



Citation: *DS v Canada Employment Insurance Commission*, 2024 SST 635

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (627042) dated November 24,
2023 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In person

Hearing date: February 14, 2024

Hearing participant: Appellant

Decision date: February 26, 2024

File number: GE-24-236

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 the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost his job. The Appellant's employer said he was let go because he drove his car into a protestor and was verbally aggressive towards the protestor and other members of the public.

[4] Even though the Appellant doesn't dispute that he had an incident with a protestor, he says he shouldn't have been let go because his mental illness (bipolar disorder) caused his actions that day.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

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

Analysis

[7] 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.

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 his job?

[8] I find the Appellant lost his job because he violated his employer's values bylaw after he drove his car into a protestor and was also verbally aggressive towards the protestor and other members of the public.

[9] The Appellant and the Commission don't entirely agree on why the Appellant lost his job.

[10] The Commission says the reason the Appellant's employer gave is the real reason for the dismissal.²

[11] The Appellant's employer told the Commission that the Appellant lost his job because they violated their values bylaw after he drove his car into a protestor and was also verbally aggressive towards the protestor and other members of the public.³

[12] I note the Appellant's termination letter says he was dismissed for violating his employer's bylaw, specifically section 192-3, Values, of the municipal code, for driving his car into a protestor and for being verbally aggressive towards the protestor and other members of the public.⁴

[13] The Appellant disagrees in part. He testified that the incident with the protestor did occur. But he doesn't feel he drove into the protestor. He drove his car into the park where he had just finished a work shift and there were two protestors sitting in the road. He tried to drive around them and one stepped in front of his car and put their hands on his car. He continued to drive slowly with his foot on the break and honking his horn for about 15 feet before stopping.

[14] The Appellant also testified that he doesn't feel he was verbally aggressive towards the protestor and other members of the public. There was another, larger group of protestors who were also at the park entrance. After he stopped his car, he got out and one of the protestors from the larger group pulled the protestor off his car. He spoke

² GD4-4.

³ GD3-32.

⁴ GD3-37 to GD3-38.

to that person for about 10 or 15 seconds, and by then the protestor who had stepped in front of his car had walked about 10 or 15 feet away. He shouted at them and then got back in his car and drove away.

[15] I acknowledge the Appellant feels he didn't drive his car into a protestor.

[16] But I disagree with the Appellant. Even though the protestor may have first stepped in front of the Appellant's car and tried to stop him from entering the park, the Appellant confirmed in his testimony that he didn't immediately stop the car. Instead, he continued to drive forward while the protestor was holding on to his car, which I find shows that he did in fact drive into them and pushed them further with his car.

[17] I also acknowledge the Appellant feels he wasn't verbally aggressive towards the protestor and other members of the public.

[18] But I disagree with the Appellant again.

[19] In my view, even though the Appellant shouted at the protestor from a distance, he had still just driven into them with his car and pushed them further with it, so it's reasonable to believe that they or anyone else who witnessed the incident could have viewed these actions as a further escalation, even if the Appellant didn't shout at anyone else.

[20] In other words, I find the fact that the Appellant was shouting at all, after just driving into someone with his car and pushing them further with it, could have given people who were there the impression that he was acting aggressively and intimidatingly.

[21] So, for the reasons set out above, I find the Appellant lost his job because he violated his employer's values by-law after he drove his car into a protestor and was also verbally aggressive towards the protestor and other members of the public.

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

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

[23] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[24] 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.⁸

[25] 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.⁹

[26] The Commission says there was misconduct because the Appellant's actions led to his dismissal, and he knew or should have known that he could be let go for those actions.¹⁰

[27] The Appellant says that there was no misconduct because his actions were caused by his illness, specifically bipolar disorder. He says his actions therefore weren't intentional because he was having a manic episode at the time of the incident. And he says he didn't think he would be let go due to his actions.¹¹

[28] The Appellant's employer told the Commission:¹²

- The Appellant was involved in an incident on August 2, 2023.

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.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ GD4-4 to GD4-6.

¹¹ GD2-6.

¹² GD3-32 to GD3-33, GD3-39.

- They investigated the incident and determined that his behaviour was unacceptable and violated the municipal code bylaw, Section 192-3, Values.
- During the investigation, they did interviews and saw video footage of the incident.
- The Appellant drove into a protestor at the entrance of the park. He pushed the protestor 15 feet or more, repeatedly honking and yelling while in his car.
- The Appellant's actions were aggressive and intimidating.
- The Appellant removed his work shirt and hat during the incident.
- The Appellant started shouting profanities at peaceful protestors.
- The Appellant showed lack of judgement and lack of discretion, and his conduct violated their policies.
- He undermined the safety of the public and his employer's reputation.
- During the investigation, they gave the Appellant a chance to explain his version of events. He was remorseful, but his conduct didn't align with their values.
- They dismissed the Appellant on September 13, 2023, following the investigation.
- The Appellant didn't raise any health issues related to the incident during their investigation.
- The Appellant worked overtime on the day of the incident.
- The Appellant didn't have any prior warnings for similar conduct. This was one incident that warranted immediate dismissal.

