



Citation: *BA v Canada Employment Insurance Commission*, 2025 SST 167

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

## **Decision**

**Appellant:** B. A.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (0) dated January 15, 2025  
(issued by Service Canada)

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**Tribunal member:** Harkamal Singh

**Type of hearing:** Teleconference

**Hearing date:** February 19, 2025

**Hearing participants:** Appellant

**Decision date:** February 25, 2025

**File number:** GE-25-233

## Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

[3] Furthermore, the Commission didn't act judicially when it reconsidered the Appellant's benefits after an 8-month delay.

## Overview

[4] The Appellant lost his job at X on January 24, 2021. The employer claims he was dismissed because of his inability to manage his temper, resulting in verbal outbursts and aggressive behaviour, with the final incident involving breaking a coworker's cup.

[5] The Appellant disputes this version of events. He states that he was not supposed to wash staff's personal dishes, that the cup broke accidentally when he removed it from the dishwasher, and that the workplace environment was problematic with inappropriate sexual comments being made.

[6] The Commission disqualified the Appellant from receiving Employment Insurance (EI) benefits, finding that he lost his employment due to misconduct. The Commission also established an overpayment of \$12,096 for benefits paid from January 24, 2021, to August 27, 2021, despite being aware of his dismissal since January 26, 2021.

[7] This case was previously heard by the General Division, which dismissed the Appellant's appeal. The Appellant then appealed to the Appeal Division, which found that the General Division had made an error of jurisdiction by failing to consider whether the Commission acted judicially when reconsidering benefits it had already paid. The

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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.

Appeal Division returned the matter for a new hearing before a different member of the General Division to address both the misconduct issue and whether the Commission acted judicially.

## **Issue**

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

[9] Did the Commission act judicially when reconsidering the benefits it had already paid to the Appellant after an 8-month delay?

## **Analysis**

[10] 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?**

[11] I find that the Appellant lost his job because of a workplace incident involving a broken cup, but this occurred in the context of unclear workplace policies and a problematic work environment.

[12] 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 terminated due to his inability to manage his temper in the workplace, resulting in verbal outbursts and actions, with the final incident involving him deliberately breaking a coworker's cup that he refused to clean.<sup>2</sup>

[13] The Appellant disagrees. The Appellant says that the real reason he lost his job involved a misunderstanding about workplace practices. He testified that staff dishes were not supposed to be washed in the dishwasher, that he removed the cup multiple

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<sup>2</sup> GD3-27, GD3-28 to GD3-29

times, and that it broke accidentally when he was handling it. The Appellant also described a difficult workplace environment with inappropriate sexual comments and poor ventilation, without proper policies or training on workplace conduct.<sup>3</sup>

[14] I find the Appellant's account to be more credible for several reasons:

- a) The Appellant worked at this establishment for over a year without any formal warnings or disciplinary meetings about his behaviour.
- b) There appears to have been no clear policy about washing personal dishes in the dishwasher, leading to confusion and frustration in a high-stress kitchen environment.
- c) The Appellant's testimony about removing the cup multiple times from the dishwasher where it didn't belong is consistent with what a reasonable kitchen worker would do, especially given that no one had told him who's cup this was.
- d) The employer has not provided documented evidence of previous warnings or a progressive discipline process before termination.
- e) The credible description of the workplace environment with inappropriate jokes and comments suggests there were broader issues with workplace culture and standards of conduct.

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

[15] The reason for the Appellant's dismissal isn't misconduct under the law.

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Appellant doesn't have to have

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<sup>3</sup> GD3-31

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>6</sup>

[17] 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>7</sup>

[18] 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>8</sup>

[19] The Commission says that there was misconduct because the Appellant had numerous outbursts at work, received verbal warnings about his behaviour, and deliberately broke a co-worker's cup while yelling and swearing. The Commission argues that these actions demonstrated willful or reckless behaviour that interfered with the employer's operations and created a negative work environment.<sup>9</sup>

[20] The Appellant says that there was no misconduct because he did not deliberately break the cup, there was no clear policy about washing personal dishes, he received no formal warnings about his behaviour, and the workplace had other issues including inappropriate comments by staff members. He maintains that he was a hard worker who did not intend to cause problems.<sup>10</sup>

[21] I find that the Commission hasn't proven that there was misconduct, because:

- a) The Appellant testified in a credible and straightforward manner at the hearing. He provided specific details about the workplace environment, including issues with ventilation and inappropriate comments made by staff. His testimony about the incident with the cup was consistent and reasonable, explaining that he was

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<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> GD4-3, GD4-4

<sup>10</sup> GD3-31, GD3-33

simply following what he understood to be proper kitchen procedures. He appeared genuinely surprised by the termination, which supports his contention that he had no reason to believe his actions could lead to dismissal.

