

Are Employees Who Get Fired for Pre-Employment Offences Eligible for EI Benefits?



Under Section 30(1) of the *Employment Insurance Act*, employees aren't entitled to Employment Insurance (EI) unemployment benefits if they lose "any employment" as a result of "misconduct." What was probably intended to be a simple rule is a frequent source of litigation due, in large part, to the fact that the law doesn't provide a clear (or any) definition of "misconduct." One recurring controversy is whether getting fired for a pre-employment offence counts as "misconduct" under Sec. 30(1). Or is misconduct limited to offences EI claimants commit during their employment with the employer who fired them immediately before they claim benefits? Here are two court cases addressing the issue.

Previous Offence Is Not Misconduct

Here's a case illustrating the previous and now largely discredited interpretation of the rule.

Situation

In January 1989, an employee is hired to drive a school bus. A few months into his employment, he's sent to prison for 6 weeks following accusations of sexual abuse by his daughter. The alleged offences took place between 1979 and 1987. Upon returning to work, the driver is fired because of the charges. Our school bus drivers must be beyond reproach, the school board tells him. The driver claims EI unemployment benefits but the Commission rules that he was fired as a result of misconduct and denies the claim. The board of referees upholds the decision, but the umpire reverses it.

Ruling

The Federal Court of Appeal rules that the employee was not fired for "misconduct."

Reasoning

According to the court, "misconduct" under Sec. 30(1) means an act that violates a "duty that is expressed or implied in the contract of employment." The acts committed by the driver may have been reprehensible. But the court said they weren't

misconduct. The offences occurred more than a year before the driver was hired. The court acknowledged that acts committed before employment begins can be misconduct if they make it impossible for the employee to do the job. So, for example, the offence could have been considered misconduct if it had caused the driver to lose his driver's licence. But that's not what happened. The driver was still able to do the job he was hired to do, according to the court. So, it was wrong to disqualify him from receiving EI benefits on the grounds of misconduct.

Attorney General of Canada v. Nolet, F.C.A., A-517-91, March 19, 1992.

Previous Offence Is Misconduct

Here's a case that illustrates the modern approach to interpreting "misconduct" for the purposes of disqualifying employees from receiving EI benefits.

Situation

A contractor hires a pipefitter to work on a construction site. He has to take a drug test administered by the operator of the site to gain access to the site. He takes the test the day before his first day on the job. Four days into the job, the results come back: The pipefitter has tested positive for THC, an active ingredient in marijuana. Since the operator will no longer let him on the site, the contractor fires him. The board of referees finds that the pipefitter was fired for misconduct and denies him EI benefits under Sec. 30(1). The umpire reverses. The pipefitter's use of marijuana isn't misconduct because it occurred before the job started, it rules. The government appeals.

Ruling

The Federal Court of Appeal says the pipefitter was, in fact, fired for misconduct.

Reasoning

The umpire was wrong to conclude that an act can't constitute "misconduct" under Sec. 30(1) because it happens before employment began. If that were the rule, employees who do something wrong could hang onto their EI eligibility by quitting and taking a job with a new employer. The issue, according to the court, is not **when** the offence occurs but whether it's the reason for termination. "Sec. 30(1) speaks in terms of a loss of 'any employment' as a result of the misconduct," the court explains. In this case, the pipefitter was fired because he smoked marijuana and thus couldn't get access to the jobsite to carry out his duties. This offence constituted misconduct even though it occurred before his employment began. (And if the *Nolet* case at right came up today, the bus driver would also probably be disqualified from receiving EI benefits as a result of misconduct.)

[*Canada \(Attorney General\) v. McNamara*](#), 2007 FCA 107 (CanLII).