Citation: *GD v Canada Employment Insurance Commission*, 2024 SST 1687

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	G. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (665604) dated July 16, 2024 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	Teleconference
Hearing date:	August 21, 2024
Hearing participants:	Appellant
Decision date:	September 10, 2024
File number:	GE-24-2686

Decision

[1] The appeal is dismissed.

[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).

[3] This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[4] The Appellant lost his job. The Appellant's employer said that he was let go because he was verbally abusive to a third-party service provider, and that company refused to engage with the Appellant anymore. This meant the Appellant could no longer do one of the primary functions of his job.

[5] The Appellant disputes that he behaved inappropriately with anyone at work, or with any third-party service providers.

[6] 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.

Matter I have to consider first

I refused documents submitted after the hearing

[7] The Appellant was restricted to providing evidence about incidents with X and Y after the hearing. The Appellant submitted evidence that was not about these two issues. The Appellant was notified that no further evidence would be accepted.[2] He sent

[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See GD20.

in additional documents after he was instructed the hearing was closed, so they were not accepted.

Issue

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

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] The Appellant lost his job because he was banned from accessing the employer's third-party payroll administrator. This meant the Appellant was no longer able to meet his employment obligations, so his employer dismissed him.

[11] 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 they received a letter from their payroll company that accused the claimant of aggressively harassing their staff on an ongoing basis. The payroll company refused to work with him anymore and requested that the company cut ties with him. The employer stated that because they would have had to remove him from payroll, which was part of his job, they had to terminate his employment.

[12] The Appellant disagrees. The Appellant raised multiple different reasons he was dismissed, but initially said that he was dismissed because he wasn't able to complete his tasks and duties in the time his employer gave him. He argues that this was not his fault—the employer expanded faster than it should have and had issues paying bills on time and refused to make changes that would help the Appellant meet expectations.

[13] I find that the Appellant was dismissed because the payroll company terminated his access rights and refused to engage with him. The employer told the Commission that "the final straw was when they received that letter from their payroll company refusing to work with the client due to his aggressive and racist behaviour."[3] The Appellant testified that his difficulties with the payroll company started on January 4, 2024, and continued for a few weeks. The letter from the payroll company, while undated, requires compliance from the employer by February 12, 2024,[4] which means it was issued after the Appellant engaged with the company. If it was sent to the employer on January 22, that would give the employer three weeks notice to comply, which is generous but not unreasonable.

[14] While the employer acknowledged the Appellant's performance and attendance issues, it stressed that was not why he was dismissed. He was dismissed for his aggressive and hostile personality issues, and the triggering incident was his being banned from communicating with or accessing the payroll services.

What is misconduct under the law?

[15] To be misconduct under the law, the conduct must be wilful. This means that the conduct was either conscious, deliberate, or intentional.[5] Misconduct can also exist if the behaviour was so reckless that it is almost wilful.[6] This means that even if there isn't wrongful intent (in other words, you don't mean to do something wrong) behaviour can still be misconduct under the law.[7]

[16] To be considered misconduct, the law requires that the Appellant knew, or should have known, that there was a real possibility of losing his job because of his conduct, or that it could prevent him from fulfilling his duties toward his employer.[8]

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[3] See GD03-47 and GD03-58.
[4] See GD03-26.
[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.

[17] The Commission must prove that the Appellant lost his job because of misconduct on the balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost his job because of misconduct.[9]

[18] Since misconduct is the exception to the general rule that eligible individuals are entitled to benefits, it must be strictly interpreted. Disqualification under the Act is a punishment for claimants who lose their jobs through wrongdoing.[10] A finding of misconduct results in the claimant losing all their insurable hours for the employment they were dismissed from. This is a very serious consequence, so the burden of proof for the Commission is high.

[19] The Commission must prove misconduct exists using clear evidence and facts that point directly to it. It can't speculate, assume, or rely on the opinion of the employer to prove misconduct.[11]

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

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

[21] The Commission says that misconduct is defined as willful or deliberate behavior that is contrary to the employers' interests. It includes actions that are so reckless as to approach willfulness, and which demonstrate a disregard for the standards of behavior expected by the employer.

