



[TRANSLATION]

Citation: *SP v Canada Employment Insurance Commission*, 2021 SST 797

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

**Decision**

<b>Appellant:</b>	S. P.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	Canada Employment Insurance Commission reconsideration decision (433255) dated September 16, 2021 (issued by Service Canada)
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<b>Tribunal member:</b>	Josée Langlois
<b>Type of hearing:</b>	Videoconference
<b>Hearing date:</b>	December 1, 2021
<b>Hearing participant:</b>	Appellant
<b>Decision date:</b>	December 1, 2021
<b>File number:</b>	GE-21-2019

## Decision

[1] The appeal is allowed.

[2] The Appellant didn't lose her job because of misconduct (in other words, because she allegedly did something that caused her to lose her job). This means that she isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost her job. The Appellant's employer, X, said that she was let go because she was on leave without pay for another purpose than the one that was authorized, that is, for training.

[4] On September 16, 2021, the Canada Employment Insurance Commission (Commission) told the Appellant that it could not pay her EI regular benefits, since her employment had ended because of misconduct on January 4, 2021. The Commission then also told the Appellant that it had reconsidered its position concerning her availability for work and that it was removing the disqualification it had initially imposed.

[5] The Appellant confirms that, on March 8, 2021, she got a letter from the employer terminating her employment. But she argues that she actually left her job. She explains that she didn't want to go back to the same position she had because she was being harassed.

[6] The Commission admits that the facts that support a finding of voluntary leaving or dismissal aren't clear. It accepted the employer's reason for the dismissal and decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

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

[7] I have to determine whether the Appellant's employment ended because of misconduct.

## Issue

[8] Did the Appellant lose her job because of misconduct?

## Analysis

[9] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

[10] In this case, the Appellant says that she wasn't let go; she voluntarily left her job.

[11] As I explained at the hearing, whether we are dealing with voluntary leaving or dismissal, I can consider the issue from a voluntary leaving perspective or from a misconduct perspective.

[12] On this point, when a section of the Act or the *Employment Insurance Regulations* deals with two distinct notions, it can easily be argued that the issue to be settled is the overall intent of what it is talking about. Section 30 of the Act says that a claimant is disqualified from receiving benefits if their employment ends because of misconduct or if they leave their job without just cause.<sup>2</sup>

[13] This means that, in deciding whether the Appellant lost her job because of misconduct, I could also consider whether she voluntarily left her job and, if so, whether she had just cause.

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<sup>2</sup> As shown in *Easson*, A-1598-92.

## Why did the Appellant lose her job?

[14] I find that the Appellant lost her job because she was on leave without pay that her employer had approved for training and wasn't taking that training during the winter 2021 term.

[15] The Commission acknowledges that the facts of this case are vague or contradictory, but it says that the employer is the one who decided to terminate the employment. It argues that the fact that the Appellant withdrew from her training while on leave without pay—granted for studies—amounts to misconduct.<sup>3</sup>

[16] On this point, a February 25, 2021, letter from the employer mentions the Appellant using [translation] “leave without pay for another purpose than that for which it was granted to [her].”<sup>4</sup>

[17] In addition, this letter says the employer considers that the Appellant resigned on January 4, 2021, because she didn't go back to school that day.

[18] On September 13, 2021, someone from human resources with the employer also told the Commission that the Appellant had resigned on January 4, 2021.<sup>5</sup>

[19] At the hearing, the Appellant explained that she was harassed at work in 2019 and 2020. Apparently, due to a conflict with a co-worker, the principal unfairly imposed rules because her co-worker would not stop complaining. The Appellant believes that these rules were applied only to her or weren't fair.

[20] For example, the Appellant realized that those rules included not using the “radio frequency” to communicate with her co-workers and no longer talking to parents picking up their kids at the end of the day. She explains that these rules were unacceptable

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<sup>3</sup> GD4-3 and GD4-4.

<sup>4</sup> GD3-24.

