



[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and AL*, 2024 SST 1352

Social Security Tribunal of Canada
General Division, Employment Insurance Section

Decision

Appellant:	X
Representative:	Jason Gagné
Respondent:	Canada Employment Insurance Commission
Added Party:	A. L.

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (676494) dated July 22, 2024 (issued by Service Canada)
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Tribunal member:	Nathalie Léger
Type of hearing:	Videoconference
Hearing date:	October 29, 2024
Hearing participants:	Appellant Appellant's representative Added Party
Decision date:	November 6, 2024
File number:	GE-24-2928

Decision

[1] The appeal is allowed.

[2] The Added Party (Employee) voluntarily left his employment without just cause. Analysis of the evidence shows that he also lost his job because of misconduct. This means that the Employee is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Employee lost his job. The Employee's employer said that he was let go because trust had been broken. The Commission determined that it wasn't misconduct under the *Employment Insurance Act* (Act). The Appellant, which is the employer in this case, requested a reconsideration of that decision, which the Commission maintained.

[4] The case can be summed up very briefly as follows: the Appellant strongly suspects that the Employee stole a sum of money given to him in cash by a Cooperative client. After a few days of pressured investigation, the Employee decided to leave at lunchtime, without telling anyone, and with the firm intention of not returning to work. The next business day, the Appellant dismissed him for [translation] "breach of trust."

[5] The Appellant asked the General Division of the Social Security Tribunal (Tribunal) to hear its appeal and determine whether the Employee had engaged in misconduct under the Act. The Tribunal has the power to hear the appeal *de novo*, which means it may allow new evidence and give the decision it deems most appropriate.

[6] I will have to decide whether the Employee lost his job for one of the reasons set out in section 30 of the Act, either misconduct or voluntary leaving. If this is the case,

¹ Section 30 of the *Employment Insurance Act* states that a claimant who loses their job due to misconduct is disqualified from receiving benefits.

the Employee will be disqualified from receiving benefits. If not, he will be entitled to them.

Matters I have to consider first

The Employee asked me to adjourn (that is, pause) the appeal, which I refused

[7] The day before the hearing, which was particularly difficult to schedule, the Employee asked me to adjourn, saying that events beyond his control had occurred and that he didn't have access to his computer.

[8] Considering that the appeal had already been adjourned several times and that the Appellant could have joined by telephone, the request to adjourn was refused. The Employee did join the hearing by telephone, saying he was on the road at the time of the hearing.

Objections

[9] The Employee objected to the admission of evidence relating to facts that occurred after the dismissal. I took this objection under advisement, since the Employer had already sent me documents that would allow me to fully address the alleged facts should I decide to dismiss the objection.

[10] After analyzing the issue, I have to accept the objection. The case law has clearly established that I can consider only the facts known to the employer at the time it decided to dismiss the employee.² This is because there must be a causal link between the conduct and the dismissal. Since facts that weren't known before the dismissal clearly can't have been a factor in the employer's decision to dismiss, they can't be admitted as evidence of misconduct.

² See *X v Canada Employment Insurance Commission and MD*, 2020 SST 97, in which the Appeal Division explained the reasoning well and cited the following Federal Court decisions: *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *Nelson v Canada (Attorney General)*, 2019 FCA 222; *Canada (Attorney General) v Bergeron*, 2011 FCA 284.

[11] As a result, I will consider only the facts that were known to the Employer at the time it decided to let the Employee go.³

Mixed analysis

[12] The case law of the Federal Court of Appeal has found that it's irrelevant to distinguish whether, in a given situation, the job ended because of a voluntary leaving or misconduct.⁴ Both are covered by the same section of the Act, and the consequence is the same.⁵

[13] Although I am of the view that the Appellant's admission that he voluntarily left his employment would be sufficient to settle this matter, I will still analyze the issue of misconduct. I think it's important to do since both parties' arguments have essentially focused on it.