[22] The Commission argues that the Appellant was repeatedly aggressive towards staff, vendors, and third-party companies, using disrespectful and degrading language. It says that that the employer warned the Appellant about his inappropriate behaviour and the potential for termination if it continued. Despite this warning, the Appellant's behaviour did not improve, and his continued abusive behaviour shows a deliberate disregard for his employer's expectations and instructions.

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[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McLaughlin*, A-244-94.
[11] See *Crichlow v Canada (Attorney General)*, A-562-97.

[23] The Appellant says that there was no misconduct because he was never abusive, threatening, inappropriate, or harassing to anyone. He says that the service providers that complained about his behaviour were all exaggerating and "blowing things out of proportion" and misleading his employer. The Appellant argues that he was acting on direct orders from the owner in several cases and that it was actually the owner and his wife who were abusive, harassing, inappropriate, and racist.

[24] I don't accept the Commission's argument that the Appellant was warned about his conduct and told that termination would follow if his behaviour did not improve. The Commission cites GD03-28 as evidence of this, but I note that this email was sent on February 6, which was after the Appellant was dismissed, and referenced behaviour after he was fired. While the employer made statements during the reconsideration process that the Appellant was warned his behaviour would not be tolerated, there is no evidence of this fact, and these statements appear to contradict the employer's original position that they decided to "let things go" and "tried to work with him."

[25] I don't accept any of the Appellant's statements or arguments because I find his testimony to be wholly uncredible.

– **The Appellant is not credible**

[26] Where the evidence of the Appellant conflicts with the evidence provided by the Commission from the employer, I prefer the employer's statements. Simply put, I find the employer's statements to be more credible given the totality of the evidence before me.

[27] The assessment of credibility is not a science. Determining credibility is "a difficult and delicate matter that does not always lend itself to precise and complete verbalization" of the "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events."[12]

[12] See *R. v R.E.M.,* (2008) 3 S.C.R. 3, 2008 SCC 51 at para 49; and *R. v Gagnon,* (2006) 1 S.C.R. 621, 2006 SCC 17 at para 20.

[28] However, there are principles that can help assess credibility:[13]

a) Inconsistencies in a person's evidence. This includes prior inconsistent statements, inconsistencies between their testimony and other evidence, selectively presenting or omitting facts, and inconsistent behaviour.
b) Contradictions between a person's evidence and independent evidence.
c) Whether the person's testimony is plausible or reasonable.
d) The person's demeanour, including their sincerity and use of language.
e) Any motive a person may have to fabricate, manipulate, exaggerate, or downplay evidence.

[29] The Appellant's testimony included inconsistent and contradictory statements, as well as significant inconsistencies to his previous statements. For example, the Appellant originally told the Commission he was dismissed because he was, essentially, unsuitable for the position and was not receiving the help he needed from management.[14] Then, when he was confronted with the employer's statement, the Appellant told the Commission that he was dismissed because "he had racked up approximately 900 hours of overtime, and that his employer had harassed him non-stop regarding the overtime as he had threatened to go to the labour board about it."[15] This is also the start of the Appellant assuming the mantle of victim and pointing the finger at his employer for being the harassing and abusive party.

[30] The Appellant's statements on why he was dismissed continued to evolve through the reconsideration process. This time he told the Commission he was dismissed because "he called the majority owner to tell him his son was running the business into the ground," and that the majority owner said that "he went to a lawyer to see about taking B. out of the company," and that "things at the company started going further down hill in September/October 2023 when the employer hired a purchaser."[16] At this point, the Appellant not only attempted to paint the employer as the guilty party, but

[13] See *Novak Estate (Re),* 2008 NSSC 283, at para. 36
[14] See GD03-20.
[15] See GD03-45.
[16] See GD03-63.