<sup>5</sup> GD3-17.

because this was the core of her work. The Appellant says that she then talked about it with the child care technician but that the conflict with her co-worker continued.

[21] The Appellant explains that, in June 2019, it was getting increasingly hard for her to come in. She found the work atmosphere unacceptable, and her anxiety level was high.

[22] She went back to work at the start of the following school year, after the summer school break. But, because of a physical health problem, her doctor put her off work indefinitely in November 2019.

[23] This time gave her the opportunity to reflect and try to find solutions, since she was uncomfortable with the idea of going back to work because of the unresolved conflict with her co-worker. So, she assessed her options, but she didn't talk to the employer about her discomfort. She didn't tell the technician or the principal that she was leaving her job. Instead, she asked for leave without pay to take training. At the end of that training, the Appellant intended to work in another area for the same employer.

[24] The employer approved leave without pay for studies from August 24, 2020, to June 30, 2021, and the Appellant started her first term at the university after that.

[25] During the fall of 2020, the Appellant was tested and diagnosed with attention deficit hyperactivity disorder (ADHD). When she finished her first term in December 2020, she decided not to continue with this training during the winter 2021 term. It was scheduled to begin on January 4, 2021.

[26] In February 2021, the employer contacted the Appellant and asked her for her fall 2020 term results and confirmation of her enrolment in the winter 2021 term, in accordance with the collective agreement.

[27] On February 10, 2021, the Appellant sent the employer her fall 2020 term results and told it that she wasn't enrolled in the winter 2021 term.

[28] The Appellant didn't tell the employer that she was leaving her job then either. As she explained at the hearing, because of the difficulties experienced, she was thinking about her options. She could not yet imagine leaving a job she had been in for about 15 years.

[29] Just before the 2021 March break, the Appellant got a call from someone from human resources with the employer, asking her whether she had received the registered letter the employer had sent her. The Appellant hadn't received the letter yet. She didn't read it until March 9, 2021. Still, she accepted what the person told her, which is that the employer was terminating her employment. Even though she was in shock after this discussion, she explains that she accepted this decision because she was beginning to realize that she [translation] "had reached that point."

[30] So, the Appellant argues that she voluntarily left her job because the employer considers that she resigned given that she was still on leave without pay and wasn't taking the training anymore. She explains that she started an inner process of acceptance because she didn't feel up to going back to work then or dealing with the principal or the union representative to explain the problems experienced. But she never told the employer, the technician, or the principal that she intended to leave her job. She accepted this fact when the employer told her it considered that she had resigned on January 4, 2021, given that she was on leave without pay for another purpose than the one that was authorized and that it was applying the collective agreement.

[31] On this point, the Appellant even told the Commission that she had accepted being let go by the employer because she didn't have the strength to challenge her dismissal.

[32] I can't find that the Appellant voluntarily left her job. The employer approved leave without pay for training and, along the way, because the Appellant wasn't enrolled in this training during the winter 2021 term, it considered that she had resigned on the alleged start date for classes.

[33] At the hearing, the Appellant even explained that she could have gone back to work. She says that she could have asked her union for help but that she didn't want to relive negative emotions.

[34] The fact is that the Appellant didn't try to talk to her employer about the difficulties she was experiencing, but, more importantly, she didn't tell it that she was voluntarily leaving her job. She quietly accepted the reasons the employer had given in its February 25, 2021, letter, and she didn't contact the employer again.

[35] Though someone from human resources with the employer told the Commission that, according to the Appellant's file, she resigned on January 4, 2021, this person also said that it was on February 10, 2021, that the Appellant sent the employer an email saying that she wasn't enrolled in the winter 2021 term. As the Appellant mentioned, she also sent her fall 2020 results then, and she didn't intend to leave her job at that time, even though she was unable to continue with her training.

[36] The February 25, 2021, letter doesn't say that the Appellant had to go back to work because the leave without pay had been approved for training and she wasn't taking the training anymore.

