Citation: *X v Canada Employment Insurance Commission and DC*, 2024 SST 993

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	X
Representative:	M. S.
Respondent:	Canada Employment Insurance Commission
Added Party:	D. C.

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (622267) dated November 24, 2023 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Videoconference
Hearing date:	February 6, 2024
Hearing participants:	Appellant Appellant's Representative Added Party
Decision date:	February 15, 2024
File number:	GE-23-3577

Decision

[1] The appeal is allowed.

[2] I find that the Added Party (Claimant) lost his job because of his misconduct (as that term is explained, below). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant in this case is the employer.

[4] The Claimant was employed by the Appellant as a tutor. He conducted his tutoring sessions online on a Zoom platform provided by the Appellant. He billed the Appellant for the time spent for these sessions.

[5] The Appellant says it learned that the Claimant hadn't been conducting tutoring sessions he was billing them for. It terminated him as a result.

[6] The Canada Employment Insurance Commission (Commission) initially decided the Claimant had been terminated as a result of his own misconduct. It advised the Claimant that he was disqualified from receiving EI benefits as a result. The Claimant asked the Commission to reconsider its decision.

[7] Following the reconsideration of the claim, the Commission reversed its decision and concluded there was insufficient evidence of misconduct. It says the Claimant presented a compelling rebuttal of the employer's allegations of wrongdoing.

[8] The Appellant appealed the reconsideration decision to the Tribunal. It maintains that the Claimant was terminated due to his misconduct.

[9] The Claimant contends that the grounds of termination are fabricated. He insists that he conducted the sessions the Appellant says he didn't.

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

Issue

[10] Was the Claimant terminated due to his own misconduct?

Matter I have to decide first

Additional documents were received after the hearing

[11] At the hearing the Appellant testified that he has video recordings of all of the tutoring sessions the Appellant says he didn't conduct. I asked him if he wanted to provide those recordings to the Tribunal and he said he absolutely did, but wanted to check with his lawyer before doing that.

[12] I gave the Claimant a delay to provide the recordings to the Tribunal. I told him he could also provide other evidence which might prove that he conducted these tutoring sessions within that same delay.

[13] The Claimant informed the Tribunal that he decided not to send the recordings he testified to having. He says he was advised by his lawyer not to. He did send other documents, which have been labelled GD10.

[14] The Commission and the Appellant were given an opportunity to respond to GD10. The Appellant's response has been labelled GD13. The Commission didn't provide a response.

[15] The parties were given permission to provide GD10 and GD13. So, even though they are post hearing documents they will form part of the record.

[16] I advised the Claimant that although he was under no obligation to send the recordings, I may draw a negative inference from the fact that he said he had them, and then decided not to provide them (in other words, I could decide that not providing the recordings shows he's not credible). He was given an additional delay to change his decision and send the Tribunal the recordings.

[17] The Claimant confirmed his decision not to provide the recordings. He argues that this shouldn't impact his credibility since he is following his lawyer's advice.[2]

[18] The Claimant sent further documents on February 13, 2024. They have been labelled GD14. The Claimant wasn't given permission to send these documents. They weren't discussed at the hearing. And I made it clear at the hearing that each party would have one chance to submit the documents we spoke about and nothing else. So, I'm not accepting GD14. It's late evidence. And I don't consider it to be necessary or relevant to my decision.

Analysis

[19] To decide if the Claimant was terminated due to his own misconduct, I first have to decide why he was terminated. Then I have to decide if that reason is misconduct under the law.

[20] The Appellant has the burden of proof. It has to prove its case on a balance of probabilities.[3] This means the Appellant has to show that it's more likely than not that:

- the Claimant did what it says he did
- it terminated him for that reason
- the reason for his termination is misconduct under the law

Why was the Claimant terminated?

[21] I find that the Claimant was terminated for failing to attend tutoring sessions which he then billed for.

– The parties positions on the reason for termination

[22] The Appellant says it terminated the Claimant because he failed to attend scheduled tutoring sessions and billed for those sessions, nonetheless.

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[2] GD12.
[3] See *McDonald v Canada Employment and Immigration Commission*, A-897-90 (FCA).

[23] This reason is set out in a termination letter the Appellant sent to the Claimant on July 13, 2023,[4] and in an email exchange with the Claimant dated July 18, 2023.[5]

[24] The termination letter also says that the Claimant was rescheduling tutoring sessions without permission. But at the hearing the Appellant said this isn't a reason he was terminated.

[25] The Appellant explained that the Claimant had been rescheduling tutoring sessions without permission in the past. He had been warned on July 6, 2023, that it would no longer be tolerated.[6] The Appellant says it didn't find any incidents of this occurring again after July 6, 2023.

