



Citation: *SK v Canada Employment Insurance Commission*, 2021 SST 198

S.K. v. Canada Employment Insurance Commission, 2020 SST 1185
Canada Employment Insurance Commission v. S.K., 2021 SST 40

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:	S. K.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision Record ID 404295, dated July 22, 2020 (issued by Service Canada)
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Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	April 23, 2021
Hearing participant:	Appellant
Decision date:	April 30, 2021
File number:	GE-21-278

Decision

[1] The appeal is dismissed.

[2] The Commission has proven that, on a balance of probabilities, S. K.(the Claimant), lost her job at the day care because of her misconduct.

[3] This means the Claimant is disqualified from receiving employment insurance (EI) benefits when she lost her job at the day care.¹

Overview

[4] The Claimant was dismissed from her job at a daycare because her employer said she violated their Behaviour Management Policy and the *Child Care and Early Year Act*, 2014. The Commission looked at the reasons the Claimant was dismissed and initially approved her claim for regular EI benefits.

[5] The Claimant's former employer asked the Commission to reconsider that decision because it said the Claimant was dismissed for cause.

[6] The employer said it was given a video recording from four months earlier of the Claimant hitting a child in her care. The employer did not share the video with the Claimant at the time of her dismissal and only shared it with the Commission after it requested reconsideration of the Commission's decision to approve the Claimant's EI benefits. After it saw the video, the Commission decided that the Claimant lost her job because of her misconduct and disqualified her from receiving regular EI benefits.

[7] The Claimant does not agree with the Commission's decision to deny her EI benefits. She says that she was only told she violated the policy but was not told how she violated the policy. She was not told why she was being dismissed and only found out after that she was dismissed for hitting a child. She was also not told that there was a video of her taken by another staff member and questions why it took four months for the video to be made known to her employer.

¹ This decision applies only the EI benefits the Claimant applied for on March 31, 2020.

Matters I have to consider first

This is a re-hearing of the Claimant's appeal to the Social Security Tribunal

[8] The Claimant appealed the Commission's decision to the General Division of the Tribunal on August 26, 2020. Her appeal was numbered GE-20-1879. The General Division Tribunal Member agreed with the Claimant and allowed her appeal on September 25, 2020.

[9] The Commission appealed the September 25, 2020, decision to the Tribunal's Appeal Division, who found that the General Division Tribunal Member based its decision on a finding of fact that was perverse or capricious. The Appeal Division returned the Claimant's appeal to another General Division Tribunal Member for a new hearing. The appeal was re-numbered to GE-21-278 and this decision arises from the new hearing.

[10] The hearing for GE-21-278 initially began on March 5, 2021. At the hearing, the Claimant indicated that she had difficulty finding a representative. I adjourned the hearing to give the Claimant some time to see if she could find a representative. On April 7, 2021, the Claimant emailed the Tribunal that she could not arrange a representative, so she would like to represent herself. The hearing was then held on April 23, 2021.

Issue

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

[12] To answer this question, I have to decide two things. First, I must decide why the Claimant lost her job. Then I have to decide whether the law considers the reason the Claimant lost her job is misconduct.

[13] If I find that the Claimant lost her job because of her misconduct she cannot receive EI benefits for losing that job.

Analysis

Why did the Claimant lose her job?

[14] I find the Claimant lost her job because her employer believed she violated the Behaviour Management Policy and the *Child Care and Early Year Act, 2014*. They say she violated the policy and the law when she hit a child in her care on the back of the head.

[15] The Claimant was dismissed on March 2, 2020. At the meeting where the Claimant was dismissed the director and a person from headquarters gave the Claimant a letter of dismissal. The letter, dated March 2, 2020, said “After reviewing a concern brought to our attention, we have determined that you contravened [company name] Behaviour Management Policy and the *Child Care and Early Years Act, 2014*. The safety and wellbeing of the children in our care is our utmost priority and this incident cannot be tolerated.”