[29] The Appellant says:¹³

- He was diagnosed with bipolar disorder in April 2016. He was in Sweden at the time.

¹³ GD2-6, GD3-25, GD3-30 to GD3-31, hearing recording.

- He was prescribed medication in 2019.
- When he moved to Canada, he found a doctor to help him manage his illness. They had regular phone appointments until 2022.
- In 2022, his doctor told him they didn't think it was necessary to meet anymore because he was stable and hadn't had a manic episode in over 3 years.
- He was still on medication in 2022. He thinks it was assumed when his doctor told him they didn't need to meet anymore because he was stable that he would continue to take medication going forward.
- In October 2022, he decided on his own to stop taking medication for personal reasons.
- He started to have a manic episode in late July 2023. His mood was elevated and he was sleeping less, which are usually signs of a manic episode. But he wasn't able to fully tell what was going on then. It's only after the episode ends that he's able to look back and realize what actually happened.
- On August 2, 2023, he woke up much earlier than normal and went on a long walk before work. His employer asked him to work overtime that day. He thought about it and ultimately agreed to do it in the end. He just didn't have the self-awareness to know that he wasn't well then.
- During the overtime part of his shift, he was mowing the lawn at the park and got the lawnmower stuck on the grass in some logs. He tried to get it unstuck, but his shift ended and he left it there.
- About 30 minutes after his shift ended, he decided to drive back to the park in his own car to get the lawnmower unstuck. He was still wearing his work shirt.
- When he arrived at the park entrance, he saw two groups of protestors there. One group was larger than the other. The smaller group had two people who were sitting in the road. The protests were about whether to keep the park fully accessible or restrict access to cars. The smaller group of protestors wanted to restrict access to cars.

- He tried to drive his car around the two protestors sitting in the road. But one of them stepped in front of his car and put their hands on his car.
- Once this happened, he continued to drive slowly with his foot on the brake for about 15 feet or so while honking his horn. The protestor was still holding on to his car during this time.
- He then stopped the car and got out. He took off his work shirt as he got out.
- Once he got out of his car, one of the people from the larger group of protestors pulled the protestor off his car. He spoke to that person for about 10 or 15 seconds, and by then the protestor who had stepped in front of his car had walked about 10 or 15 feet away. He shouted at them and then got back in his car and drove away.
- He was in the middle of a manic episode during the incident. His actions weren't conscious, deliberate, or intentional. He didn't think he was doing something dangerous and didn't have insight into his behaviour at the time. He didn't think what he was doing would lead to his dismissal.
- He took off his work shirt when he got out of the car because he didn't want to be recognized as a city employee. He had done a short interview two days earlier (on July 31, 2023) on his way to work about why the park should be kept fully accessible. The interview ended up on the radio. His supervisor told him not to do that again because he works for the city and isn't supposed to share political opinions. He still thought it was appropriate for him to speak up after work, on his own time, but not with his work shirt on.
- He didn't take off his work shirt when he got out of the car because he thought he was violating his employer's values. He did this only because his supervisor had told him not to share political opinions as a city employee.
- He went to work the next day, on August 3, 2023. There was video footage of the incident with the protestor circulating by then.

- He went to work the day after, on August 4, 2023. But his supervisor sent him home with pay that day.
- That same day, his parents called 911 after they noticed his mood was elevated. He was taken to the hospital and spent 10 days there. He was discharged on August 14, 2023. His doctor's note confirms these details and the reason why he was there.¹⁴
- He got a sick note and took that to work on August 15, 2023. The note said he would be off for 2 weeks.
- His general supervisor then wrote to him to say that he should not return to work and that he was on administrative leave starting August 21, 2023.
- On August 22 or 23, 2023, he had an in-person meeting with several people. It was part of his employer's investigation of his incident with the protestor.
- The meeting lasted about 2 hours. They asked him around 40 or 50 questions about the incident. They had seen news footage of it.
- He didn't tell them about his illness during the meeting. His union representative told him to just answer the questions honestly and not say anything unnecessary.
- He also didn't feel he needed to disclose his personal health information during the meeting.
- He didn't know that his employer's investigation could lead to his dismissal. They didn't mention that possibility before or during the meeting.
- He expected to hear about some kind of return-to-work plan during the meeting. He thought he would possibly be moved to a different park, but he didn't expect to be let go afterwards.
- The policy his employer says he violated is sort of a code of conduct. All employees have to complete a 7-to-8-hour review of the policy every spring

¹⁴ GD2-11.

through a series of courses. One of the courses is on the section of the policy (Values) his employer says he violated.