[26] The Appellant says that although the termination letter refers to two reasons for the termination, the only reason it can prove is that the Claimant was terminated because he failed to attend scheduled sessions and billed for the sessions he didn't attend.[7]

[27] The Claimant says that inasmuch as he was terminated for this reason, it's untrue that he didn't attend the sessions he billed for. He says the Appellant made this up.

[28] So, the reason for the Claimant's termination isn't in dispute. What is in dispute is whether the alleged reason for his termination actually occurred. The Appellant says it did. The Claimant says it didn't. And the Commission says it believes the Claimant.

[29] I will now review the evidence before me to explain why I've concluded that it's more likely than not that the Claimant didn't attend the sessions which the Appellant says he didn't attend but billed for.

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[4] See GD3-51.
[5] See GD3-129.
[6] See GD3-55.
[7] The Claimant argued that adding an additional reason that proved to be untrue shows that the Appellant isn't credible. I disagree. The evidence shows that the Claimant had been rescheduling sessions without permission. But because he hadn't continued to do that after being warned, the Appellant decided to withdraw that ground of termination. If anything, this enhances the Appellant's credibility in my view.

– The evidence

[30] The Appellant's CEO testified at the hearing.

[31] She explained that the Claimant had three weekly assignments, he was tutoring a student group (GED) and two individual students, J. and I.

[32] The CEO testified that J. complained to the Appellant that the Claimant wasn't attending their scheduled tutoring sessions. The Appellant decided to reach out to I. to see if he was having issues with the Claimant's attendance as well. I. confirmed that he was.

[33] The Appellant reviewed the Claimant's billing and found that he had billed the Appellant for the sessions that J. and I. said he hadn't attended. It also verified its Zoom records. These records showed that no sessions had been conducted on those dates.

[34] To ensure this wasn't simply a misunderstanding, the Appellant advised the Claimant that there appeared to be some discrepancies in his billing and asked him to resubmit his timesheets for the period in question. The Claimant continued to contend that sessions were conducted on the dates that J. and I. claimed no sessions took place and for which there was no record in Zoom that a session had taken place.

[35] From all of this information, the Appellant concluded that the Claimant was billing it for tutoring sessions he hadn't conducted.[8] The CEO says she considered this to be a theft and a breach of trust. She decided to terminate the Claimant without notice.

[36] The CEO explained that the Claimant's actions put the Appellant in a difficult and embarrassing situation vis-a vis its client.[9] It was forced to tell its client that the Claimant hadn't attended the sessions and had to reimburse it for these sessions.

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[8] It says he also concluded sessions early, without permission, and billed for the entire session. But the Appellant admits that it discovered this after it terminated the Claimant. So, it isn't a reason why he was terminated.
[9] The Appellant's client is X. It refers students to the Appellant.

[37] The CEO took me through various documents to show that the Claimant didn't actually conduct the sessions that he says he conducted and billed for.[10]

[38] The Appellant's representative also testified briefly to confirm and further clarify certain details in respect of issues the CEO had testified to.[11]

[39] The Claimant testified at the hearing as well. He denies that he failed to attend his scheduled sessions.

[40] The Claimant drew my attention to the following documents:

- emails from Zoom showing that cloud recordings were created for sessions he presumably had with I.
- emails from Zoom showing that I. entered his waiting room
- Google Meets confirmations showing that I. would have apparently participated in sessions held on that platform[12]

[41] All of these documents are dated on dates where the Appellant says no session was held.

[42] When I asked the Claimant why the Zoom emails were sent to his personal email account, he told me that he redirected these emails from his work email account to his personal account.[13] He purports to have done this to keep all emails from his employment in one place.[14] These documents were originally provided to the Commission during the reconsideration process.

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[10] In particular the documents in GD9. Some of these documents are also found in GD3 and GD2.
[11] The Representative is the Appellant's Director of Finance and Human Resources.
[12] It's worth noting that the evidence shows that the Appellant had a policy that session were only to be conducted on Zoom.
[13] He originally said he had forwarded them. But forwarded emails normally show that they have been forwarded. After the hearing the Claimant corrected himself and said they had been redirected (see GD-10).
[14] See GD3-100.

[43] He claims that the Appellant has fabricated its story, as well as the evidence it provided to the Tribunal. And he says that J. and I. are lying.

[44] The Appellant claims that I. had an ulterior motive for saying the Claimant didn't attend his tutoring sessions. This is because I. had told the Claimant that he was planning on suing X, who had referred him for tutoring. I. believed his case would be stronger if he said he couldn't attend the tutoring.[15]

[45] The Claimant didn't explain why J. would lie about the Claimant's failure to attend sessions.

