



Citation: *PR v Canada Employment Insurance Commission*, 2024 SST 1628

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:

P. R.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (685840) dated October 16, 2024
(issued by Service Canada)

Tribunal member:

Bret Edwards

Type of hearing:

In person

Hearing date:

December 4, 2024

Hearing participant:

Appellant

Decision date:

December 13, 2024

File number:

GE-24-3790

Decision

[1] The appeal is dismissed. I disagree 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 the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because he wasn't logging into his jobs at work.

[4] Even though the Appellant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. The Appellant says that the employer actually let him go because he had been complaining to his co-workers about his employer.

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

Issue

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

Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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

Why did the Appellant lose his job?

[8] I find that the Appellant lost his job because he wasn't logging into his jobs at work.

[9] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant was dismissed because he wasn't logging into his jobs at work.²

[10] The Appellant disagrees. He says the real reason he lost his job is that he had been complaining to his co-workers about his employer.

[11] The Appellant testified that he agrees that he sometimes didn't log into his jobs at work and that his employer warned him about that prior to his dismissal.

[12] But the Appellant also testified that he doesn't think he was dismissed for not logging into his jobs. Prior to being dismissed, he had been complaining to his co-workers about how unhappy he was with his employer because they had hired some people who were being paid more than him. He thinks his employer somehow found out what he had been saying and decided to use the fact that he didn't always log into his jobs as an excuse to dismiss him.

[13] I acknowledge that the Appellant thinks that he was dismissed for complaining to his co-workers about how unhappy he was with his employer.

[14] But I'm not persuaded that the Appellant was dismissed for the reason he says. This is because there is other evidence that leads me to conclude that he was dismissed for the reason the Commission says.

² GD3-23.

[15] More specifically, I note the Appellant received two written warnings from his employer on April 25, 2024 and June 19, 2024 for “continually not clocking into jobs” that he was working on.³ He confirmed in his testimony that he signed these warnings.

[16] Also, as discussed above, the Appellant’s employer told the Commission that the Appellant was dismissed for not logging into his jobs at work. And the Appellant confirmed at the hearing that he agrees that he sometimes didn’t log into his jobs at work.

[17] I acknowledge the Appellant’s termination letter, dated June 26, 2024, doesn’t specifically indicate the reason why he lost his job. It just says he has been dismissed “following our meeting today”.⁴

[18] But even so, I find it’s more likely than not that the Appellant was dismissed for not logging into his jobs at work. The gap between his second written warning (on June 19, 2024) and his dismissal (on June 26, 2024) was one week. Because of that, I think it’s reasonable to believe that the Appellant’s dismissal was linked to what his employer warned him about in writing the week before, which was not logging into his jobs at work.

[19] Additionally, I find there’s no other evidence besides the Appellant’s testimony to support that he was dismissed for the reason he says. I don’t doubt that he was complaining about his employer to his co-workers. But in my view, the fact that this happened isn’t enough to show that it is why he lost his job, particularly since he has also confirmed that he wasn’t always logging into his jobs at work and was warned about that more than once prior to being dismissed.

[20] Taken together, based on the available evidence, I find, on a balance of probabilities, that the Appellant was dismissed for not logging into his jobs at work.

³ GD3-24 to GD3-25 (first written warning), GD3-26 to GD3-27 (second written warning).

⁴ GD3-28.

[21] Now that I've determined why the Appellant was dismissed, I will look at whether the reason he was dismissed amounts to misconduct.

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

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

[23] 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.

[24] Case law says that to be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[25] 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.⁸

[26] 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 have to focus on what the Appellant did or didn't do and whether that amounts to misconduct under the Act.⁹

[27] 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

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

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

means it has to show that it is more likely than not that the Appellant lost his job because of misconduct.¹⁰

[28] The Commission says that there was misconduct because the Appellant didn't always log into his jobs as required and should have known that he could be dismissed for that reason after he received written warnings.¹¹

[29] The Appellant says that there was no misconduct because he was dismissed without cause and his employer didn't follow all of their disciplinary steps when dismissing him.¹²

[30] The Appellant's employer told the Commission that the Appellant was dismissed for refusing to follow directions about logging into his jobs. They spoke to him multiple times and gave him formal warnings. Following a meeting, they then terminated him.¹³

[31] The Appellant testified to the following:

- His employer wanted to control him and that's why they asked him to log into his jobs.
- But he didn't mean to do anything wrong. He just sometimes forgot to log in to his jobs. There were also others who forgot too but they weren't dismissed.
- It also wasn't always easy to log into his jobs.
- He had to log in on specific pieces of paper, and sometimes the paper wasn't where it should be because someone else had taken it with them to a different department. He had to spend more time than he wanted to look for the paper and sometimes just decided not to do that because it was frustrating.
- Sometimes the paper he needed to use to log in had completely disappeared too. He had to use a general paper (for maintenance and the warehouse)

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ GD4-3 to GD4-4.

