



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SK v Canada Employment Insurance Commission*, 2020 SST 1185

Tribunal File Number: GE-20-1847

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bonnie Ozirny

HEARD ON: September 10, 2020

DATE OF DECISION: September 25, 2020

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) has not proven that the Appellant (Claimant) lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is not disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job as an early childhood educator in a childcare centre on March 2, 2020. The Claimant's employer said that she was let go because she hit a small child on the back of the child's head. It said that the conduct contravenes the employer's behaviour management policy.

[4] Even though the Claimant does not dispute that this happened, she says that the employer only told her she was being dismissed because of a complaint about an incident four months prior. The employer did not give her details of the alleged incident or give her a chance to provide an explanation.

[5] The Commission initially did not accept the employer's reason for dismissal. The employer made a reconsideration request. On reconsideration, the Commission decided that the Claimant lost her job because of misconduct based on a very short cell phone video taken by another staff member four months prior to the date of dismissal. The Commission says that the video shows that the Claimant struck the child at least twice on the back of the child's head. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

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

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

Analysis

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

Why did the Claimant lose her job?

[8] I find that the Claimant lost her job because she slapped a child on the back of the head.

[9] The Claimant and the Commission agree that is the reason why she was dismissed from her job.

[10] I find that the Claimant lost her job for slapping a small child once on the back of the head because she admits that she did that, and the cell phone video shows the Claimant doing that.

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

[11] No, the reason for the Claimant's dismissal is not misconduct under the law for employment insurance purposes. My reasons follow.

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant 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.⁴

[13] There is misconduct if the Claimant 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 that the employer would terminate her employment because of it.⁵

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

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

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

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

[14] The Commission has to prove that the Claimant 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 Claimant lost her job because of misconduct.⁶

[15] The Commission says that there was misconduct because the employer provided a cell phone video taken by another staff member that shows the Claimant striking the small child on the head on at least two occasions, and that the Claimant was subsequently charged by the police. The Commission submits that the Claimant's conduct was considered to be of a violent nature and a violation of the employer's behaviour management policy.⁷ The Commission submits that the criminal charge supports its position that the Claimant resorted to aggressive behaviour against the child.

[16] The Commission provided the following documents that it received from the employer:

- A letter from the employer to the Claimant, dated March 22, 2019, offering the Claimant a fulltime early childhood education educator position and specifying the terms and conditions of employment, and is signed by the Claimant on March 25, 2019. It states that terms and conditions of employment not specified in the letter are governed by employment policies and the staff handbook, and that the Claimant must review and sign the policies prior to starting work;⁸
- The employer's behaviour management policy;⁹
- An email from the regional police service to the employer, dated March 5, 2020, stating that the Claimant was arrested and charged that day with one count of assault, and that another individual would be arrested that evening and charged with assault. The name of the individual whom the Claimant is alleged to have assaulted is redacted;¹⁰
- A cell phone video, approximately 10 seconds long, showing the date of November 8, 2019, taken at 4:23 p.m., which shows the Claimant slapping the child on the back of the

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ GD4-4.

⁸ GD3-40 to 43.

⁹ GD3-37 to 39.

¹⁰ GD3-34.

head.¹¹ The employer told the Commission that the video was taken by another staff member.¹²

[17] The Claimant says that there was no misconduct because she did not intend to hit the child, and she and a co-worker had tried to comfort the child who cried continually and was restless the day before and the day of the incident. She does not know why the employer would not have raised the incident with her until four months after it happened.

[18] The Claimant told me that:

- On the afternoon of March 2, 2020, her Director told her that she could not stay in the room where she was working, took her into another room and asked her to do other work;
- A few hours later, a woman from head office and the Director came into the room and the woman gave the Claimant a dismissal letter and told her she had to sign it;
- She read the letter and asked what is the matter. The woman told her that there is a complaint against her, and that she is dismissed immediately because she hit a child;
- They did not show her any evidence or give her specific details, other than that the employer had a cell phone video showing that she assaulted a child in November 2019. So she was not able to respond to the allegation or provide any explanation to them;
- She was charged with assault on March 5, 2020, but, due to covid-19, the date of a meeting with the Crown has been delayed. She did not plead guilty;
- The incident of the conduct for which she was dismissed happened in November, 2019;
- The child was one year old at the time, and the incident happened on the child's second day at the childcare centre. The parents did not comply with the centre's protocol of the child attending for one hour only, with a parent, on the first day, and one hour only by herself on the second day. The child cried continuously and was restless on both days and would wake up the other young children in the sleep room. Parents who were watching the video feed from the sleep room were calling the childcare centre about the crying child. The Claimant and a co-worker tried to comfort the child. The Claimant heard the

¹¹ GD7A.

¹² GD3-36.

child's mother telling her Director that she could not keep the child at home because the child is challenging and it is hard on her because she is recovering from surgery;

- She asked her Director on both days about how to deal with the child's difficult behaviour as staff is required to do when a child has behaviour issues;
- as staff is required to do when there are behaviour issues with a child;
- She was given access to the cell phone video only after she filed her appeal with the Tribunal;
- The childcare centre has two video cameras that run 24 hours a day: one in the main room and one in the sleeping room. Parents have full access to both cameras at all times, and they are always watching;
- She does not know why the employer would give the Commission a cell phone video rather than video from the employer's video cameras;
- At the time shown on the cell phone video, she was the only trained early childcare educator working. The other person helping her was one of the kitchen staff who was assigned to help for an hour because the employer did not have the required number of childcare employees for the number of young children the Claimant was caring for. There was an employee working in the kitchen at that time. The Director had left for the day, but the Assistant Director was in and out of the main room where the cell phone video was taken;
- The parents can always watch her and other staff on the childcare centre's two video cameras, and can call if they think anyone is doing anything wrong. No one ever said she was doing anything wrong;
- She continued to care for the child during the four months after the incident, and the child became very attached to her and had improved alot.

