Citation: *AB v Canada Employment Insurance Commission*, 2025 SST 116

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (690854) dated October 9, 2024 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Videoconference
Hearing date:	January 6, 2025
Hearing participant:	Appellant
Decision date:	January 8, 2025
File number:	GE-24-3859

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was terminated because of his own misconduct (as that term is explained, below). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was terminated from his job for failing to respect his employer's policy regarding attendance. He applied for EI benefits.

[4] The Commission says it can't pay the Appellant benefits because he was terminated as a result of his own misconduct. The Appellant disagrees.

[5] The Appellant says that although he technically wasn't in compliance with the attendance policy, his employer had unjustly denied a request to extend an unpaid leave. He says that his employer should have extended his leave when he asked. If it had, he would have been in compliance with the attendance policy.

Issue

[6] Was the Appellant terminated due to his own misconduct?

[7] If he was, then he's disqualified from receiving benefits.

Analysis

[8] I find that the Appellant was terminated due to his own misconduct.

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

Why was the Appellant terminated?

[9] I find that the Appellant was terminated for breaching his employer's attendance policy.

[10] The Appellant doesn't dispute that he was terminated for having breached his employer's attendance policy. It's the reason that he gave when he filed his application for benefits.[2]

[11] He also acknowledges that he was in breach of the policy, although he says that this is because his employer unfairly denied him personal leave time.

[12] The Appellant says that prior to his breach of the attendance policy, his employer had raised issues regarding his performance. He claims these issues were fabricated with a view to trying to get rid of him. However, the Appellant's performance issues were not the reason his employer gave for terminating him. And in my view, there is no credible evidence that indicates that they were the real reason for his termination.

[13] In the absence of any credible evidence that the Appellant's breach of the attendance policy was merely a pretext, I must conclude that it's the reason for his termination. So, now I have to determine whether the law considers that reason to be misconduct.[3]

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

[14] I find that the Appellant's breach of the attendance policy was misconduct under the law.

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[2] GD3-9.
[3] The Commission has the burden of proving that the Appellant lost his job because of misconduct. It has to do so 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. See *Minister of Employment and Immigration v Bartone*, A-369-88.

– The law

[15] The term **misconduct**, as it is used in the *Employment Insurance Act*, doesn't have the same meaning as it does in common language. There doesn't have to be wrongful intent (in other words, you don't have to mean to be doing something wrong) for your behaviour to be misconduct under the law.[4]

[16] Misconduct is conduct that a claimant knew or should have known could get in the way of carrying out their duties toward their employer and could result in their termination.[5] The conduct has to be wilful (in other words, conscious, deliberate, or intentional).[6] Or, it has to be so reckless that it is almost wilful.[7]

[17] If you lose your job due to your own misconduct, you're disqualified from receiving EI benefits.[8]

– The circumstances that led to the Appellant's termination

[18] On December 2, 2023, the Appellant began an approved unpaid leave of absence to attend his grandmother's funeral. He was expected to return to work on January 8, 2024.[9]

[19] Prior to his leave, the Appellant had experience conflict with his manager. He claims that his manager had been harassing and bullying him. He filed a complaint against him.

[20] Following the lodging of the complaint against his manager, the Appellant received a written warning about his performance at work. The Appellant says the warning was baseless. He says that to the extent that he was having any performance issues, they related to an injury he'd sustained and was continuing to recover from. He

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[4] See *Attorney General of Canada v Secours*, A-352-94.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] Section 30 of the EI Act.
[9] GD3-59.

believes the warning was sent as retaliation for the fact that he'd filed a complaint about his manager. He also felt that his employer wanted to get rid of him following his injury.

[21] The Appellant appealed the warning to a senior manager, but his appeal was denied.

[22] Following the unsuccessful appeal, the Appellant received a performance improvement plan (PIP) in connection with the warning he'd received. He felt the PIP was unfair and he refused to sign it.

[23] The Appellant explained that following his grandmother's funeral, some estate matters came up which he wanted to resolve before returning to work.

[24] Although the Appellant could have returned to work on January 8, 2024, as he was expected to, he was unhappy about how he was being treated by his employer. He was upset about the conflict between him and his manager, about the failure of senior management to address it, and about the PIP. So, he decided to prioritize his personal family matter over work and to take additional time off to deal with his grandmother's estate. He asked his employer to extend his unpaid leave of absence to January 31, 2024, so that he could do so.

[25] The Appellant's employer refused to extend the Appellant's leave of absence. It said it couldn't do so because the Appellant wasn't in good standing.[10]

[26] The Appellant says that in his view the request to extend his leave should have been allowed.

[27] Despite his employer's refusal to extend his leave, the Appellant took the time off, nonetheless. He didn't return to work until January 31, 2024. As a result, he accrued 12 unapproved absence days.

[28] On February 13, 2024, the Appellant received a written warning that he was in breach of the attendance policy. He was reminded that under the policy he could only

[10] GD3-69.

have 6 unapproved absences. He was informed that he had 17. He was told that if he didn't cure his breach of the policy by obtaining approval for the absences, he would be terminated.[11]

[29] The Appellant says he wasn't given any options to cure the breach. He argues that his leave should have been approved. He claims that he was entitled to take up to three months of unpaid leave for any reason[12].