Issue

[14] Did the Appellant lose his job because of misconduct or because he left voluntarily?

Analysis

1- Voluntary leaving

[15] The Act states that a claimant will be disqualified from receiving EI benefits if it is shown that they voluntarily left their job without just cause and that leaving was not the only reasonable alternative in their case.⁶

³ This means that I will not consider the documents in GD9-4 to GD9-44 or those in GD3-40 to GD3-47.

⁴ See *Canada (Attorney General) v Lamonde*, 2006 FCA 44 at 8, and *Canada (Attorney General) v Langevin*, 2011 FCA 163 at 5.

⁵ See section 30 of the *Employment Insurance Act* (Act).

⁶ See sections 29 and 30 of the Act.

[1] The law states that a claimant is disqualified from receiving benefits if they voluntarily left their job without just cause.⁷ Having a good reason for leaving a job is not enough to prove that there was just cause for leaving.

[2] The law explains what it means by “just cause.” It says that a person has just cause for leaving their job if they had no reasonable alternative to leaving, having regard to all the circumstances.⁸

[3] The Appellant [*sic*] is responsible for showing that, on a balance of probabilities, he had just cause for leaving.⁹ This means he must demonstrate that it is more likely than not that leaving his job was the only reasonable alternative. To make a decision, I must examine all the circumstances present when the Appellant [*sic*] left his job.

[16] The Commission didn’t comment on this issue. This is surprising because the notes taken by its agents show that the Appellant always claimed that the Employee had left work on Friday at lunchtime and never returned.¹⁰ Furthermore, this was not actually denied by the Employee. Since it was aware that this was a serious possibility, the Commission should have decided whether the Employee had left his job voluntarily.

[17] Since this is a *de novo*, or new, hearing, I will review the information that was in the Employee’s file as well as the information obtained at the hearing, and determine whether he voluntarily left his job without just cause.

[18] The Employee initially told the Commission that he had thought about resigning, but that the Employer had dismissed him first.¹¹ On reconsideration, he instead said that he had gone home for lunch and had chosen not to return.¹² He also said [translation] “he thought about resigning at that point.”

⁷ See section 30 of the *Employment Insurance Act*.

⁸ See *Canada (Attorney General) v White*, 2011 FCA 190 at 3, and section 29(c) of the Act.

⁹ See *Canada (Attorney General) v White*, 2011 FCA 190 at 3.

¹⁰ See GD3-17, GD3-25-26, GD3-29, and GD3-39.

¹¹ See GD3-30.

¹² See GD3-49.

[19] To clarify this point, I asked the Employee at the hearing to tell me about the Friday. After recounting the heated exchanges with the general manager in the morning, he said: [translation] “I didn’t come to work to be told things, to be told things like that and to be threatened like that. [...] For me, clearly, I wouldn’t stay there. [...] Simply, when I left there, around noon as was said earlier, I left for good and that was clear in my mind. [...] I knew very well that I was leaving the Cooperative for good.” He admitted that no one had told him not to come back and that he hadn’t yet been dismissed.

[20] The Employee also said he hadn’t told anyone of his intention to leave the company permanently before he left. He admitted that on that Friday afternoon, he received messages from his manager and the board chair. In those messages, the Employer asked the Employee to call back, which he didn’t do.

[21] Therefore, the Appellant [*sic*] admitted without reservation that he left voluntarily and that he did intend to voluntarily leave his job for good. The facts in evidence clearly show that the Employee did not return to work on that Friday afternoon. At that time, the Employer had not yet sent him the letter of dismissal.¹³

[22] It’s also clear that this wasn’t the only reasonable alternative in his case. Although the situation was tense, nothing stopped him from staying in his job or asking for a few days off, if he found the situation so unbearable. Rather, the evidence shows that he did not look for any alternative that would have allowed him to keep his job. He did not attempt to speak with the Employer about an alternative that would have allowed him to stay in his job. For him, the only option was to leave without notice, as he did.