[46] He pointed out what he deems to be inconsistencies in the Appellant's statements, mostly with respect to errors on dates,[16] to try to demonstrate that the Appellant isn't credible.

[47] The Claimant admits that he billed for all of the sessions that the Appellant says he didn't conduct. But he says he billed for them because he did conduct them. The only exception is in respect of his billing for July 13 and 14, 2023.[17] He says on those dates he advised the Appellant that I. hadn't shown up to his sessions and that he would be working on other things instead. He claims he mistakenly indicated on his timesheet that he was billing for time spent with I., when in fact he had worked on preparing for the upcoming GED course.[18]

[48] The Claimant testified that he has recordings of the sessions the Appellant says didn't take place. He decided not to provide them, despite being told that this might impact his credibility.

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[15] See GD3-59 and GD3-137.
[16] For example, the date the Claimant lost access to the Appellant's Zoom account and the date I. began being tutored by another tutor. In my view, these errors, if they are in fact errors, are minor and have no impact on the Appellant's credibility.
[17] As set out above, I didn't allow GD14 into evidence. But I do note that the Appellant purports to have corrected his billing for July 3, 2023. Even if this fact were in evidence, it wouldn't impact my decision. This is because even if he did correct his billing for this date, I have concluded that he billed for many other sessions that he didn't conduct.
[18] It's worth noting that the Appellant's CEO testified that the Claimant hadn't been assigned the upcoming course, had no reason to be preparing for it, and wasn't authorized to prepare for it.

[49] He has filed an Employment Standards complaint against the Appellant claiming just under $3,000 in unpaid wages and termination pay as a result of what he deems to be an unjust dismissal.

– **My assessment of the evidence**

[50] The record contains hundreds of pages of evidence. The hearing lasted well over two hours. The parties' positions and versions of what occurred are diametrically opposed (in other words, completely opposite to each other). Each of the Appellant and the Claimant allege that the other fabricated or altered documents.

[51] After reviewing all of the evidence and hearing the testimony of the parties, I find that on a balance of probabilities it's more likely than not that the Appellant failed to attend the tutoring sessions that the Appellant says he didn't attend and billed for them, nonetheless.

[52] I found the Appellant's CEO to be a credible witness. She was honest that although the termination letter refers to tutoring sessions being scheduled without permission, that never occurred after the Claimant was warned about it on July 6, 2023.

[53] She was also honest about the fact that some of the information provided to prove the Appellant had been billing for time he hadn't put in (in particular, sessions where the Claimant ended the session early but charged for the full session nonetheless) was obtained after the Claimant was terminated (and therefore wasn't the reason he was terminated).

[54] The Appellant's evidence is simple, yet compelling. Two different students advised it that the Claimant wasn't showing up for their sessions.[19] And the excerpt of the Appellant's corporate Zoom account shows that the Claimant conducted only two

[19] The Appellant says one of the two students has authorized it to release his telephone number to the Tribunal for further verification of the veracity of his statement (see GD9-1). That student gave them a written statement over the phone (see GD9-2). It should be noted that the Tribunal accepts hearsay evidence if it finds it to be credible (see *Canada (Attorney General) v Morris*, A-291-98, leave to S.C.C. refused; *Canada (Attorney General) v Mills*, A-1873-83.) The Tribunal doesn't conduct its own investigation. It doesn't call witnesses. But the fact that I. was willing to provide his phone number to the Tribunal, and the fact that the Appellant offered to provide it, suggest to me that the hearsay evidence provided by the Appellant regarding I.'s statements is reliable.

sessions with J. and no sessions with I. as of June 1, 2023, and no sessions at all as of June 22, 2023.[20]

[55] The Claimant was advised of a discrepancy and was given an opportunity to correct his timesheets. He reconfirmed that he had conducted the sessions in question.[21]

[56] Although the Claimant asserts that he has video recordings of the sessions he held with I. after June 1, 2023, the Appellant says there are no such recordings in its Zoom account.

[57] The Appellant's version of events is straight forward and logical. And I have no reason to believe it isn't truthful.

[58] I'm afraid I can't say the same for the Claimant's version of events.

[59] The Claimant says that the Appellant, and the students who say he didn't attend their sessions, are lying.

[60] He claims that the Appellant fabricated the Zoom evidence it relies on and filtered out any information that would show that he conducted the sessions he's being accused of not conducting.[22] He testified that he has a Ph.D. in technology and has an in-depth understanding of how electronic documents can be manipulated.[23]

[61] I didn't find the Claimant to be credible and I didn't find his version of events to be plausible.