also started levying salacious accusations about the employer's conduct, including burning accounting papers and asking him to hide $500,000 in GST revenue.[17] He also stated that he was suing the employer and was speaking to police about illegal activity, but the employer informed the Commission that they had pressed charges for theft over $5,000 because the new accountant had found the Appellant diverting company funds into his personal accounts.[18]

[31] At the hearing the Appellant's position on why he was dismissed transformed into an argument that he was "traumatized and psychologically tortured" by his employer, which caused him "to behave differently than [he] normally would ever behave," and that a lot of his behaviour was directly caused by his boss. But, when he was informed that alleging his outbursts were caused by stress, that he was not in his right mind and was experiencing PTSD, would need to be backed up with proper medical evidence, the Appellant reverted to his claims that he didn't behave egregiously with anyone, ever.

[32] In my view, the Appellant's credibility is seriously compromised when he claims one thing, and then says states the opposite. This is especially true when it occurs at the culmination of a series of completely unrelated reasons for being dismissed.

[33] The Appellant testified that he "despises conflict." He also said that "I don't yell, I raise my voice," and that "it sounds like I'm yelling, but I just changed my tone." I'm not entirely certain what the Appellant thinks yelling is, but he just described the very definition of "yelling at someone." He also testified that raising his voice and interrupting someone is "nothing" but the fact that he did that is "horrifying." Regarding his interactions with the software development company, the Appellant said that he acted childish and was offended by his actions, but how he behaved was "no big deal." So, by his own admission, his behaviour has been "childish." "offensive," and "horrifying." But, he can still paint these specific behaviours as completely innocuous. I find these internal inconsistencies damaging to the Appellant's overall credibility.

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[17] See GD03-62.
[18] See GD03-58.

[34] Parts of the Appellant's testimony is implausible and unreasonable given the circumstances and independent evidence. The Appellant maintains that he was never abusive or harassing to anyone, and that any claims made against him are either false or grossly exaggerated. As proof, the Appellant has provided multiple "character witnesses," but no evidence or statements that directly contradict the evidence on file or the specific claims against him. The evidence shows that the Appellant has quite the history of inappropriate, aggressive, and abusive behaviour:

- On December 28, 2023, an employee at a third-party software company complained to his management that the Appellant had a heated discussion with him about deliverables that escalated to swearing and verbal abuse until the software representative hung up.[19]
- The third-party payroll company informed the employer that the Appellant "repeatedly yelled and used disrespectful, degrading language directed towards several of [their] Customer Service Representatives." The Appellant was "contacted several times by senior staff at [Y] to discuss the inappropriateness of his comments and behaviour. Furthermore, Mr. [D.] has also been warned that any further disrespectful comments and/or behaviour will not be tolerated. Unfortunately, the behaviour continues."[20]
- The Appellant's coworker told the Commission that the Appellant would complain about everything at the workplace, including the people, almost every hour. She said he would "often be disrespectful to people and even start conflicts with them." She said she witnessed the Appellant making the owner's wife cry, and that he was very disrespectful to various people a lot of the time.[21]
- The employer told the Commission that half the staff did not want to deal with the Appellant as they felt that he was arrogant and argumentative. The Appellant had raised his voice at the employer after he had found out that the employer had asked their customers how the client was doing. The employer stated that they were told that the Appellant was quite abrupt and a bit ignorant by their customers.[22]

- The employer told the Commission that the Appellant required conversations about his behaviour almost every month, and they always involved the employer

[19] See GD03-32.
[20] See GD03-36.
[21] See GD03-49.
[22] See GD03-47.

apologizing to an employee, customer, or service provider for the Appellant's conduct.[23]

