations against him and there was no proof these incidents occurred.

k) He doesn't deny using the word "mafia," but he meant organized crime.

l) He says his assistant manager was threatening to cut his hours back from 40-hours a week to between 2 and 28 hours a week because he was a part-time employee. He says he was terminated when he took issue with the number of hours he was being given.

m) He qualifies for EI and he was not terminated for cause because he wasn't provided with evidence about an offence on the day he was terminated.

n) He was being bullied and forced to pursue his rights through the courts. He said his employer was attempting to defame him through the EI process. He says the actions of the employer was an attempt at union-busting. He believes he was terminated because he was challenging his five day suspension though his union.

o) He contested his dismissal with the union. However, the settlement offer he was presented with was for less money than he was owed. He said no. The union then closed the file.

p) All these events have had a significant effect on his mental and physical health. He is also two months behind on his rent and at risk of losing his housing. He says he has been relying on family and friends. He says a local café has been proving him with food and he looks like a “holocaust victim.” He says this is all the result of malicious actions on the part of his employer trying to destroy his life because he wouldn’t go ahead with organized fraud.

q) That the Commission violated his rights for a reason. He says there is collusion between the former Attorney General of Canada (David Lametti) and the former Minster of Employment (Carla Dawn Qualtrough). They are covering for each other by having his Federal Court application dismissed. This is because the employer was given $12 million for fridges. He said that the Attorney General of Canada has violated his Charter rights.

[37] I find that the Commission has proven that there was misconduct. The Appellant knew that his employer had a zero tolerance policy for inappropriate conduct and language in the workplace:

a) He indicated he read the policy when he went through orientation.

b) He was given a copy to read again when he received his first warning.

c) He was verbally informed by his employer that he was violating the policy and further violations could lead to dismissal.

d) He was given a written warning that he was violating the policy and further violations could lead to dismissal.

e) He was suspended for five days following an investigation for violating the same policy and told that continued inappropriate behaviour could lead to a dismissal.

f) When he returned from his suspension he continued to violate the policy and was terminated.

g) The Appellant knew about the policy, knew what he had to do, but didn't follow the policy. It is well established that a deliberate violation of the employer's policy is considered misconduct under the EI Act.[9] The Appellant made a personal and deliberate choice to continue to violate his employer's policy by making inappropriate and disrespectful comments about his co-workers.

h) He also knew that as a result of not following the policy he could lose his job.

[38] The Appellant made a voluntary decision not to comply with the policy and this constitutes misconduct under the Act.

[39] The Appellant denied some of the incidents in the employer's chronology above, but not all of them. For example, he agreed that he said there was a fraud in his workplace and that he used the word mafia. He testified that he didn't know the word mafia would be controversial but what he meant to say was that his co-workers were engaged in organized crime. He agreed that he physically protected himself from the truck driver he said assaulted him. He said he was justified in acting in self-defense even though his employer suspended him for five days following its investigation. He said he believes that his manager and his union representative were having a sexual relationship and that he had a right to know this as it affected his rights.

[40] Mostly, the Appellant's focus was on how his employer, and then the Commission had obtained evidence, he said, that was in obtained in violation of his

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[9] See *Paradis v Canada (Attorney General),* 2016 FC 1282; *Canada (Attorney General) v McNamara,* 2007 FCA 107

rights under the collective bargaining agreement. Whether the Appellant's rights under his collective bargaining agreement were violated or not, is not for me to say. That is an issue that needs to be addressed through a different process. The Appellant did advise that his union closed the file on his grievances.

[41] I am not able to address most of the arguments put forward by the Appellant because they fall outside of my jurisdiction. However, I will address the Appellant's main points to show why I those arguments were unsuccessful.

[42] The Appellant argued that procedural fairness had not been followed by the Commission in its investigation and in reaching its decision and reconsideration decision. Namely, the Appellant thought that the way the Commission worked breached his rights and that the Commission wrongly determined that the Appellant had committed misconduct.

[43] This is not a judicial review. I have no authority over the internal processes of the Commission. I only have jurisdiction over the issue before me which is whether or not the Appellant committed misconduct. I have no authority to consider whether the Commission breached procedural fairness. I can only consider whether the evidence presented before me meets the test for misconduct. In this case, the Appellant agreed that a significant portion of the events that the employer said occurred, did in fact occur.

[44] Finally, the Appellant said that there was a conspiracy to get rid of him. He alleged organized crime in his workplace, that his employer was taking retribution against him for filing a grievance and that is union representative and management were colluding against him. The Appellant presented no evidence to support these allegations other than his own suspicions. With regard to these allegations, I do not find that there is a nexus between the Appellant's allegations of corruption and the Appellant's decision not to comply with the employer's workplace policy. This case is not analogous to that of *Astolfi v. Canada (Attorney General)*[10] where the Federal Court found that Appellant's refusal to attend at the workplace (the alleged misconduct) was a

[10] 2020 FC 30

direct result of the employer's alleged harassment prior to the misconduct. This case differs from *Astolfi* because there is no evidence that the employer caused the Appellant to breach the policy. Therefore, my focus is on the Appellant's actions and I cannot consider the employer's actions.

[45] The Tribunal has a very narrow and specific focus on whether the Appellant's actions were misconduct within the meaning of the EI Act. In this case, the Commission has shown that the Appellant made a conscious choice not to follow his employer's workplace policy and that the Appellant's failure to comply with the policy meets the test for misconduct within the meaning of EI Act.

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

[46] Based on my findings above, I find that the Appellant was dismissed from his job because of misconduct.

[47] This is because the Appellant's actions – his inappropriate comments and lack of respect for his co-workers – breached the employer's workplace policy and led to his dismissal. He acted deliberately. He knew that continuing to make derogatory comments to and about his colleagues about people from Quebec, immigrants, people of colour, people who are LGBTQ, and accusing his co-workers of collusion and working in organized crime could lead to his dismissal. He continued to make these comments and was dismissed. This meets the test for misconduct.

Conclusion

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

[49] This means that the appeal is dismissed.

Marisa Victor

Member, General Division – Employment Insurance Section