[23] As a result, I have to conclude that on Friday, December 8, 2023, the Employee voluntarily left his employment without just cause under the Act. For that reason, he must be disqualified from receiving benefits as of that date.

¹³ The letter is dated December 11, 2023. See GD3-34.

2- Misconduct

[24] As previously mentioned, although I do not strictly need to address the misconduct since I have already determined that the Appellant [*sic*] left his employment without just cause, I will still address misconduct since it is the ground on which the parties have argued.

[25] To decide whether the Employee lost his job due to misconduct, I have to decide two things. First, I have to decide why the Employee lost his job. Then, I have to decide whether the law considers that reason to be misconduct.

Why did the Employee lose his job?

[26] I find that the Employee lost his job because his behaviour broke the trust between him and his employer.

– The parties' arguments

[27] The Commission is of the view that the Employer let the Employee go on suspicion of stealing a large sum of money. It maintains that the Employer [translation] “did not prove that the Claimant had stolen the missing money.”¹⁴ The Commission is also of the view that both parties' versions are equally credible. Therefore, the Employee's version should be preferred.¹⁵

[28] The Appellant disagrees. It states that the real reason the Employee lost his job was that it had lost trust in him, particularly because it was convinced he had stolen a large sum of money.

[29] The Appellant also argues that even if it were to believe that the Employee didn't keep the money for himself, he was at the very least seriously negligent in handling

¹⁴ See GD4-6.

¹⁵ According to section 49(2) of the Act, the Commission must effectively give the benefit of the doubt to a claimant when it finds that two contradictory versions exist and are equivalent. It's important to note that this section applies only to the Commission and not to the Tribunal.

such a large sum of money given to him by one of the company's clients. It's a serious mistake that led to trust being broken.

– **The facts**

[30] Most of the facts aren't in dispute. They can be summarized as follows:

a) On September 22, 2023, a Cooperative client came to deposit nearly \$6,000 in cash. The Employee received it. He issued a receipt for the amount deposited by the client. Only the client's copy of the receipt could be found, even though another copy should be on file.

b) On Monday, December 4, 2023, the accounting technician informed the general manager that a sum of money received by the Cooperative in September 2023 had never been deposited in the Cooperative's account.

c) On Tuesday, December 5, the general manager asked the Employee what happened to the money. He said he didn't remember anything. She asked him to get the money and go work at home.

d) On Wednesday, December 6, the Employee claimed to have searched, but didn't find the envelope containing the money. The general manager again asked the Employee to look everywhere. She felt that he didn't put much effort into the search.

e) On Thursday, December 7, the situation between the general manager and the Employee became more complicated. The tone rose. The general manager didn't think the Employee was looking hard enough. She began to wonder if he might have taken the money. The Employee claimed he didn't take it.

That same day, the general manager contacted the client in question. He confirmed that he had handed the money to the [translation] "gentleman" at the reception desk and that he had his receipt. The Employee was the only man working at the Cooperative's reception desk. The receipt bears the Employee's handwritten signature.

f) On Friday, December 8, 2023, the general manager again asked the Employee to look for the money. A heated exchange ensued. At lunchtime, the Employee decided to go home. He didn't return to work in the afternoon. He received a message from the general manager and one from the Cooperative's chair, but returned neither call.

g) The cabinet that holds cash or cheques received from clients can be accessed by several people: the administrative assistant (the Employee), the general manager, her assistant, and the operations people.

h) Deposits are usually made once a week, toward the end of the week. The deposit book is filled in by the person who receives the money. It indicates the amount received and details its composition. When the general manager is ready to make the deposit, she checks that what is written in the deposit book matches what is in the envelope, and countersigns.

i) The deposit book corresponding to the week in which the money was given to the Cooperative had not been prepared by the Employee.

[31] The general manager testified that she didn't start thinking that the Employee might have taken the money until she realized that he hadn't returned to work after his lunch hour.