- The employer told the Commission that the Appellant would often yell and call people incompetent including the owners, the staff, and vendors. The employer stated that when the Appellant was terminated, he had threatened to fight the owner B. with his fists up and was refusing to give the key back for the business and that the main owner, P. M. had had to intervene.[24]
- The employer emailed the Appellant a cease and desist two weeks after his dismissal because he was calling staff during work hours "using inappropriate, racial comments, and foul language." The email warned that litigation could ensue.[25]
- The first Commission officer indicated that the Appellant "became very verbally aggressive during the conversation and had to be told several times to tone down his anger and language or the call would be discontinued. At several points during the interview, the Appellant started yelling at the officer. He told the officer that he "cannot even speak to [his] family due to the anger [he has] with them." When the Appellant felt like the officer was going to rule against him, he started yelling again, declaring himself to be the victim of abuse from B.[26]
- Shortly into the first reconsideration call the Appellant needed to be calmed down and reminded to control himself and his language.[27] Even after this warning, the Appellant went on to say he was "so fucking done," that he was "fucking shaking in anger," and proceeded to call his employers "fucking cocksuckers."[28] After "ranting" for some time, the Appellant stated that if he was fired for how he interacted with the payroll company, then "he should just shoot everyone" and that "B. should be hung." Despite being warned that the call would be disconnected if he continued to behave in such an alarming way, the Appellant continued to make comments about being shot or shooting himself, calling his coworkers and employer "fucking asshole liars," "fucking morons," and "losers and uneducated lowlifes." [29]
- The reconsideration officer was so perturbed by the Appellant's conduct during a fact-finding call that she decided not to call him to discuss her decision.[30]

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[23] See GD03-57.
[24] See GD03-22.
[25] See GD03-28.
[26] See GD03-45 and 46.
[27] See GD03-62.
[28] See GD03-63.
[29] See GD03-64.
[30] See GD03-71.

- In a call log dated August 13, 2024, Tribunal staff noted the Appellant "started, like last time I spoke to him (July 26, line 40078 in SP), to rant about how he had been 'f***ed over' by everyone, from coworkers to EI staff."

[35] Even removing the statements from the employer, there are multiple instances of, at best, inappropriate language, and in some instances very concerning, threatening behaviour. The Appellant's statements that all these claims against him are meritless is completely unreasonable and implausible. It does not make sense for multiple service providers to risk their own revenue by threatening to terminate contracts or stressing relationships with clients over fabricated issues with the Appellant. It is also highly improbable for at least seven different people, three of whom work for the Government of Canada, to make up or exaggerate statements attributed to the Appellant.

[36] The very nature of an appeal to the Tribunal means the Appellant is self-interested in the outcome, so that can't be the primary basis for determining credibility. However, the impact of the outcome on the Appellant may give additional weight to credibility findings. The same can be said for how the evidence makes the Appellant look, or what role the Appellant played in various situations or events.[31] In this case, the Appellant attempts to shift the blame for his behaviour onto his employer, rather than taking responsibility for his role in events. For example, the Appellant says that he was following his employer's explicit instructions when he engaged with the software representative, going so far as to state "B. made me do it." But he didn't say that his employer told him to swear, threaten, and yell, and B. most certainly wasn't standing behind him forcing the Appellant to behave this way.

[37] In contrast to the issues with the Appellant's evidence, there are no major inconsistencies in the employer's statements. The statements from the employer are internally consistent, even when obtained from different people, and the account of events is not only plausible, but reasonable and probable from an employment perspective in these circumstances. I see no factual motive for the employer to provide a false or misleading statement to the Commission, as the employer has no real interest

[31] See *R. v Laboucan*, 2010 SCC 12, [2010] 1 SCR 397 and *Rahman v Canada (Citizenship and Immigration)*, 2019 FC 941.

in the outcome of this case. On the contrary, the employer could be penalized for providing a false or misleading statement to the Commission.[32]

[38] The Ontario Court of Appeal has said that, “where the standard of proof is the balance of probabilities, believing one party may in fact mean disbelieving the other. Furthermore, a trier’s failure to explain why it rejected a respondent’s plausible denial of the allegations will not render the reasons deficient, as long as the reasons generally demonstrate that where the complainant’s evidence and the respondent’s evidence conflicted, the trier accepted the complainant’s evidence.”[33]