- It didn't occur to him during the incident that he could be dismissed for violating his employer's policy. He wasn't well at the time and didn't have the self-awareness to know what he was doing was wrong or dangerous.
- He didn't tell his employer about his illness until after he was let go.
- It isn't fair to say that he should have told his employer sooner about his illness sooner. There is a stigma around mental illness and it's not something you tell everyone about. It's also not something you have a lot of insight into at the time, and only when you look back later can you see your actions were unusual and a result of your illness.
- It also isn't fair to say that it was his fault that he stopped taking medication in 2022. Medication isn't a guarantee that you won't have a manic episode. He made a difficult choice and didn't intend to have a manic episode 9 months later. It's common for people with mental illness to struggle with how to manage it sometimes.
- His termination letter says the trust with his employer is damaged, but he's now reached an agreement with them through mediation and will be reinstated pending his enrollment in the employee health and wellness program. This shows the trust with his employer has been repaired.
- But even though he's being reinstated, he won't be given any backpay. It would greatly help to get EI for the time he was off work because the months without pay have been very challenging.

[30] I find the Commission has proven that there was misconduct for the following reasons.

[31] First, I find the Appellant committed the actions that led to his dismissal and that his actions were intentional.

[32] I find the Appellant drove his car into a protestor and was then verbally aggressive towards the protestor and other members of the public. As discussed above, even though the Appellant disagrees with how his employer has characterized his actions, he agrees that the incident itself happened and that he was dismissed for it.

[33] I also find the Appellant's actions during the incident with the protestor were intentional.

[34] The Appellant testified that his actions during the incident with the protestor on August 2, 2023 weren't intentional, conscious, or deliberate. He was in the midst of a manic episode at the time and didn't have clear judgment then. It was only looking back later, after the episode, that he realized what had happened.

[35] I accept that the Appellant is bipolar and was in the middle of a manic episode during the incident with the protestor on August 2, 2023, which resulted in him being hospitalized for 10 days starting on August 4, 2023. He testified in detail about his illness, his treatment history, and his past manic episodes. He also provided a doctor's note that says he is bipolar and was hospitalized for 10 days starting on August 4, 2023 because of a manic episode that started in late July 2023¹⁵, which I find helps to support his testimony.

[36] I acknowledge that the Appellant says he didn't tell his employer that he is bipolar until after his dismissal because he didn't think he needed to share that personal health information with them. And I acknowledge that he says it isn't fair to say he should have told his employer sooner that he is bipolar because there is a stigma around mental illness and it's not something you tell everyone about.

[37] I agree with the Appellant. What he did or didn't tell his employer about his illness isn't relevant here because it doesn't deal directly with why he was dismissed. Instead, I will focus only on the Appellant's actions during the incident with the protestor, which is why he was dismissed.

¹⁵ GD2-11.

[38] I also acknowledge that the Appellant says it isn't fair to link his actions during the incident with the protestor to the choices he made to manage his illness leading up to the incident.

[39] I agree with the Appellant. These things aren't relevant here because they occurred well before the incident happened, so I won't consider them in my analysis. Instead, I will focus only on the Appellant's actions during the incident.

[40] When I look at the Appellant's actions during the incident with the protestor, I find he hasn't persuaded me that his actions were involuntary at the time, even though I accept that he is bipolar and was in the middle of a manic episode then.

[41] Instead, I find the evidence shows the Appellant was aware of his actions during the incident.

[42] The parties agree that the Appellant took off his work shirt when he got out of his car after he drove into the protestor. The Appellant's employer told the Commission that the Appellant did this.¹⁶ And the Appellant told the Commission¹⁷ and confirmed in his testimony that he did this.

[43] I asked the Appellant why he took off his work shirt when he got out of his car.

[44] The Appellant testified that there were debates at the time about whether to keep the park (where the incident occurred) fully accessible or restrict car access. On his way to work 2 days before (July 31, 2023), he gave a short interview to a news reporter who asked him what he thought about that issue. His interview ended up on the news.

[45] The Appellant testified that once he was at work, his foreperson talked to him about the interview and said that he had to just say "no comment" if that ever happened again because he's a city employee and shouldn't share political opinions.

¹⁶ GD3-32.

¹⁷ GD3-30.

[46] The Appellant testified that when he got out of his car during the incident, he took off his work shirt because he didn't want to be recognized as a city employee after what his foreperson had told him.

[47] I find the Appellant's explanation for why he took off his work shirt during the incident shows that he was aware of his actions at the time. Even though he was having a manic episode, he was still able to remember his conversation with the foreperson and decided to remove his work shirt because of advice they had given him, which I find shows he was capable of making logical decisions in that moment.