[19] The employer confirmed that it did not share any evidence of the incident with the Claimant when it dismissed her because it says the incident was reported to the police.¹³

[20] The Claimant provided the termination letter from the employer's senior area director dated March 2, 2020.¹⁴ The letter states it has terminated her employment for cause effective

¹³ GD3-36.

¹⁴ GD8-2.

immediately. The employer says it has reviewed a concern that was brought to its attention, and has determined that she contravened the behaviour management policy and the *Child Care and Early Year Act, 2014*. The letter does not state the nature of the concern or provide any details. It does not state what provision of the policy or what provision of the Act the employer alleges the Claimant contravened.

[21] I asked the Claimant about the behaviour management policy. She told me that, on the day of her interview, she was given a full binder containing the employer's policies. She told me this was her first job, so she was overwhelmed by all the information she was given. She says that she read everything she was given, but that she cannot say that she understood everything she read or remember everything she read. She signed the policies as she was required to. She did not know what the consequences would be for her if she hit a child. The employer did not give her a print copy of the behaviour management policy or provide access to policies electronically. She told me that the employer did not go through the behaviour management policy at that time, and has never discussed that policy with her at any of the many meetings she had with her Director during the period of her employment.

[22] I asked the Claimant if, during her training for her early childhood educator diploma, there was any discussion about consequences for an early childhood educator's use of physical or corporal punishment in the performance of their duties. She told me that she was taught in her training to make sure the children are healthy and safe, and to always be patient and positive with the children. She told me hitting a child doing harm to a child is a bad thing. She says that none of the employers in her three placements in childcare centres during her training gave her any information about consequences for use of physical or corporal punishment.

[23] I asked the Claimant what she understood the disciplinary consequences would be if she contravened the behaviour management policy. She told me she was not aware of what the consequences would be. Nobody ever told her about consequences for contravening the policy. It was never discussed in their meetings.

[24] I find the Claimant to be credible. She readily answered my questions directly. She admitted that she hit the child, but says that was the only time she has ever struck a child. I find

the Claimant to be sincere. Therefore, I accept the Claimant's testimony and give it greater weight than the employer's verbal statements to the Commission.

[25] The short cell phone video shows that the Claimant slapped, with the palm of her hand, the upper back of the child's head once while she was sitting and holding the crying, squirming child. The slap did not startle the child or stop her crying even briefly. The Claimant appears to be calm and not upset. At least one person, other than the Claimant, can be heard talking, but is not in camera range. The video does not show the Claimant hitting the child "at least twice" as the Commission submits. I find that the Claimant slapped the upper back of the child's head once with the palm of her hand.

[26] I asked the Claimant why she slapped the child on the back of her head. She told me she can't exactly remember. She said that, on that day and the day before, the child was scratching and hitting her and her co-workers, and the child was scared and upset. The child was poking and scratching the other children. She told me she did not intend to hit the child.

[27] I accept the Claimant's testimony that she did not intend to hit the child. However, in view of the Claimant's testimony about her training as an early childhood educator and her understanding of how an early childhood educator is to interact with children in their care, I find that her conduct was so reckless that it was almost wilful.

[28] The copy of the behaviour management policy that the employer provided to the Commission is not dated. The Commission did not ask for and the employer did not provide the copy of the policy that the Claimant signed when she started her job. There is no evidence to show that the version of the policy provided to the Tribunal is the same as the policy the Claimant signed. There is no evidence to show that the copy of the policy the Claimant signed stated that a caregiver who uses physical or corporal punishment on a child will result in immediate dismissal as the copy of the policy the employer provided states.¹⁵

[29] I note that the behaviour management policy states that, when anyone becomes aware of a contravention of the policy, they must report it to the employer's President.¹⁶ The cell phone

¹⁵ GD3-38.

¹⁶ GD3-37, 1st paragraph, last sentence.

video of the Claimant's conduct was recorded on November 8, 2019, but the employer did not meet with the Claimant to raise the incident and dismiss her until March 2, 2020. The Commission did not ask the employer and the employer did not explain why it did not address the incident until four months after the incident occurred.

[30] Based on the Claimant's testimony that she was not aware of the disciplinary consequences for contravening the behaviour management policy and on the fact that the Commission did not provide the copy of policy with the Claimant's signature, I find that the Claimant did not know and should not have known that the incident on November 8, 2019, when she slapped the child, could get in the way of carrying out her duties owed her employer, and that there was a real possibility that the employer would terminate her employment because of it.

[31] I do not accept the Commission's submission that the charge of assault against the Claimant supports its position that the Claimant resorted to aggressive behaviour against a child and was dismissed for that conduct. I accept the Claimant's testimony that, as of the date of the hearing, she has only been charged. There is no evidence to dispute that. Being charged with one count of assault, which has not proceeded beyond the laying of the charge itself, cannot be construed as evidence that the Claimant committed conduct that constitutes misconduct for the purposes of employment insurance.

[32] I find that the Commission has not proven that there was misconduct, because it has not proven that the Claimant knew or should have known that the incident of striking the child could get in the way of carrying out her duties owed the employer, and that there was a real possibility that the employer would dismiss her for that.

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

[33] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.

Conclusion

[34] The Commission has not proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is not disqualified from receiving EI benefits.

[35] This means that the appeal is allowed.

Bonnie Ozirny

Member, General Division - Employment Insurance Section

HEARD ON:	September 10, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. K., Appellant