



Citation: *SH v Canada Employment Insurance Commission*, 2025 SST 44

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

## **Decision**

**Appellant:** S. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (682246) dated November 21,  
2024 (issued by Service Canada)

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**Tribunal member:** Edward Houlihan

**Type of hearing:** Videoconference

**Hearing date:** December 16, 2024

**Hearing participants:** Appellant

**Decision date:** January 14, 2025

**File number:** GE-24-3856

## 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.<sup>1</sup>

## Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go for misconduct because he failed to follow company policies and protocols.

[4] The Appellant worked as an overnight support worker in a facility for young people. The employer says that the Appellant was given three written warnings about his failure to follow policies and protocols. Under their progressive discipline policy, he was dismissed.

[5] The Appellant says that there were extenuating circumstances for the incidents.

[6] He also says that he thought he would be given a verbal warning for any mistakes before he would receive any written warnings. He says that he wasn't given any verbal warnings.

[7] 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

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

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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.

## **Analysis**

[9] 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?**

[10] I find that the Appellant lost his job because he had failed to follow the employer's policies and protocols. According to his employer's progressive discipline policy this resulted in his dismissal.

[11] The Commission says that the Appellant had three incidents that resulted in written warnings from his employer. They involved incidents where the Appellant failed to follow the employer's policies and protocols.

[12] The Commission says that the employer had a progressive discipline policy where an employee could be dismissed after three written warnings.

[13] The Appellant says that he understood that he could be dismissed after three written warnings.<sup>2</sup>

[14] However, he says that he thought that he would receive a verbal warning for any incidents before the employer would progress to written warnings.

[15] I find that the Appellant was dismissed for three incidents of failing to follow the employer's policies and protocols that resulted in written warnings. As part of the employer's progressive discipline policy, he was dismissed.

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

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

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<sup>2</sup> See GD3-39

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</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>5</sup>

[18] 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>6</sup>

[19] 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.<sup>7</sup>

[20] The Commission says that there was misconduct. They say that each of the three incidents involving the Appellant were a breach of the employer's policy or protocols that the Appellant knew or should have known would result in discipline and the possibility of termination.

[21] The Appellant says that there was no misconduct. He says that the three incidents occurred but there were extenuating circumstances, and he wasn't the only employee present when they happened. He says that he wasn't given a chance to correct his mistakes.

[22] He also says that he thought he would receive a verbal warning before the employer would issue written warnings.

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] It is not my role to determine if the Appellant's dismissal was fair or the appropriate sanction for his conduct. I have to look at whether his conduct amounted to misconduct under the *Employment Insurance Act* (Act).<sup>8</sup>

[24] I will now consider the three incidents that occurred.

### **Incident 1 – March 15, 2024**

[25] The Commission says that part of the Appellant's duties was to follow the employer's basic and strict policy and read the resident protocol at the start of the shift. This had to be done to understand the resident's behaviour and support plan.

[26] On this date, the Commission says that the Appellant didn't check the cameras to ensure that all residents were in their rooms.

[27] One of the residents was able to leave his room and hide in the lounge. When the Appellant went into the lounge he was punched by the resident.

[28] The Commission says that the Appellant failed to follow overnight protocols as outlined in the employer's policies and protocols. He also failed to follow the protocol in place when the resident left their rooms to use the bathroom<sup>9</sup>

[29] The Appellant says in his evidence that he saw a door open and thought he forgot to close it. He didn't check the cameras as he was supposed to. He went into the lounge and was punched by the resident hiding there.<sup>10</sup>

[30] He acknowledges that this was a breach of the protocol. However, he says there were two other support workers on duty with him and they could have watched the cameras and seen that the resident was out of their room.

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<sup>8</sup> See *Canada (Attorney General) v. Marion*, 2002 FCA 185

<sup>9</sup> See GD3-47

<sup>10</sup> See GD3-42

[31] The Appellant received a written warning letter dated March 22, 2024, for the incident. The employer provided support and gave him the opportunity to improve his performance.<sup>11</sup>

[32] The written warning also said that his performance would be monitored for a three-month period. If his performance didn't improve the next level of discipline, up to and possibly including termination would be implemented.<sup>12</sup>

## **Incident 2- April 12, 2024**

[33] On this date a resident was able to leave the facility. The resident left his room and triggered the fire alarm which unlocked all doors to the outside. He left the facility and was pursued by other workers.