[16] The employer’s representative provided the Commission with an email dated March 5, 2020, from a police constable stating that the Claimant was charged that afternoon with assault. The employer’s representative emailed the Commission “In March 2020, evidence of the incident came to our attention showing the employee hitting a child on the back of her head. According to the evidence, the incident occurred in November 2019.”

[17] The employer was given a video recording of the Claimant hitting the child. It relied on this recording when it decided to dismiss the Claimant. The Claimant has seen the video. The Claimant agrees that it is her in the video and that child in the video was in her care. The Claimant testified the child was approximately 12 months old at the time the video was recorded. The Claimant is sitting down while holding the child back on to her chest. The child is crying and squirming. While holding the child around the waist with her right hand the Claimant hits the child on the back of the skull with her left hand. The child’s head moves forward when the Claimant’s hand makes

contact with the child's skull. The contact makes a sound. The child continues to cry after being hit and continues to squirm in the Claimant's arm.

[18] The Claimant agreed at the hearing that she was dismissed for violating the employer's Behaviour Management Policy and the *Child Care and Early Years Act, 2014* and not for any other reason.

[19] I find that the delay between when the video was recorded in November 2019 and when the Claimant was dismissed in March 2020 is not relevant to the issue of whether she lost her job due to misconduct. The delay is troublesome given that the law requires that all harm to children be reported.² While the reason for the delay is not clear, the evidence tells me that the employer became aware of the Claimant's behaviour in March 2020 and acted on that information on March 3, 2020, when it dismissed the Claimant. The letter refers to a single incident. The employer has confirmed to the Commission that the sole reason for the Claimant's dismissal was the violation of the Behaviour Management Policy and *Child Care and Early Years Act, 2014*. The violation occurred when the Claimant hit a child in her care. The Claimant testified that she had not been disciplined by the employer before her dismissal. She also confirmed that she had no reason to believe that the employer had dismissed her for any other reason. As a result, I find that the Claimant was dismissed for her conduct of hitting a child, which was a violation of the employer's Behaviour Management Policy and *Child Care and Early Years Act, 2014*.

[20] The Claimant said that she was not told what she had done when she was dismissed. She said that the person from headquarters said that she would find out later on and she would be contacted by the Children's Aid Society. The Claimant said that not knowing what she did meant that she could not respond to the allegations. Whether the Claimant was shown the video evidence or was told that she was being dismissed for hitting a child on the day she was dismissed is not relevant to my decision. That is because my decision only deals with whether the Claimant is disqualified from receiving EI benefits. Since her dismissal, the Claimant has been

² *Child, Youth and Family Services Act, 2017*. SO 2017, Chapter 14

provided a copy of the video and the employer's statements to the Commission. She has been able to respond to that evidence and I have taken her responses into consideration in reaching my decision.

The reason for the Claimant's dismissal is misconduct under the law

[21] The Claimant explained that she earned an Early Childhood Educator (ECE) diploma at college. The diploma took two years of study. She learned about taking care of children and building positive relationships with them. She also learned about taking care of children's health and safety. The Claimant said she also learned how to deal with children's behaviour. She said "we cannot hit a child." Whenever there was a struggle with a child, you would make eye contact at their level to grab their attention. She learned she should try to calm the child. To do that you would try to grab their attention, play a song, clapping for one or two seconds to get the child to stop the behaviour. She could also remove the child from the room to give them a different environment.

[22] The Claimant explained she also learned about the laws that apply to the care of children. They studied the Ministry of Education's policy. They studied the *Child Care and Early Years Act*. While it was hard to remember what is said in each Act they did study the laws. The Claimant said that when you start working on the job you also learn how to do the job. I asked the Claimant if the law allowed her to hit a child. She replied, no, the law does not allow you to hit a child.

[23] On the Claimant's first day of work in the day care, she was given a large book of policies. There were about 30 pages in the book. She was put in a room, told to read and sign the policies. The director kept coming into the room asking her have you signed? have you signed? The Claimant looked at the policies once and signed them. The Claimant was not given copies of the policies. Nor were the policies kept in an office where she could look at them. The Claimant testified that she did not know what is written in the employer's Behaviour Management Policy.