¹² GD2-5.

¹³ GD3-23.

instead in those cases. His employer never told him not to do that, so he kept doing it when he had to.

- And sometimes his employer wanted him to log into another job from the job he was currently doing. That led him to forget to log back in to the original job afterwards.
- His employer talked to him about not logging into his jobs. But he didn't see them as formal verbal warnings, but as a manager just talking to him.
- His employer then gave him two written warnings. He can't remember the date of the first written warning, but the second written warning happened the week before he was dismissed.
- His employer didn't give him a copy of the written warnings. They just asked him to sign them, which he did.
- He didn't read the written warnings before signing them. He didn't want to read everything that was there.
- He didn't think he would be dismissed for not logging into his jobs. He was a good worker and just sometimes forgot to log into his jobs.
- He was dismissed without cause. That is what his termination letter says.
- His employer didn't follow their disciplinary process in dismissing him. The employee handbook says that process involves 4 steps (verbal warning, written warning, suspension, and then dismissal), but they didn't follow all 4 steps in his case because they didn't suspend him before dismissing him.

[32] I sympathize with the Appellant, but I find the Commission has proven that there was misconduct. Here are my reasons.

[33] First, I find the Appellant committed the actions that led to his dismissal. He confirmed in his testimony that he didn't always log into his jobs even though his

employer had specifically asked him to do that. And his employer told the Commission the same thing.¹⁴

[34] Second, I find the Appellant's actions were intentional or so reckless as to be almost wilful.

[35] I find it's more likely than not that the Appellant consciously didn't log into some of his jobs. He confirmed this in his testimony when he said that he sometimes decided not to look for the log in paper when someone had taken it to a different department because it was frustrating to have to spend more time looking for it. To me, this shows his actions (not logging into the job because he didn't want to look for the paper) were intentional in those cases.

[36] I acknowledge the Appellant also testified that he didn't mean to do anything wrong and sometimes just forgot to not log into his jobs.

[37] But, as discussed above, case law says the Appellant doesn't have to have wrongful intent for his actions to be misconduct. This means that even if the Appellant didn't mean to do anything wrong, his actions can still amount to misconduct.

[38] And in this case, I find the Appellant's actions do amount to misconduct. In my view, the fact that he knew he had to log into his jobs but sometimes forgot anyway shows that he acted in a way that was so reckless as to be almost wilful even if it wasn't intentional. Despite knowing his employer wanted him to log into his jobs, his forgetfulness indicates that he didn't always take the necessary steps to ensure that he was meeting that requirement.

[39] I also acknowledge the Appellant testified that he sometimes didn't log in to his jobs because the papers weren't where they should be or were absent entirely or because his employer asked him to log in to a different job.

¹⁴ GD3-23.

[40] But I'm not persuaded that the Appellant has shown that he was prevented from logging into his jobs for reasons beyond his control.

[41] In my view, the Appellant was still able to log into his jobs even if the paper he needed to log in was elsewhere or missing entirely. He confirmed that he knew where to find the paper if it was elsewhere, but he didn't look for it because it took more time than he wanted and that frustrated him. And he confirmed that he used a different (general) paper to log in if the paper was missing altogether and that he was never told not to do this.

[42] In both of these cases, I find the Appellant had other ways to log in that he either chose not to pursue (in the case of tracking down the paper when it was elsewhere) or successfully utilized (in the case of using a general paper instead). While I understand these situations frustrated him, he still had ways of logging into his jobs on those occasions.

[43] And, in my view, the Appellant was still able to log into his jobs even if his employer asked him to log into another job while he was in the middle of a log in process. He confirmed that in those cases, he often just forgot to log back into the original job to finish that process. To me, this means there was nothing else stopping him from logging back into the original job afterwards.

[44] In other words, while I understand that it might have been frustrating or time consuming for the Appellant to log into his jobs, his testimony about his workplace experience shows me that he still had the ability to meet that job requirement but either just chose not to or simply forgot.

[45] Additionally, I acknowledge the Appellant testified that his employer just wanted to control him by requiring him to log into jobs and that other employees would forget to do that too but weren't dismissed.

[46] Unfortunately, as discussed above, I can't look at the employer's actions here. Instead, I have to focus only on the Appellant's actions (meaning what he did or didn't

do) leading up to his dismissal to see if they amount to misconduct. And when I do, I find that his actions amount to misconduct, for the reasons set out above.

[47] Third, I find the Appellant knew or should have known that he could be dismissed for not logging into his jobs.