[34] The Commission says that the Appellant breached the Behaviour Support Plan (BSP) regarding monitoring the cameras during the night.

[35] The Commission also says that the Appellant failed to follow the overnight protocol when the resident left his room. He also failed to contact the on-call supervisor when the fire alarm was triggered, and the resident left the facility.

[36] The Commission says that the Appellant admitted when the incident occurred, he was very relaxed, on the phone and had his shoes off.<sup>13</sup> He also didn't notify the police as required.<sup>14</sup>

[37] The Appellant says that he didn't call the on-call supervisor right away as he was trying to find the key to turn off the fire alarm. <sup>15</sup>His evidence was that the keys were all disorganized and it took him some time to turn off the fire alarm. By then the fire department had notified the supervisor.

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<sup>11</sup> See GD3-47 and GD3-48

<sup>12</sup> See GD3-48

<sup>13</sup> See GD3-49

<sup>14</sup> See GD3-42

<sup>15</sup> See GD3-30

[38] The Commission says that the Appellant received a written warning for this incident dated April 30, 2024. It outlined the conduct of the Appellant and the breaches of the protocols and BSP he had committed.<sup>16</sup>

[39] The written warning also offered support and reminded him that if his performance didn't improve the next level of discipline up to possibly termination would be implemented.<sup>17</sup>

### **Incident 3- May 18, 2024**

[40] This incident occurred on May 18, 2024. The Appellant admits that the incident occurred.

[41] The Commission says that on the date, the Appellant left the medication cabinet for the facility unlocked. A resident was able to access medication and overdosed on the medication he had taken. The resident was taken to the hospital.<sup>18</sup>

[42] In his evidence the Appellant said that he found the cabinet unlocked. He said there was a problem with the log for medication. Someone had taken medication, and it wasn't properly recorded.

[43] He said that he then took medication out of the cabinet for the resident he was working with. He left his binder with the medication and went to sort out the issue with the medication log.

[44] It was at this time a resident obtained the medication and consumed it. The Appellant admits that he hadn't locked the medicine cabinet when he left and left his binder open with medication in it.<sup>19</sup>

[45] He said that there were other staff on duty at the same time who could have locked the cabinet, but they didn't.

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<sup>16</sup> See GD3-49 and GD3-50

<sup>17</sup> See GD3-50

<sup>18</sup> See GD3-42

<sup>19</sup> See GD3-39

[46] The Commission says that the employer issued a third letter on May 22, 2024, as a result of the incident and he was dismissed.<sup>20</sup>

[47] They say that the Appellant violated the Medication Administration policy by leaving the medication cabinet open and unattended. He admitted walking away from the unlocked cabinet and leaving it unattended.<sup>21</sup>

[48] The Commission says that the employer viewed this a dereliction of duty as well as negligent and gross misconduct. It contravened the health and safety responsibilities and the medication administration policies as well as the BSP.<sup>22</sup>

[49] The Commission says that this was the culminating incident and not the first incident where a resident was put at serious risk because of his actions. The Appellant had two previous written warnings and as a result he was dismissed.<sup>23</sup>

### **Was the Appellant's conduct misconduct?**

[50] I find that the Commission has proven that, on the balance of probabilities, there was misconduct.

[51] The Appellant doesn't deny that he violated the policies and protocols as set out above. He explains why they happened and extenuating circumstances surrounding the events but admits they occurred.

[52] He knew or should have known that his conduct would get in the way of him carrying out his duties to his employer and could result in his termination.

[53] The Appellant says that he knew could be dismissed if he received three written warnings., but he says he believed that he would receive a verbal warning first. He says that he didn't receive a verbal warning.

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<sup>20</sup> See GD3-51

<sup>21</sup> See GD3-51

<sup>22</sup> See GD3-51 and GD3-52

<sup>23</sup> See GD3-51



[54] . There is no evidence that supports the Appellant's belief that he should have received a verbal warning before receiving written warnings.

[55] Even if this was the case, the Commission says there were three other disciplinary actions implemented for similar performance issues besides the written warnings.<sup>24</sup>

[56] The Appellant knew that he could be dismissed for his conduct and committed the acts that resulted in the written warnings and ultimately his dismissal.

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

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

### **Conclusion**

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

[59] This means that the appeal is dismissed.

Edward Houlihan  
Member, General Division – Employment Insurance Section

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<sup>24</sup> See GD3-49