[24] The Claimant was hired to work in the infant room of the day care. Children in her room were from 5 months old to 18 months old. Once they reached 18 months, the children moved to the toddler room. The number of staff in each room is determined by the age of the children and the number of children assigned to that room. The Claimant and an assistant worked in the infant room.

[25] The Claimant said that nine children were allowed in her room. The day care put new children in the room and it had 12 children in it, which was too many for the ratio of staff to children. She asked the management why three new children were being placed in her room. They did not care. She spoke to the director and said there were too many children in the room. The director said they would put a new staff member in the room, but that did not happen. When it was time for a break the relief staff would just sit in the room and not do anything. The Claimant told the director about this, the director said the Claimant had to tell the other workers what to do.

[26] The Claimant testified that the day care has a policy to orientate children to the day care. On the first day the child comes to the day care for one hour with their parents. The next day the child comes for one hour without their parents. The next day the child spends two hours at the day care without their parents. After that, the child attends daycare for days. This policy is explained to parents prior to placing their child with the day care.

[27] The Claimant testified that the child on the video did not go through orientation at the day care. Instead, the child was at the day care for full days from the outset. The Claimant testified that the child was having great difficulty settling into the day care. She was crying all the time. She was hitting out at the staff. The Claimant tried to distract the child by taking her out of the room into other areas of the day care. She tried to feed the child but the child was swinging her arms and spilled her milk. The Claimant said the child was scratching at the Claimant's neck. The Claimant said the child was new and did not understand why she was there.

[28] The Claimant testified she spoke to the day care's director about the child on the second day the child was at the day care. She told the director that the child should not

have been placed without being gradually introduced to the day care. She said the child was very upset and would not settle. The child's crying was upsetting the other children in the room and their naps were being interrupted. The director replied that the child's mother was recovering from brain surgery, could not cope with the child crying all day and could not keep her. The director said she understood it was hard for the Claimant, but nothing was done.

[29] The Claimant testified that she does not remember hitting the child. It is not in her nature to hit a child. She has seen the video and is upset by it. She testified that the child took about four weeks to adjust to the day care environment. The child was happy at the day care, was a very good child and was still at the day care on the day the Claimant was dismissed.

[30] The Claimant testified that on the day she was dismissed the director came to her room and told her that she had to leave the infant room. She was asked to wait in the storage room. The Claimant was not told why she was told to leave the infant room she was only told that someone from headquarters would be coming to see her. While she waited in the storage room, the Claimant was asked to complete the progress reports for the children in her care.

[31] At 4:45 p.m. the Claimant was called into the director's office where the director and a person from headquarters were present. She was told that she was being dismissed for violating the policy and the law. She was given the letter of dismissal. The Claimant read the letter and was shocked. The Claimant asked the director and the person from headquarters to tell her what she did. They said that she would find out later on and she would be contacted by the Children's Aid Society.

[32] The employer gave the video to the child's parents and they complained to the police. The next day the police showed up at the Claimant's home. She was told that she had hit a child. The police officer who visited the Claimant at her home did not show her the video. The Claimant met with a person from the Children's Aid Society. That person had seen the video but did not name the child.

[33] The representative of the employer told the Commission the Claimant was dismissed after it reviewed the video. The employer also provided the Commission with an email it received from the local police force stating the Claimant and another employee were charged with assault. The names of the persons assaulted are redacted on the email but the Claimant testified that the person she was alleged to have assaulted is the child pictured on the video. The Claimant testified the other employee named on the email had stopped working for the day care some months previously to take another job. The Claimant does not know who the other employee is alleged to have assaulted.

[34] The video has a date and time stamp of Nov. 8, 2019 4:28 p.m. The Claimant said she was not aware she was being video taped. She testified that the door to the kitchen opened onto the infant room where she worked. She explained that the woman who worked in the kitchen often had her phone out recording and would stand in the doorway watching. The Claimant said when she received discovery as part of her court case the woman who worked in the kitchen was identified as the person who recorded the video of the Claimant with the child. The Claimant said on the day she was dismissed that person was at work and was also there when the Claimant left the day care. The Claimant is not aware if the person who recorded the video was dismissed from her employment.