[48] Otherwise, if the Appellant had little to no self-awareness of his actions as he says, I find it's reasonable to believe he wouldn't have taken off his work shirt when he got out of his car because he likely wouldn't have been able to think logically at that time and it wouldn't have occurred to him to do that then.

[49] I therefore find the Appellant hasn't provided enough evidence to persuade me that his actions during the incident with the protestor were completely beyond his control. While I accept that he was having a manic episode then, I find there is other evidence to show that he did understand the situation he found himself in, which I find shows his actions were conscious and deliberate.

[50] Second, I find the Appellant should have known that he could be dismissed for driving his car into a protestor and then being verbally aggressive towards the protestor and other members of the public.

[51] The Appellant's termination letter says that he was dismissed for violating his employer's public service bylaw, specifically section 192-3, Values.¹⁸

[52] I note section 192-3, Values, of the public service bylaw says the following:¹⁹

- To serve the public well
- To serve Council and/or their Board well

¹⁸ GD3-37.

¹⁹ GD3-35.

- To act with integrity
- To maintain political neutrality
- To uphold [city's] motto – Diversity Our Strength
- To use City property, services and resources responsibly
- To apply judgment and discretion
- To serve the public service well

[53] I find the Appellant knew about the public service bylaw, and specifically section 192-3, Values. He told the Commission²⁰ and confirmed in his testimony that he had to complete a review of the bylaw every year, including a course on the Values section, which I find means he would likely have been very familiar with it.

[54] The Appellant testified that he didn't know he could be fired for violating section 192-3. It didn't occur to him that he could be fired for violating section 192-3 and he thought he would just be suspended instead since he hadn't gotten any prior warnings. And he thought that since the incident happened after his work shift ended, he had the right to express his opinion.

[55] I find there's not enough evidence to show that employees would be dismissed for violating section 192-3. The bylaw itself doesn't say anything about this. And the Appellant's employer didn't indicate to the Commission that employees would be dismissed if they violated section 192-3.

[56] I acknowledge the Appellant thought he wouldn't be dismissed for his actions. But I find he still should have known that he could be dismissed for violating section 192-3 due to his actions during the incident with the protestor.

[57] As discussed above, I find the evidence shows that the Appellant's actions during the incident were intentional because he did understand the situation that he was in.

²⁰ GD3-25.

[58] Since the Appellant understood the situation that he was in, I find it's reasonable to believe that it should have occurred to him at that time that he could be dismissed due to the severity of his actions. Because he drove his car into a protestor and then shouted at them with other witnesses present, I find it's reasonable to view his actions as clearly violating at least one of the section 192-3 values, notably "to apply judgment and discretion". And as the Appellant was familiar with section 192-3, he should have realized that how he specifically behaved during the incident could put his job at risk, even if it took place after work and he hadn't gotten any prior warnings.

[59] In other words, I acknowledge the Appellant thought he would just be suspended for his actions. But I find it also should have at least occurred to him that he could be dismissed instead because of what exactly he did. He should have realized that his actions clearly violated section 192-3 and that his employer might reach this conclusion too and decide to dismiss him because of it.

[60] I acknowledge the Appellant says that he only took off his work shirt when he got out of the car because of what his foreperson told him, and not because he thought he was violating his employer's values.

[61] And I acknowledge the Appellant says that he didn't think he would be let go because his employer didn't mention anything about that during their meeting after the incident.

[62] I'm not persuaded by the Appellant's explanation, unfortunately. Since I find his actions during the incident with the protestor were intentional and he was familiar with section 192-3, I find it's reasonable to believe that it should have at least occurred to him that his actions clearly violated section 192-3 and that the seriousness of the violation (due to the specific nature of his actions) could lead to him being let go, even if his employer didn't bring up that possibility during their meeting.

[63] Taken together, I find the Appellant should have known that he could be dismissed for driving into a protestor and being verbally aggressive towards the protestor and other members of the public.

[64] I acknowledge the Appellant says that his employer has now reinstated him, which he says shows the trust between them has been repaired.

[65] Unfortunately, I find that isn't relevant here. This is because the misconduct analysis focuses on the Appellant's actions **leading up** to his dismissal. Anything that happens after his dismissal (including his employer's decision to reinstate him) falls outside the legal test.

[66] In other words, I find the fact that the Appellant has gotten his job back doesn't change my above findings. For the reasons set out above, his actions leading up to his dismissal are still misconduct.

[67] I also acknowledge the Appellant says it would greatly help to get EI because the months he has been off work have been very challenging.

[68] Unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. And, in this case, I find the Appellant doesn't meet those requirements since he was dismissed from his job because of misconduct.

[69] I therefore find the Appellant's conduct is misconduct under the law since he committed the actions that led to his dismissal, his actions were wilful, and he should have known that he could be dismissed as a result of his actions.

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

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

Conclusion

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

[72] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section