[39] The Supreme Court of Canada held that, “in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case.”[34] It also said that, “there is no requirement that a trier of fact must accept or reject the evidence of a witness in its entirety. None or part of a witness’s evidence may be accepted, and different weight may be attached to various parts of the testimony.”[35]

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[32] See section 39 of the EI Act.
[33] See *Caine v Ontario College of Teachers*, 2022 ONSC 2592.
[34] See *F.H. v McDougall*, 2008 SCC 53, (2008) 3 SCR 41.
[35] See *R. v D.R.,* 1996 SCC 207, (1996) 2 S.C.R. 291 at para. 93

– **The Commission has proven misconduct**

[40] I find that the Commission has proven that there was misconduct, because the Appellant behaved so egregiously that he should have known he could be dismissed.

[41] Specifically to the incidents with the payroll service provider, the Appellant was contacted multiple times by senior staff to discuss the inappropriateness of his comments and behaviour, and he was warned that any further disrespectful comments and/or behaviour would not be tolerated. And yet, the Appellant continued to behave inappropriately, forcing the service provider to lock him out of the system and refuse to engage with him.

[42] The Appellant testified that he lost his patience with the Y customer service representatives, and that the supervisors told him they didn't like that he raised his voice or said "hell." He was then assigned a single point person to communicate with, but this person refused to communicate with him as well. So, by his own admission he was less than pleasant to deal with when engaging with Y.

[43] Behaving aggressively, yelling, swearing, and denigrating people is a choice. As a fully functioning adult, the Appellant is fully in control of the words he chooses and the tone he takes when he interacts with others. So, being aggressive, disrespectful, offensive, and inappropriate was a wilful action.

[44] I therefore find the Appellant's conduct to the Y staff was a wilful and conscious choice.

[45] I also find that the Appellant knew, or ought to have known, that his behaviour could result in losing his job because accessing the Y software was a crucial portion of his work duties. Being banned from the platform would mean he could no longer fulfil his obligations to his employer, and his employer would have cause to dismiss him.

[46] The Federal Court of Appeal (FCA) has held that employers are under no obligation to modify their policies, employment requirements, or work duties to accommodate claimants who cause themselves to be unable to fulfill their obligations to

their employers.[36] The Appellant's behaviour with the payroll company were such that he could normally foresee the possibility of being banned from the platform, and therefore be unable to complete critical duties for his job. The FCA has held that such situations are misconduct under the EI Act because claimants can reasonably foresee losing their jobs when they cannot complete their duties.[37]

[47] It is not necessary that there be a wrongful intent for behaviour to amount to misconduct under the EI Act.[38] When a claimant, through his own actions, can no longer perform all of the services required under the employment contract, that claimant "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily."[39]

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

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

[49] The Appellant raised additional concerns I have not addressed in this decision. Some of these claims I cannot consider because they are outside of the scope for the legal test for misconduct. The court has said I don't need to address arguments that are outside of my mandate.[40] Other claims I have chosen not to discuss because they are baseless and do not warrant consideration.

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[36] See *Canada (AG) v Cooper*, 2003 FCA 389.
[37] See *Canada (Attorney General) v Langlois*, [1996] F.C.J. No. 241; *Canada (Attorney General) v Wasylka*, 2004 FCA 219; *Attorney General of Canada v Borden*, 2004 FCA 176; and *Canada (Attorney General) v Lavallée*, 2003 FCA 255.
[38] See *Canada (Attorney General) v Caul*, 2006 FCA 251; *Canada (Attorney General) v Pearson*, 2006 FCA 199; *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Johnson*, 2004 FCA 100; *Canada (Attorney General) v Secours*, A-352-94; and *Canada (Attorney General) v Tucker*, A-381-85.
[39] See *Attorney General of Canada v Lavallée*, 2003 FCA 255, at paragraph 10.
[40] See *Kuk v Canada (Attorney General),* 2023 FC 1134 at para 46.

Conclusion

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

[51] This means that the appeal is dismissed.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section