[30] The Appellant points out that the reason he was given for the denial of his request to extend his leave related to the warning he received about his performance[13]. He argues that his employer couldn't refuse to extend his unpaid leave on the basis of a warning that he considered to be unsubstantiated. He says that had the leave been approved, as it should have been, he wouldn't have been in breach of the policy.

[31] On February 15, 2024, despite having received a warning that he was in breach of the attendance policy, the Appellant took three additional days off. He says the sink in his apartment was overflowing every time the upstairs tenant turned on the water. He claims he needed to stay home until the issue was fixed.

[32] The Appellant claims he was entitled to take those additional three days off despite the warning he'd received about being in breach of the attendance policy. He says this is because his employer is supposed to provide 80 hours (8 days) of personal time off per year for emergencies.[14] He says he reported his absences, as required under the policy.[15]

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[11] GD3-40.
[12] I note that his testimony to this effect is contrary to the terms of the policy (see GD2-16). The policy provides that only leaves of absence for the reasons set out in provincial employment standards legislation are permitted.
[13] This is not clear from the evidence. It is equally possible that the Appellant wasn't in good standing for other reasons. I note that the reason for the extension of the leave is not a reason provided for in the provincial employment standards legislation applicable to the Appellant (see the *Employment Standards Act*, [RSBC 1996] Chapter 113).
is not a reason provided for in the provincial employment standards legislation applicable to the Appellant (see the *Employment Standards Act*, [RSBC 1996] Chapter 113).
[14] Once again, I note that his testimony is contrary to the terms of the policy (GD2-16). It indicates that 48 hours a year of personal time is permitted.
[15] However, the evidence shows that he was already in breach of the policy at the time.

[33] On February 21, 2024, the Appellant was informed that he was being terminated for failing to attend work since February 15, 2024, and for failing to cure the breach of the attendance policy that he was warned about on February 13, 2024.

– **The Appellant's conduct is misconduct under the law**

[34] The Appellant argues that his employer wrongfully terminated him. But even if that were to be the case, his conduct is misconduct under the law.

[35] The Appellant admits that he was aware of the attendance policy. He knew he was only entitled to 6 absence days and that any further absences had to be offset in one of the four ways set out in the policy.[16]

[36] He says he didn't breach the policy by being absent from work from February 15 to 17, 2024, to attend to an emergency. He says he reported those days and applied personal time off hours that he was entitled to in order to justify his absence.

[37] Given that the Appellant was already in breach of the policy at that time, I don't accept his argument. But even if he was entitled to take those three days off work, he remained in breach of the attendance policy as a result of having extended his leave without permission.

[38] The Appellant claims that although he was technically in breach of the policy for remaining off work from January 8 to January 31, 2024, this was only because his employer had unjustly refused to extend his unpaid leave. In his view, the refusal to extend his leave was grounded on a baseless warning about his performance. He argues that he was entitled to the extension in the circumstances.

[39] Case law makes it clear that I'm not to consider the employer's conduct when deciding if a claimant was terminated due to their own misconduct, except in

[16] See GD3-41, which lists the four ways to offset missed days of work.

circumstances where a claimant must choose between disobedience and unavoidable loss or harm.[17]

[40] It's clear from the evidence that the Appellant didn't have to remain on leave until January 31, 2024, to prevent unavoidable loss or harm. He made a decision to extend his leave because he was angry with his employer. In his view, his employer had been treating him unfairly. He wasn't prepared to prioritize work over his personal family matter in those circumstances. So, he decided to stay on leave without permission to deal with his grandmother's estate.

[41] Moreover, the Appellant chose to remain on leave despite having been told that the extension of his leave hadn't been approved and that he was expected back at work. He ignored his employer's directive to return to work. In my view this was willful.[18]

[42] The Appellant claims that he didn't believe extending his leave, even without approval, would result in his termination. He says he was sure that he'd be able to convince his employer that the refusal to extend his leave wasn't justified because it was based on a warning that hadn't been warranted.

[43] I see this as wishful thinking. The Appellant had appealed the warning and hadn't been successful. It was unreasonable and reckless for him to believe that it would ultimately be set aside and that his extended leave would be approved retroactively.

[44] In my view the Appellant knew or should have known that not returning to work on January 8, 2024, as expected, could result in his termination. He had to be aware that not returning to work on that date would cause him to be in breach of the attendance policy and of his employer's clear requirements of him. The email he received denying the extension of his leave specifically says so.[19]

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[17] See *Canada (Attorney General) v McNamara* 2007 FCA 107; *Paradis v Canada (Attorney General),* 2016 FC 1282*; Dubeau v Canada (Attorney General),* 2019 FC 725; *Canada (Attorney General) v Caul*, 2006 FCA 251.
[18] And if not, it was certainly reckless to the point of being willful.
[19] GD2-32.

[45] So, even if the employer's refusal to approve the extension of the Appellant's leave wasn't justified, his conduct is misconduct under the law, nonetheless. He should have returned to work on January 8, 2024, when expected rather than extend his leave without permission.

Conclusion

[46] The appeal is dismissed.

[47] I find that the Commission has proven that the Appellant was terminated due to his own misconduct. Because of this, he's disqualified from receiving EI benefits.

Elyse Rosen
Member, General Division – Employment Insurance Section