[62] I asked him why he thought the Appellant would go to the trouble of making up a story, and fabricating evidence to support it, rather than letting him go without cause and paying him a few weeks of damages in lieu of notice. He said it was because the

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[20] See GD9-8, which the Appellant says is an excerpt taken directly from their Zoom account and GD9-3, which is an explanatory table that it prepared.
[21] See GD9-4 to GD9-7. These timesheets show 23 sessions with I. and 6 sessions with J. as of June 2, 2023.
[22] He told the Commission this (GD3-137) and reiterated it at the hearing.
[23] At approximately 1:34:05 of the recording of the hearing.

CEO didn't like him and was stubborn. In his view she's not prepared to accept being proven wrong, so she fabricated evidence to support her story.

[63] I don't accept this answer. I find it difficult to believe that a company with institutional clients like X would make up such an elaborate lie, alter documents to support that lie, and reimburse its client for sessions that had in fact taken place simply because the CEO didn't like the Claimant or to avoid paying the Claimant a few thousand dollars, if that, as pay in lieu of notice.[24]

[64] The Appellant's CEO didn't strike me as someone who is so venal that she would compromise her business and her reputation to cause harm to an employee that she didn't like, just because she couldn't accept to be proven wrong.

[65] There are many examples in the record of circumstances where the Claimant shirked his obligations to the Appellant and refused to follow policy, such as continuously failing to use the corporate communications system (Discord), failing to hand in timesheets on time, not keeping on top of the holiday schedule (and not showing up for work on a workday, thinking it was a holiday), and rescheduling tutoring sessions without permission. But rather than terminate the Claimant for these things, the Appellant gave him warnings and encouraged him to do better.[25]

[66] As the CEO said in her testimony, her people are her greatest asset. Had she truly disliked the Claimant so much, I find that given his conduct over the course of his employment, she would have had ample opportunities to terminate him. She didn't need to make up a story and fabricate evidence to do so. Instead, she kept him on for three years and tried to get him to improve. But once she'd discovered that he'd been billing for tutoring sessions he hadn't conducted, the bond of trust was broken, and she could no longer keep him on.

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[24] The Claimant's employment contract provides that in the event he is terminated without cause, he is entitled to the minimum amount of notice, or pay in lieu of notice, payable at law plus one week of salary (see GD3-87). As mentioned above, his claim for wages and termination pay is less than $3000.
[25] See for example GD3-42 and GD3-66.

[67] So, I don't accept the Claimant's pretension that the Appellant's evidence is fabricated.

[68] As for the documents the Claimant filed, I find that they don't prove that tutoring sessions took place.

[69] The documents showing that I. entered the Claimant's waiting room or was present for a session on Google meets doesn't prove that a session actually took place. I. could have entered those meetings and then left because the Claimant never showed up, or because he made an excuse as to why he was unable to conduct the session.[26]

[70] Although at the hearing, the Claimant said he would provide me with recordings of the sessions he claims to have had with I. after June 1, 2023, he decided not to send them. Without those recordings, I can't be sure that the emails from Zoom advising that cloud recordings are available don't show 4 hours of dead airtime because the Claimant never showed up for the session.

[71] Moreover, I find it very suspicious that the Claimant said he would provide the recordings and then decided not to.[27] I also find it suspicious that he claims to have been advised by his lawyer not to provide them.

[72] It seems to me that these recordings would be the best evidence to prove his pretension that the sessions took place and would be helpful to the Claimant, not only in these proceedings, but in any proceedings with respect to his allegations of unjust dismissal. If they show what the Claimant says they show, I would think that the Appellant would withdraw its appeal before the Tribunal and settle the allegations of unjust dismissal after seeing them. So, I can't understand why the Claimant's lawyer would advise him not to provide them.

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[26] See GD9-2. According to I., the Claimant often made excuses as to why the session couldn't take place.

[27] I warned the Appellant that I could draw a negative inference from the fact that he had decided not to provide them and gave him additional time to do so if he wanted to change his mind.

[73] I'm not able to explain how it is that the Claimant has emails which appear to emanate from Zoom showing that cloud recordings were created for the dates and times that the Appellant says no sessions took place when the Appellant claims that no such recordings appear in the Zoom account. Although I'm not prepared to go so far as to conclude that the Claimant fabricated these emails, I do note that he testified that as a Ph.D. in technology he has the expertise required to do so.

[74] I also find it strange that the Claimant would redirect Zoom confirmations from his work account to his personal account, allegedly to keep them all in one place. I would think that the best place to keep work documents in one place is in one's work email account rather than their personal account.

