



Citation: *KD v Canada Employment Insurance Commission*, 2021 SST 169

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: K. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (416780) dated February 25, 2021
(issued by Service Canada)

Tribunal member: Katherine Wallocha

Type of hearing: Teleconference

Hearing date: April 7, 2021

Hearing participants: K. D. Appellant

Decision date: April 9, 2021

File number: GE-21-421

DECISION

[1] The appeal is dismissed. The Claimant lost her job because of misconduct. This means that the Claimant is disqualified from being paid employment insurance (EI) benefits.

OVERVIEW

[2] The Claimant worked as a continuing care assistant in a long-term care home. She said she was dismissed due to a safety violation because she was falsely accused of coming to work with Covid-19 symptoms. She said she had allergies and knew she did not have Covid-19. She took the test and it came back negative. Unable to speak to the employer, the Commission allowed EI benefits.

[3] The employer submitted a request for the Commission to reconsider its decision. The employer said the Claimant was terminated for disregarding the public health order, specifically in that she reported to work knowingly being sick and within close contact with someone who was sick.

[4] Following further investigation, the Commission changed its decision and decided the Claimant lost her employment as a result of her own misconduct. She was disqualified from being paid EI benefits.

[5] The Claimant appealed the Commission's decision. She said she is still in the process of a grievance with her union and she believes she should still be entitled to EI benefits.

WHAT I MUST DECIDE

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

REASONS FOR MY DECISION

[7] To determine if the Claimant lost her job because of misconduct, I will first decide the reason why she lost her job. Then I will decide if the reason for the Claimant's dismissal is considered misconduct under the law.

Why did the Claimant lose her job?

[8] The Claimant lost her job because she failed to follow the employer's Covid-19 policies and the provincial public health orders by reporting to work with Covid-19 symptoms, and not informing her employer as required.

[9] The Claimant stated in her application for EI benefits dated January 14, 2021, that she was dismissed because her employer accused her of committing a safety violation by showing a disregard for the public health order including the fitness-for-work test.

[10] The employer provided the termination letter dated January 10, 2021. This letter states that the results of their investigation completed on January 7, 2021, determined that the Claimant's conduct, in attending the workplace on December 19, 21, 22, and 25, 2020, demonstrated a significant disregard for the public health order including the fitness-for-work test and mandatory self-isolation, while she was symptomatic with Covid-19 symptoms.

[11] The employer provided the Provincial Health Authority Provincial Readiness Update dated April 21, 2020, which states the following:

- On April 14, 2020, the health authority announced new screening and masking requirements for all health care providers;
- The public health order now also includes personal care homes and formalizes existing requirements for long-term care and affiliate care homes, including health screening and masking while on shift;
- A health care worker will use the screening tool to determine fitness for work and will sign a logbook indicating they are fit for work;

- The screening questionnaire asks if there are new or worsening respiratory symptoms such as cough, shortness of breath or difficulty breathing, runny nose or sneezing, nasal congestion, hoarse voice, sore throat or difficulty swallowing;
- The screening questionnaire further asks if there are any new onset atypical symptoms including but not limited to chills, muscle aches, nausea/vomiting, diarrhea, loss of appetite, malaise, fatigue or weakening, loss of sense of smell, loss of sense of taste, or headache;
- Answering YES to screening questions requiring self-isolation or a temperature greater than 38 Celsius will result in the determination that the worker is not permitted to work.

[12] The employer provided the notes from its investigation on January 7, 2020. The Claimant admitted to completing the ready for work screening checklist. Public Health informed the employer that the Claimant stated to them that she was experiencing symptoms of “influenza-like illness” which included nasal congestion and a lack of taste and smell, with an onset date of either December 22 or 23, 2020. The Claimant told the employer she did experience nasal congestion during the period stated and that her child had been experiencing influenza-like symptoms. She told the employer she understood the Covid restrictions to include not coming to work when feeling ill and completing the daily ready for work checklist.

[13] The Claimant, the employer and the Commission agree on the reason why the Claimant lost her job. I find the Claimant lost her job because she violated the employer’s policy and the public health authority’s orders regarding Covid-19 symptoms.

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

[14] Yes, the reason for the Claimant’s dismissal is considered misconduct under the law¹.

¹ Section 30 of the *Employment Insurance Act* (EI Act) disqualifies claimants from being paid benefits if they lose their employment because of misconduct.

[15] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional². Misconduct also includes conduct that is so reckless that it approaches willfulness³. The Claimant does not have to have a wrongful intent for her behaviour to be misconduct under the law⁴.

[16] 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 possibility⁵.

[17] The Commission has to prove that it is more likely than not⁶ that the Claimant lost her job because of misconduct⁷.

[18] The Commission says that there was misconduct because the Claimant was aware that she was required to complete a "Ready for Work" checklist checking for Covid-19 symptoms prior to commencing each and every shift. She was also fully informed and aware of the Covid-19 policies and procedures at her workplace and if she was experiencing symptoms, or had been in close contact with someone experiencing symptoms, that she was to inform her employer and would not be permitted to work. The Claimant failed to disclose that she and an immediate family member were experiencing symptoms.

[19] The Claimant says there was no misconduct because she suffers from allergies all year. This means she experiences nasal congestion and a loss of sense of smell and taste. She knew it was not Covid-19 because she knows her body. She said she took two Covid-19 tests and both came back negative. She said her son, who also has allergies and who was also experiencing symptoms, also took a Covid-19 test which came back negative.

² This is explained in the Federal Court of Appeal (FCA) decision *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ This is explained in the FCA decision *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ This is explained in the FCA decision *Attorney General of Canada v Secours*, A-352-94.

⁵ This is explained in the FCA decision *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁷ This is explained in the FCA decision *The Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The employer provided an example of the fit for work checklist. This checklist identifies the symptoms which include nasal congestion and a loss of sense of smell and taste. I asked the Claimant if she answered, "No," to those questions on the checklist. She admitted to me that she made bad decisions when she answered those questions negatively but she does not feel she should be terminated from her job over this.

[21] I recognize the Claimant feels she should not have been let go from her job because she experiences symptoms caused by allergies. She was adamant that she takes the pandemic seriously and follows all the protocols put in place because of Covid-19. However, the symptoms she has admitted experiencing were explicitly listed on the checklist and she failed to disclose her symptoms to her employer. She also failed to disclose that she had been in close contact with someone experiencing Covid-19 symptoms.

[22] I find that the Commission has proven that there was misconduct because the Claimant admits to making bad decisions by not disclosing her symptoms or her close contact with someone with symptoms. I recognize the Claimant tested negative for Covid-19, but this was after she had worked several shifts while exhibiting symptoms. The Claimant had to know that by ignoring the employer's and public health authority's policies that dismissal was a real possibility.

[23] The Claimant argued that the public health nurse shared her medical information with her employer and this was a breach of confidentiality. Further, they accused her of breaching the mandatory self-isolation which she says they have no proof. But this does not change the fact that the Claimant has admitted she falsely completed the screening checklist and did not inform her employer that she was symptomatic or that she had been in close contact with someone who was symptomatic. This was a deliberate breach of the employer's policies and the public health authority's orders. This is considered misconduct.

CONCLUSION

[24] The appeal is dismissed. This means the Claimant is not entitled to receive EI benefits.

K. Wallocha

Member, General Division - Employment Insurance Section