[32] After discussion with her lawyer and the Cooperative chair, she decided to dismiss the Employee for breaking trust. For her, trust was broken by several factors:

- a) The fact that the [translation] "lost" amount was received by the Employee;
- b) The fact that the Employee claimed not to remember the transaction;
- c) The fact that the Employee did not, in her opinion, make much effort to search for the lost envelope;

- d) The fact that a copy of the receipt wasn't included in the client's file, despite the procedure in place;
- e) The fact that the Appellant [*sic*] did not return to work on the afternoon of Friday, December 8, 2023; and
- f) The fact that it seems more likely than not that the Employee took and kept the money.

– **Analysis**

[33] The Commission says that the Employer failed to demonstrate that the Employee stole the money in question and that, as a result, it failed to prove that the alleged action actually took place. This means that there can be no misconduct.

[34] Although the Commission acknowledges that the dismissal letter [translation] “mentions a breach of trust and not a theft,” it considers that evidence of the theft was not provided and therefore, the misconduct was not proven.¹⁶

[35] I find that the Commission noted the wrong action as the reason for the dismissal. The evidence on file shows that it wasn't just suspicions of theft that led the Employer to dismiss the Employee, it was also his lack of cooperation throughout the investigation.

[36] The fact that he didn't return to work on the afternoon of December 8, and that he didn't return the general manager's and the chair's calls reinforced the Employer's doubts and led it to lose all trust in the Employee.

[37] In my opinion, it is the loss of trust resulting from the previously mentioned facts that is the real reason for the dismissal.

¹⁶ See GD4-7.

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

[38] The reason for the Employee's dismissal is misconduct under the law.

[39] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁸ The Employee 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.¹⁹

[40] There is misconduct if the Employee 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.²⁰

[41] The Appellant has to prove that the Employee lost his job because of misconduct. The Appellant 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 Employee lost his job because of misconduct.²¹

[42] The Appellant says there was misconduct because the evidence shows that it's more likely than not that the Employee took the money deposited by the client. The Appellant's representative notes that the burden of proof in civil matters is the balance of probabilities, contrary to what the Commission suggests. What made the Employer lose trust for good isn't only the fact that the Employee decided to leave without notice, in the midst of a crisis, but also that he didn't bother to return the calls of the general manager or the Cooperative's chair. These actions are necessarily wilful and, in the context in which they occurred, the Employee must have known that they could lead to dismissal.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁹ See *Attorney General v Secours*, A-352-94.

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[43] The Employee, like the Commission, essentially claims that there was no misconduct because the Employer failed to show that he stole the lost money. The Employee maintains that he has always given the same version of events, that he did not take the money and that several other people had access to where the money was kept.

[44] I find that the Appellant has proven that there was misconduct, because the Employee's actions were wilful, or at least so reckless that they constituted misconduct and the Employee must have known that he could be dismissed.²²

[45] Taken in the context of the loss of a large sum of money received by the Employee, his lack of cooperation amounted at the very least to gross recklessness "such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."²³

[46] In addition, all the facts that led to the Employer's loss of trust were wilful actions by the Employee. I am also of the opinion that, given the strained relations in the days prior, the Employee had to have necessarily known that leaving without explanation or not returning the Employer's calls could lead to his dismissal.

[47] Lastly, it's important to bear in mind that even if the Employee's alleged theft is the reason for the loss of trust, it's not the only action to be taken into consideration. All factors must be considered.

[48] In my opinion, based on this comprehensive analysis, it's indisputable that the Employee lost his job because of misconduct.

²² See *De Carolis v Canada (Attorney General)*, 2007 FCA 372.

²³ See *Lachebi v Canada (Attorney General)*, 2024 FCA 78 at 9, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

Conclusion

[49] The Employee voluntarily left his employment without just cause. Because of this, he is disqualified from receiving EI benefits.

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

[51] This means that the appeal is allowed.

Nathalie Léger
Member, General Division – Income Security Section