



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. K. v Canada Employment Insurance Commission*, 2019 SST 1421

Tribunal File Number: GE-19-3496

BETWEEN:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Glen Johnson

HEARD ON: November 13, 2019

DATE OF DECISION: November 13, 2019

DECISION

- [1] The appeal is allowed. The Commission has not proven that the Claimant lost her job because of her own misconduct. This means that the Claimant is not disqualified from being paid employment insurance benefits.¹

OVERVIEW

- [2] The Claimant was fired from her job at a nursing home. The Claimant's employer said that she was dismissed because she was away from her job without getting approval from them. She left on vacation even though her employer told her vacation leave was refused. They say that she did not follow the policy in place about meeting with her supervisor in-person to see if her vacation leave request is approved.
- [3] The Claimant says that she should get benefits. She agrees that she went on vacation even though her employer denied her leave at the last minute. She says that she thought her employer approved the days off work because she asked her employer for leave about 2 months before she was to go and they did not answer.
- [4] The union Collective Agreement with her employer says that they need to tell her whether her request for leave is approved within 2 weeks of asking. Her employer told her a day before she was set to go on vacation that her leave was denied.
- [5] The Commission agrees with the employer. It says that the Claimant was fired because of misconduct and she is disqualified from getting benefits. She did not follow the rule about meeting with her employer in-person to see about vacation leave approval. She went on vacation even though leave after being told leave was denied.

¹ Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

ISSUE

[6] Was the Claimant fired because of misconduct? To determine this, I will first decide the reason why the Claimant lost her job.

ANALYSIS

[7] Yes; I find that the Claimant was dismissed for misconduct.

Why did the Claimant lose her job?

[8] She was fired because her employer told her vacation leave was not approved and she went anyway.

[9] The Claimant asked her employer for leave about 2 months before she was to go on leave and they did not answer. She thought leave was approved even though they did not answer.

[10] The employer says that she did not follow the policy in place about meeting with her supervisor in-person to see if her vacation leave request is approved. They filled-out a Record of Employment that says she was dismissed.

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

[11] No; The reason the Claimant was fired is not considered misconduct under the law.

[12] I find that she did not willfully abandon her job by leaving on vacation when her employer said that she could not go. The employer and the employer did not communicate properly about leave requests.

[13] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it about the same as willfulness.³ The Claimant does not have to have a wrongful intent for her behavior to be misconduct under the law.⁴

[14] There is misconduct if the Claimant knew or ought to have known that her conduct could impair the performance of the Claimant's duties owed to her employer and, as a result, that dismissal was a real possibility.⁵

[15] The Commission has to prove that it is more likely than not⁶ that the Claimant lost her job because of misconduct.⁷

[16] The Claimant and the employer did not communicate properly and there was no misconduct. She thought that her employer approved her leave request because they did not answer her when she asked. The employer did not tell her that she could not have vacation leave until about 24 hours before she was to leave. She had already bought her airline ticket.

[17] I find that the employer did not follow the union Collective Agreement because they did not tell her in writing whether leave is approved within 2 weeks of her asking. The Claimant testified that her employer did not tell her why they did not follow the clear wording in the Agreement.

[18] The Commission says that that there was misconduct because the Claimant did not follow the employer's rule that she needed to meet in-person with her employer to see whether there is leave approval. They say she knew about the rule and she disagrees. She says that she did not know that her employer made a new rule at the end of April 2019

² *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ *Attorney General of Canada v Secours*, A-352-94.

⁵ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ The Claimant has to prove this on a balance of probabilities which means it is more likely than not.

⁷ *The Minister of Employment and Immigration v Bartone*, A-369-88.

about in-person meetings to get leave approval. The new rule was put in place after she had asked for vacation leave.

[19] I find that the employer's rule causes confusion for the Claimant who reasonably thought that the employer would follow the Collective Agreement and tell her in writing whether leave is approved within 2 weeks of her asking.

[20] The Claimant say that for a long time she and other employee thought leave was approved when the employer did not answer when they asked for leave. She says that her employer approved all her past leave requests and she also thought they approved her request the last time.

[21] I find that the Commission has not proven that there was misconduct. She mistakenly thought that her leave request was approved. It is not misconduct when she went on vacation after her employer told her last minute that leave was not approved.

CONCLUSION

[22] The appeal is allowed. This means that the Claimant is not disqualified from being paid benefits.

Glen Johnson

Member, General Division - Employment Insurance Section

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| HEARD ON: | November 13, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | A. K., Appellant |