Citation: *SK v Canada Employment Insurance Commission*, 2025 SST 418

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (697220) dated December 24, 2024 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	March 25, 2025
Hearing participant:	Appellant
Decision date:	March 28, 2025
File number:	GE-25-609

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was fired from her employment as a security guard because her employer says she was sleeping on the job.

[4] The Appellant says she was not sleeping on the job. She says that she was "dozing" as she was very sick, but even though her physical eyes were closed while she was dozing, her third eye, or soul, was open, so she could see what was going on around her, thus the place was secure.

[5] The Commission decided they could not pay the Appellant benefits because she lost her employment as a result of her own misconduct.

Issue

[6] Did the Appellant lose her job because of misconduct?

Analysis

[7] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

Why did the Appellant lose her job?

[8] I find the Appellant was fired for sleeping on the job.

[9] I understand the Appellant does not like the term "sleeping" and says that what she was doing was "dozing". However, as the definition of "dozing" is a short, light sleep,[2] regardless of which term is used, the Appellant was fired for sleeping on the job. Here is why I find this:

- The Appellant testified that she dozed off while she was meditating and her physical eyes were closed.
- She also said this in her written arguments.[3]
- The termination letter says she was fired for sleeping on the job.[4]
- Her employer told the Commission she was fired for sleeping on the job.[5]
- I don't see any evidence to support she was fired for any other reason.

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

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

[11] To be misconduct under the law, the Appellant's conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[8]

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[2] As per the Cambridge English Dictionary: https://dictionary.cambridge.org/dictionary/english/dozing
[3] GD09-2
[4] GD03-22
[5] GD03-19
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Attorney General of Canada v Secours*, A-352-94.

[12] There is misconduct if the Appellant knew, or should have known, that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[9]

[13] The Commission has to prove that the Appellant lost her 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 her job because of misconduct.[10]

[14] So, to summarize the above. There are three points the Commission needs to prove for the Appellant's actions to rise to the level of misconduct. Those three points are:

- Did she do the action she was fired for?
- Did she do it on purpose?
- Did she know, or ought she have known, she could be fired for what she did?

Did she do the action she was fired for?

[15] Yes, she did. The Appellant testified that she was meditating but because of feeling sick and being tired, she dozed off, so her physical eyes were closed. As dozing is a light sleep, she was therefore sleeping on the job.

[16] While the Appellant argues her third eye, or soul, was open, which allowed her to see what was going on, so the area was still secure, and thus she was doing her job as a security guard, I do not agree.

[17] Regardless of whether she actually has a third eye, and whether it was actually open, the Appellant still committed the action that her employer fired her for. She was not awake since she was dozing, and was thus sleeping.

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[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.

Did she do it on purpose?

[18] The Appellant says that she had been called in for a shift at the last minute. She was patrolling for several hours before she was assigned to the loading dock area. She was given a chair and told she could sit down if she was tired.

[19] The Appellant says that she has health problems, severe ankle problems that cause her a lot of pain if she does a lot of walking, and mental heath issues.

[20] She meditates in order to help control her mental health issues.

[21] Since she was tired from all her patrolling and was feeling rather sick from being near the smell of the building's garbage bins, she sat down, as she says she was allowed to do, and decided to meditate.

[22] Unfortunately, she says that feeling sick and being so tired, she ended up dozing off.

[23] I can accept the Appellant's actions were not intentional, as in she did not decide that she was purposely going to sleep on the job; however, I find the Appellant's conduct was so reckless it was almost wilful.

[24] In order for the Appellant's conduct to not be voluntary due to a medical issue she needs to establish both the medical issue and the fact that because of this medical issue her actions were involuntary.[11]

[25] In other words, there needs to be persuasive evidence to show, on a balance of probabilities, that because of medical condition A and/or B, the Appellant did not have control over action C which led to her being fired.

[26] I accept as fact that the Appellant has ankle damage and mental health issues as there is medical documentation to support this.[12]

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[11] *Canada (Attorney General) v Bigler*, 2009 FCA 91.
[12] GD02-10

[27] However, that alone is not enough for me to say she did not have control over her actions. I find she has failed to prove that her health conditions prevented her from staying awake or taking actions to not fall asleep.

[28] The Appellant, feeling tired and sick, should have taken steps to not fall asleep, or reported her inability to continue working to her employer. Instead, she decided to sit down and try and meditate, rather than taking some reasonable actions to try and prevent herself from falling asleep.

Did she know, or ought she have known, she could be fired for what she did?

[29] I find the Appellant ought to have known that she could be fired for what she did.

[30] The Appellant says that she was not aware of any policy about sleeping on the job, but I do not find this credible.

[31] The employer mentions the exact section of their policy related to sleeping on the job being cause for dismissal in the termination letter,[13] so I find the employer does have a policy about sleeping on the job.

[32] I do not find it credible that in the 10 years the Appellant says she has been working for her employer, she was not made aware of this policy.

[33] However, even if I am wrong, the Appellant ought to have known she would be fired for falling asleep as the entire essence of being a security guard is being in a state that allows a person to secure an area. Being asleep would mean she could not perform her job of securing the area and she ought to have known failing to do the core concept of her job by sleeping would result in being fired.

[34] Even though she has argued that the area was secure, despite her physical eyes being closed while dozing, because her third eye was open, I find that she ought to have known that this would not meet her obligations to her employer. This is because

[13] GD03-23

her employer had a policy disallowing sleeping on the job, so they clearly expected her to be physically awake during work hours.

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

[35] Based on my findings above, the Appellant lost her job due to misconduct, which means she cannot be paid EI benefits.

Conclusion

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

[37] This means that the appeal is dismissed.

Gary Conrad
Member, General Division – Employment Insurance Section