



Citation: *RL v Canada Employment Insurance Commission*, 2025 SST 388

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: R. L.
Representative: T. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (696348) dated January 14, 2025
(issued by Service Canada)

Tribunal member: Anne S. Clark

Type of hearing: Teleconference
Hearing date: February 18, 2025
Hearing participants: Appellant
Appellant's representative

Decision date: March 5, 2025
File number: GE-25-333

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 that 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 had alcohol in the workplace. The Commission said that conduct violated the employer's policy. The Appellant said he put a bottle of alcohol in his lunch bag the day before. He forgot it was there and mistakenly took it with him to work the next day. He did not intend to have alcohol in his workplace. He also said the employer settled a wrongful dismissal claim with him and amended his record of employment (ROE) to say he was dismissed without cause.²

[4] The Appellant doesn't dispute that he had alcohol in his possession at work. But he says that it doesn't constitute misconduct. He says he didn't remember putting the bottle in his lunch bag the day before. He says the conduct was not intentional, so it is not misconduct. His representative submitted the Appellant didn't know he could be fired for having alcohol on the premises. The Appellant also says his employer later agreed they dismissed him without cause so he could qualify for EI benefits.

[5] The Commission accepted the employer's reason for dismissal was that the Appellant was dismissed for having alcohol in his possession in the workplace. 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. The Commission said the conduct violated the employer's policy and the Appellant knew or

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

² The amended record of employment is at GD3-22. The amended record notes "without cause" in the comments section.

should have known that conduct could result in his termination. The Commission also said the employer's amendment to the record of employment doesn't preclude a finding of misconduct.

[6] The Appellant's representative said the Commission gave three incorrect citations in their submission. She said she could not find the decisions the Commission listed in their submissions. I was also unable to find the decisions the Commission cited. But the fact that the citations were not accurate doesn't necessarily mean the Commission's statement of the law is incorrect. It does mean I can't rely on those decision as authority. I felt it would not be fair to delay the appeal and ask the Commission to correct their references. That is because I am still able to consider both parties' stated positions and argument as I decide the issues on appeal.

Matters I have to consider first

I agreed to accept the documents sent in after the hearing

[7] The Appellant's representative requested time to review the Commission's submissions and make written argument after the hearing. She said she couldn't make oral submissions because she felt she hadn't had enough time to prepare. She asked for one week to file post hearing submissions.

[8] I allowed the request. It was reasonable, fair, and wouldn't delay the appeal.³

Issue

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

³ See GD6.

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 he was in possession of alcohol in the workplace. That conduct violated the employer's policy.

[12] The Appellant and the Commission agree the Appellant had alcohol in his possession in the workplace. The Commission says the employer said the Appellant had alcohol in his lunch bag. The employer told the Commission the Appellant acknowledged he had a bottle of alcohol in his bag. The Appellant agreed he had possession of alcohol but doesn't agree that was misconduct under the law.

[13] I find the Appellant had alcohol in the workplace. That was the reason for the dismissal.

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

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

[15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁶ See *Attorney General of Canada v Secours*, A-352-94.

[16] 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.⁷

[17] 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.⁸

[18] The Commission says that there was misconduct because the Appellant had alcohol in the workplace. That conduct violated the employer's policy.⁹ The Commission says even if the Appellant's conduct was a mistake it showed reckless disregard for the policy. The Commission also said the fact the Appellant entered into an agreement with the employer to settle his labour dispute does not preclude a finding of misconduct.

[19] The Appellant says that there was no misconduct because his actions were not intentional. The representative argued the Appellant was not aware he could be terminated if he violated the policy. She wrote that the Appellant's actions didn't violate the intended purpose of the policy. She argued that mere possession of alcohol does not violate the "heart" of the issue the policy intends to address. Moreover she said the employer agreed to amend the record of employment so the Appellant could qualify for EI benefits.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁹ The policy begins at page GD3-42.

[20] I find that the Commission has proven that there was misconduct. The following facts support the finding of misconduct.

- The employer's policy prohibited employees from **possessing** alcohol on all work premises.
- Contrary to the written argument, the Appellant said he knew about the policy and knew of one employee who was terminated for violating the policy.¹⁰
- The Appellant said he put the bottle of alcohol in his lunch bag the evening before. He packed his own lunch the next morning. He didn't notice the bottle was also in the bag. He also said he forgot he put the bottle there.
- He thinks the bottle tumbled to the top of the bag in his truck. That was the reason another employee could see it in the bag.

[21] The Appellant's actions were careless to the point of recklessness. He is asking me to excuse the fact that he violated the employer's policy because he made a mistake. He had explanations for all questions about why he was in possession of alcohol in the workplace. I don't find his explanations reasonable.

[22] I find it hard to accept as reasonable that he put a bottle of alcohol in his lunch bag, forgot it was there, and then didn't notice it was there when he packed his lunch the very next morning. He says it was probably on the bottom of the bag so he wouldn't see it when he put his lunch in the bag. He said it probably worked its way to the top of the bag during the drive to work. He said that explains how a coworker could see the bottle in the bag. If a co-worker could see the bottle it makes no sense that the Appellant couldn't or didn't. Even if his explanation was reasonable, he said he knew about the policy. Knowing that, it was reckless of him to transport alcohol in his lunch bag and then fail to ensure it was removed before he went to work.

¹⁰ The Appellant said this in the hearing.

[23] The Representative argued the mere possession of alcohol should not be considered misconduct because it doesn't violate the purpose of the employer's policy. I can't assess the value or purpose of the employer's policy. My jurisdiction is limited to the Appellant's conduct and whether it was misconduct under the law.¹¹ She also argued that the conduct was a "first offence". That meant the Appellant wouldn't expect it to result in termination. The argument is not persuasive. Again, it is not within my jurisdiction to decide if the employer's policy is a reasonable one. However, contrary to the submissions, the termination letter refers to two previous (different) disciplinary actions. Applying the Representatives argument that would mean the Appellant's conduct was a "third offence".

[24] The Appellant argued the settlement means his conduct shouldn't be considered misconduct. I can't consider a settlement between the employer and the Appellant when I assess misconduct. The Social Security Tribunal Appeal Division (AD) recently discussed settlements in misconduct cases. While I am not bound by decisions of the Tribunal I find recent decisions are instructive on this point. I am required to follow decisions of the courts. The AD considered the law on this point including direction from the Federal Court.¹² I agree with the AD conclusions and find they apply to this appeal. The direction from the courts is that I can't disregard the applicable legislation because the employer and Appellant settled their dispute in an agreement. It is clear a settlement can't rebut a finding of misconduct unless it clearly confirms the employer's prior dismissal was wrong.¹³

[25] In this appeal there is nothing to suggest the Appellant didn't violate the policy or that the employer didn't dismiss the Appellant because of his conduct. The Appellant argues that the amended the ROE means the Appellant should be entitled to EI benefits.¹⁴ She said the agreement does not refer to the circumstances of the dismissal.

¹¹ The Federal Court confirmed this in *Kuk v. Canada (Attorney General)*, 2023 FC 1134 and in *Cecchetto v. Canada (Attorney General)*, 2023 FC 120.

¹² See *MR v. Canada Employment Insurance Commission*, 2023 SST 1086.

¹³ See *Canada (Attorney General) v. Boulton* (1996), 208 N.R. 63 (FCA).

¹⁴ The amended record is at GD3-22.

The Appellant lost his job because of misconduct

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

Conclusion

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

[28] This means that the appeal is dismissed.

Anne S. Clark

Member, General Division – Employment Insurance Section