[48] I find the Appellant received verbal warnings from his employer about not logging into jobs. He confirmed this in his testimony, although he disputes that it was a formal warning. But in my view, the fact that he agrees that his employer brought up the subject with him shows that he received a verbal warning.

[49] I also find the Appellant received two written warnings from his employer about not logging into jobs. He confirmed that he was shown and signed the warnings in his testimony.

[50] I note the Appellant received the first written warning on April 25, 2024. It says that “this warning is for continually not clocked into jobs being worked on. You’ve been spoken about this several times. Company Policies and Procedures need to be followed going forward.” It also says that “further infractions of our policies, you will be subject to further discipline as per our progressive discipline policy up to and including termination.”¹⁵

[51] I note the Appellant received the second written warning on June 19, 2024. It says that “this is a second and a written warning is for continually not clocked into jobs being worked on. You’ve been spoken about this several times and received a warning for this in the past. Company Policies and Procedures MUST be followed going forward.” It also says that “further infractions of our policies, you will be subject to further discipline as per our progressive discipline policy up to and including termination.”¹⁶

¹⁵ GD3-24.

¹⁶ GD3-26.

[52] Based on this evidence, I find the Appellant knew or should have known that he could be dismissed for not logging into his jobs. He received two written warnings that clearly say he could lose his job for that reason if his actions continued.

[53] I acknowledge that the Appellant testified that he didn't read the written warnings before he signed them.

[54] But even though the Appellant didn't read the written warnings, I find that he still should have known that he could be dismissed for not logging into his jobs. His employer made it clear to him in the warnings that his job was now at risk. And he had the opportunity to read the warnings before he signed them, but he simply chose not to. This means he deliberately avoided looking at information that related to his job status.

[55] I also acknowledge the Appellant testified that he was terminated without cause. And I note his termination letter says the same thing.¹⁷

[56] But even so, I find the fact the Appellant was dismissed without cause isn't relevant here. This is because the issue of dismissal with or without cause isn't part of the misconduct legal test. As discussed above, misconduct occurs when a person's conduct is intentional or so reckless as to be almost wilful and when they knew or should have known that they could lose their job due to their conduct. And I find the Appellant's actions do amount to misconduct, for the reasons set out here.

[57] In other words, I don't dispute that the Appellant was dismissed without cause, but that isn't relevant for determining whether his actions are misconduct. Based on the legal test that I do have to look at, he lost his job due to misconduct.

[58] Additionally, I acknowledge that the Appellant testified that his employer didn't follow their disciplinary process when dismissing him because the employee handbook says that there are 4 steps to this process (verbal warning, written warning, suspension, and dismissal) but his employer didn't follow all 4 steps in his case.

¹⁷ GD3-28.

[59] But I disagree, unfortunately.

[60] On the one hand, I find the Appellant is correct in saying that the employee handbook outlines a 4-step process of progressive discipline. Those 4 steps are a verbal warning, written warning, suspension (without pay), and termination.¹⁸

[61] But I find there is other information in the employee handbook that should have led the Appellant to realize that he could be dismissed for not logging into his jobs without being suspended first.

[62] More specifically, I note the employee handbook says that “certain infractions of a more serious nature may come in at an advanced level of the Progressive Discipline Scale up to and including termination” and that “this will be at the discretion of the supervisor.”¹⁹

[63] I also note the employee handbook says that the disciplinary process “does not preclude the “at-will” principle, that is, the right of both the employer and the employee to terminate the employment relationship at any time, with or without notice, and/or any reason, or for no reason at all.”²⁰

[64] In my view, the above quotes from the employee handbook clearly show that the employer could choose to skip some of the steps in the disciplinary process and proceed immediately with termination if they felt the employee’s actions warranted such a response.

[65] Based on this evidence, I find it should have occurred to the Appellant from reading the employee handbook that he could be dismissed for not logging into his jobs even if he hadn’t been suspended first. He should have realized that his employer could view his actions as serious enough to dismiss him without going through all 4 steps of the disciplinary process since he had been repeatedly warned about not logging into his

¹⁸ GD2-16.

¹⁹ GD2-16.

²⁰ GD2-17.

jobs and specifically warned the last two times that his job was now at risk if he continued with that behaviour.

[66] Taken together, I find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he didn't log into his jobs as required), his actions were intentional or so reckless as to be almost wilful, and he knew or should have known that his actions could lead to him being dismissed.

[67] The Appellant also testified that he's in a tough situation financially now and hasn't been able to find a job.

[68] I sympathize with the Appellant's financial situation. But unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify for benefits. And in this case, for the reasons set out above, the Appellant hasn't met those requirements here because his actions in losing his job are misconduct under the law.

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

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

Conclusion

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

[71] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section