[35] The Claimant said that when she was dismissed on March 2, 2020 she did not know why she was being dismissed. The person from headquarters only told her that she had violated the policy and the law. They would not tell her how she violated the policy. It was only the next day when the police visited her home and when she was talking to the person from the Children's Aid Society that she learned she was accused of hitting a child in November 2019.

[36] The Claimant said the woman who took the video would regularly visit her room and the other children's rooms. She would gossip about other workers and what was taking place in the other rooms. The Claimant told the woman that she was not interested in the gossip and asked her not to interrupt the care of the children in her

room. The Claimant cannot explain why the woman who took the video waited four months to give the video to the employer. On the day the Claimant was dismissed the woman asked her what happened, if she had ever hit a child, the Claimant said no, and the woman said oh you don't worry.

[37] Since her dismissal, the court has told the Claimant she cannot work with children under 16. Her ECE license was cancelled because her employer notified the College of Early Childhood Educators.

[38] The Claimant said that it took over three months for the Commission give her EI benefits. No one from her employer spoke to the Commission until after she was given EI. It was not until July 2020 when she was talking to a person from Service Canada that she was told she could not have EI and that she could appeal that decision to the Social Security Tribunal. The Claimant said that she was at this appeal hearing only because the letter said that she could appeal. The Claimant said that she has been paying back the EI benefits that she received but it is hard because she does not have steady employment.

[39] The Commission says it concluded the Claimant's conduct caused her dismissal from her employment. It says that the Claimant's conduct of hitting a child was considered conduct of a violent nature and a violation of the employer's Behaviour Management Policy. The evidence of the conduct is in the video provided to the Commission by the employer.

[40] The law says to be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it approaches willfulness.⁴

[41] The law says the Claimant does not have to have a wrongful intent, or mean to do something wrong, for her behavior to be misconduct under the law.⁵

³ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ *Attorney General of Canada v Secours*, A-352-94.

[42] I find that the Claimant's conduct was so reckless as to be wilful. Oxford Languages defines "reckless" as an adjective (of a person and their actions) without thinking or caring about the consequences of an action.⁶ Black's Law Dictionary defines reckless as a term that means to be careless and indifferent to the welfare of other people.⁷

[43] I accept that the child was difficult to manage and was disrupting the care of the other children in the room. The Claimant testified that as part of her ECE training she learned how to calm a struggling child. She learned that you make eye contact at their level, grab their attention, sing a song, clap your hands, take the child out of the environment, or feed the child. The Claimant did all those things on the first day and on the second day with the child. None of those things worked. The child continued to cry and could not be calmed down.

[44] The video shows the Claimant hitting the back of the child's head with four fingers of her left hand. There is a sound made when the Claimant's fingers make contact with the child's head. There is no change in the Claimant's demeanour after she hits the child. Whether the Claimant intended to hit the child is not relevant to my decision. Whether the Claimant remembers hitting the child is also not relevant to my decision. She admits that it is her on the video and that it is her who hits the child. The Claimant's hitting the child was reckless because it was done without thinking about the consequences for the child, the welfare of the child, or the consequences the action would have for the Claimant. As noted above, conduct that is reckless is considered to be wilful. As a result, I find the Claimant's conduct of hitting the child to be wilful.

[45] The law says there is misconduct if the Claimant knew or ought to have known that her conduct could impair the performance of the duties she owed to her employer and, as a result, that dismissal was a real possibility.⁸

⁶ Oxford Languages via Google. Copyright 2021, Oxford University Press.

⁷ The Law Dictionary featuring Black's Law Dictionary Free Online Legal Dictionary 2nd ed. URL: <https://thelawdictionary.org/reckless/>

⁸ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[46] I find that the Claimant should have known that she could be dismissed for hitting a child in her care.

[47] The Claimant testified that she did not know she could lose her job for hitting a child. She said she did not know that she could lose her job for violating the day care's Behaviour Management policy.