- b) The breaking of the cup appears to have been accidental rather than deliberate. The Appellant's explanation that he was removing a foreign object from the dishwasher in accordance with what he understood to be proper kitchen practice is reasonable.
- c) There is no evidence of formal warnings or a progressive discipline process that would have made the Appellant aware that his behaviour could lead to dismissal. Without such warnings, the Appellant would not reasonably have known that his actions could result in losing his job.
- d) The workplace appears to have lacked clear policies and training regarding both kitchen procedures and appropriate workplace conduct. In an environment where, according to the Appellant's testimony, inappropriate sexual comments were common, the standards of expected behaviour were unclear.
- e) The evidence does not establish that the Appellant's behaviour was willful or deliberate in a way that meets the legal threshold for misconduct. While there may have been workplace tension and occasional disagreements, this falls short of the conscious, deliberate, or intentional misconduct required by the law.
- f) The Commission has relied heavily on the employer's statements to establish misconduct, but these statements are contradicted by the Appellant's credible testimony about what actually occurred in the workplace. Without additional corroborating evidence of willful misconduct, the Commission has not met its burden of proof.

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

[22] Based on my findings above, I find that the Appellant didn't lose his job because of misconduct.

## **Did the Commission act judicially when reconsidering benefits after an 8-month delay?**

[23] The Commission didn't act judicially when it reconsidered the Appellant's benefits after an 8-month delay.

[24] Section 52 of the Employment Insurance Act gives the Commission authority to reconsider its decisions. However, this authority must be exercised judicially. This means the Commission must act in good faith, without discrimination, and must consider all relevant factors when making a decision to reconsider benefits already paid.

[25] In this case, the Commission became aware of the Appellant's dismissal on January 26, 2021, when his employer submitted the Record of Employment (ROE).<sup>11</sup> Despite this knowledge, the Commission continued to pay benefits until August 2021 and did not make a decision until September 22, 2021 - approximately eight months later.

[26] The Commission established an overpayment of \$12,096 for the benefits paid during this period.<sup>12</sup> This is a significant sum that the Appellant was expected to repay after having received and likely spent these funds over many months.

[27] The Appellant testified that he contacted Service Canada shortly after his dismissal to report his employment status. He states he was advised to "leave it for now" as an investigation would suspend his ability to receive funds. While there is no documentary evidence of this contact, I find the Appellant's testimony on this point of informing Service Canada about the dismissal to be credible.

[28] The Commission has not provided any explanation for the significant delay in investigating and making a decision on the Appellant's entitlement to benefits. The file contains no information about why the Commission waited eight months to address this matter after receiving the employer's Record of Employment.

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<sup>11</sup> GD3-25 to GD3-26

<sup>12</sup> GD3-34 to GD3-35

[29] When the Commission delays action for a significant period, continues to pay benefits, and then suddenly demands repayment of a large sum, it raises serious concerns about procedural fairness and the judicial exercise of authority. The impact of such a delay on the Appellant is substantial, as he was allowed to receive and presumably rely on these benefits for his living expenses over many months.

[30] Based on the evidence before me, I find that the Commission's unexplained 8-month delay in addressing the Appellant's case, particularly when the Appellant appears to have made efforts to report his job loss, demonstrates that the Commission did not act judicially in reconsidering his claim. The Commission failed to consider the impact of such a delay on the Appellant and the significant financial hardship that would result from establishing a large overpayment after such a lengthy period.

## **Conclusion**

[31] The Commission hasn't proven that the Appellant lost his job because of misconduct. Because of this, the Appellant isn't disqualified from receiving EI benefits. Furthermore, the Commission didn't act judicially when it reconsidered the Appellant's benefits after an 8-month delay.

[32] This means that the appeal is allowed.

Harkamal Singh  
Member, General Division – Employment Insurance Section