[75] Because I have serious doubts regarding the Claimant's credibility, I can't accept his testimony that he conducted the sessions that the Appellant says he didn't conduct. Contrary to the Commission, I find that his rebuttal of the Appellant's evidence wasn't very compelling. It was convoluted, focussed on minor contradictions of no importance, and would require me to find that the Appellant's CEO, its Representative, and two of their students had lied.

[76] I therefore conclude that the Claimant billed the Appellant for tutoring sessions he didn't in fact conduct. And this is why he was terminated.

[77] Now I have to decide if this reason is misconduct under the law.

What is misconduct?

[78] The law doesn't say what **misconduct** means. But case law (decisions from courts and tribunals) explains how to determine whether someone was terminated because of misconduct. It sets out the legal test (in other words the facts to consider and the questions to ask) for deciding whether their conduct is misconduct under the law.

[79] Case law says that to be misconduct, the conduct that led to the claimant's termination has to be wilful (in other words, conscious, deliberate, or intentional).[28] Misconduct also includes conduct that is so reckless that it is almost wilful.[29] The claimant doesn't have to have wrongful intent (in other words, they don't have to mean to be doing something wrong) for their behaviour to be misconduct under the law.[30]

[80] There is misconduct if the claimant knew, or should have known, that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being terminated because of that.[31]

Was the Claimant terminated as a result of his misconduct?

[81] I find that the Appellant was terminated as a result of his own misconduct.

[82] As set out above, I'm satisfied that the Claimant failed to attend tutoring sessions and billed for them, nonetheless. This isn't something that happens unconsciously or unintentionally. You don't mistakenly stop attending tutoring sessions for over a month and accidentally continue to bill for them. The Claimant was even given an opportunity to correct his timesheets but didn't do so. I find that his conduct was wilful.

[83] Although I might have been inclined to accept that the sessions billed for on July 13 and 14, 2023 were billed by mistake, the Claimant hasn't satisfied me that he did in fact perform other work on those dates or was authorized to do so. So he shouldn't have billed on those dates.

[84] In all events, it doesn't matter if he made a mistake or not on July 13 and 14, 2023. There isn't any evidence that he made a mistake with respect to any of the other sessions he billed for but didn't attend.

[85] I also find that the Claimant knew that doing what he did was contrary to his obligations to his employer and could lead to his termination. At the hearing, the

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[28] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[29] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[30] See *Attorney General of Canada v Secours*, A-352-94.
[31] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

Claimant admitted that the Appellant would be justified in firing him on the spot if it learned he was billing them for time he hadn't actually put in. He says he would expect that to happen in those circumstances.[32] But even in the absence of his admission, anyone should realize that not fulfilling your work obligations and billing for time not spent is likely to result in your termination.

[86] The Claimant contends that he was unjustly dismissed. He argues that he never received a warning about billing for sessions he didn't conduct. And he says he wasn't given a chance to explain himself before being terminated. But this doesn't mean his conduct isn't misconduct under EI law.

[87] Caselaw has consistently held that the Tribunal shouldn't consider the employer's conduct or whether it was justified in terminating the employee when deciding if a claimant was terminated for misconduct.[33] It isn't the role of the Tribunal to determine if the Claimant was unjustly dismissed.[34] That will be for the Employment Standards Board to decide when it hears the Claimant's complaint.

[88] So, the Appellant's failure to warn the Claimant or allow him to explain himself isn't relevant. It doesn't change the fact that the Claimant's conduct was wilful and that he knew he would likely be terminated if the Appellant learned that he was billing them for sessions he hadn't conducted.

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[32] At approximately 1:51:14 of the recording of the hearing.
[33] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 and *Fleming v Canada (Attorney General),* 2006 FCA 16).
[34] See *Canada (Attorney General) v Marion*, 2002 FCA 184; *Canada (Attorney General) v Caul*, 2006 354 N.R. 21 (FCA); *Fakhari v. Canada (Attorney General*), 197 N.R. 300 (FCA);.*Canada (Attorney General) v Namaro,* 46 N.R. 541 (FCA); *Canada (Attorney General) v Jewell*, 175 N.R. 350 (FCA); *Canada (Attorney General) v Secours*, 179 N.R. 132 (FCA); *Canada (Attorney General) v Langlois*, A-94-95, A-96-95 (FCA).

Conclusion

[89] Based on my findings above, I conclude that the Claimant was terminated as a result of his misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[90] This means the appeal is allowed.

Elyse Rosen
Member, General Division – Employment Insurance Section