[48] It is not reasonable for the Claimant to think that she could disobey the law and continue to be employed by the day care. The employer gave the Commission a copy of the terms and conditions of employment letter it issued to the Claimant. The letter was signed by the Claimant on March 22, 2019. The Claimant's employment was subject to her providing a "clear criminal reference check." The letter states that it is the Claimant's responsibility to provide the company with this information before she started work and "... at any such future intervals, as may be required ...". The letter also states that the company may terminate the Claimant's employment at any time for just cause.

[49] The Claimant testified that as part of her ECE training they learned "we cannot hit a child." She said that as part of her ECE training they studied the Ministry of Education policies and also the law as it applied to children. She could not say the names of the laws she studied but they did learn about the law. When asked, the Claimant said she knew the law did not allow her to hit a child.

[50] The day care provided a copy of its Behaviour Management Policy to the Commission. The policy does not allow corporal punishment. It says that failure to comply with the policy could result in a verbal warning and finally dismissal. I accept that the day care violated its policy by not orientating the child with short visits to the day care. But, that does not making hitting a child right. The day care's failure to comply with its orientation policy does not mean that the Claimant could expect that the Behaviour Management Policy would not apply to her when she hit the child.

[51] I accept that the Claimant might not remember the contents of the employer's Behaviour Management Policy given that she reviewed it along with a number of other policies and was rushed when she did so. However, the Claimant was aware from her

ECE courses how to calm a child, and she also knew that the law did not allow her to hit a child.

[52] The evidence shows that the Claimant knew that the law did not allow her to hit a child. She signed the terms and conditions of employment which required that she provide a clear criminal record check and knew she might be asked to do so again. This evidence tells me that the Claimant knew or ought to have known that she could lose her job for hitting a child.

[53] The law says the legal test for misconduct requires a causal relationship between the misconduct of which the Claimant is accused and the loss of employment. The conduct must cause the loss of employment, have been committed by the Claimant while employed by the employer, and must constitute a duty that is express or implied in the employment contract.⁹

[54] I find that it is an express and implied duty for an employee who is caring for children to do so in accordance with the employer's policies and the law. The Claimant agrees that she is the one in the video and that the video shows her hitting the child. It is the Claimant's duty to follow the employer's policies and to obey the law when caring for children. The law says that you cannot hit a child. The day care's Behaviour Management Policy says that corporal punishment of child is not allowed. The policy says that failure to comply could result in a verbal warning and finally dismissal. While the Claimant may argue that she did not have time to read the policy, the law continues to apply and she was aware of the law. As a result, I find that the Claimant's action of hitting the child violated an express and implied duty that she owed to her employer.

[55] The law says the Commission has to prove, on a balance of probabilities, meaning it is more likely than not, that the Claimant lost her job because of misconduct.¹⁰

⁹ *Canada (Attorney General) v. Cartier*, 2001 FCA 274.

¹⁰ *The Minister of Employment and Immigration v Bartone*, A-369-88.

[56] I find that the Claimant committed misconduct when she violated her employer's Behaviour Management Policy and *Child Care and Early Years Act, 2014*. The violation occurred when she hit a child in her care. By hitting the child, the Claimant's conduct was so reckless as to be wilful. The Claimant ought to have known that she could be dismissed for hitting a child. Her employer dismissed her for this misconduct. As a result, I find the Commission has proven that, on a balance of probabilities, the Claimant lost her job because of her misconduct. This means the Claimant is disqualified from receiving EI benefits.

Other Matters

[57] The Claimant said she is experiencing financial difficulty. The COVID-19 pandemic has made it difficult to find work. She has been able to find some work, but it is on-call and she is finding it very hard to pay back the EI benefits she received.

[58] I am sympathetic to the Claimant's circumstances. I note that nothing in my decision stops the Claimant from contacting the Commission directly to ask if it will reduce or write-off the debt she owes. If she is not satisfied with the Commission's answer she may appeal to the Federal Court of Appeal.

Conclusion

[59] The appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section