[37] The Appellant agrees that the employer sent her a letter terminating her employment, but she disagrees that it asked her to go back to work. On this point, I give preference to the Appellant's testimony. There is no evidence on file that the employer asked the Appellant to come back to work when the leave without pay was going to end on June 30, 2021.

[38] The Appellant admits that the employer approved the leave without pay specifically for training and that she didn't enrol in the winter 2021 term. I find that the Appellant lost her job for this reason.

[39] I agree with the Commission that the Appellant didn't have a choice to leave or to stay in her job; the employer terminated her employment.<sup>6</sup> The employer didn't accept her being absent when she wasn't enrolled in training, and it let her go.

### **Is the reason for the Appellant's dismissal misconduct under the law?**

[40] The reason for the Appellant's dismissal isn't misconduct under the law.

[41] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>8</sup> The Appellant doesn't have to have wrongful intent (in other words, he [*sic*] doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the Act.<sup>9</sup>

[42] There is misconduct if the Appellant 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 of being let go because of that.<sup>10</sup>

[43] Reprehensible conduct isn't necessarily misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in their dismissal.<sup>11</sup>

[44] The Commission has to prove, on a balance of probabilities, that the Appellant lost her job because of misconduct. This means that it has to show that it is more likely than not that the Appellant lost her job for committing the act attributed to her.<sup>12</sup>

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<sup>6</sup> To find that a claimant voluntarily left, you have to be able to determine that it is more likely than not that the claimant had a choice whether to stay in their job. This principle is explained in *Peace*, 2004 FCA 56.

<sup>7</sup> See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

<sup>8</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>9</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>10</sup> See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

<sup>11</sup> This principle is mentioned in the following decisions: *Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; and *Meunier*, A-130-96.

<sup>12</sup> As mentioned in *Minister of Employment and Immigration v Bartone*, A-369-88.



[45] The Commission argues that the Appellant's employment ended because of misconduct given that she withdrew from her training and that, in doing so, she could reasonably expect to be let go.

[46] As she told the Commission on March 29, 2021, when the employer informed her in early March 2021 that it was terminating her employment because it had approved the leave without pay only so that she could take training, the Appellant didn't try to correct the situation, since it was too late for her to register for a course for the winter 2021 term.<sup>13</sup>

[47] At the hearing, she explained that the employer had never let her go back to work or given her the option. It told her that it was terminating her employment. The Appellant doesn't feel like she had a choice and, as she explained, it was too late to meet the requirement to enrol in the winter 2021 term.

[48] The Appellant explains that, as early as December 2020, she wasn't planning to continue with the training she had started, in January 2021, because she had experienced some difficulties and had been diagnosed with ADHD after some tests.

[49] For this reason, she didn't stay in school. But, she didn't feel up to going back to work in the near future, and she saw a psychologist. As mentioned earlier, the Appellant explained at the hearing that there had been an ongoing conflict at work and that she had felt unjustly targeted but that she had felt unable to talk to the union representative or the principal about it. She also says she started taking steps to find another full-time job during that period.

[50] The employer, for its part, just sent the Appellant a letter terminating her employment. The letter mentions that the Appellant was granted leave without pay from August 25, 2020, to June 30, 2021, to take a course.<sup>14</sup> The letter doesn't mention the

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<sup>13</sup> GD3-13.

<sup>14</sup> GD3-27.

Appellant having the option to go back to work. Instead, the employer indicates that it considers that the Appellant resigned on January 4, 2021.

[51] I disagree with the Commission on the interpretation of the facts. At the hearing, the Appellant said that, on January 4, 2021, she was on leave without pay and wasn't taking the training anymore, but that the employer hadn't asked her to go back to work; it terminated her employment.

[52] The employer didn't dismiss the Appellant for not performing her work duties—it didn't give her the option. The employer dismissed the Appellant for being on leave without pay for another purpose than to study.

[53] Although the Appellant knew that the leave without pay had been approved specifically for training, given the circumstances mentioned earlier, such as an ADHD diagnosis, her obvious inability to continue with her training due to the difficulties experienced, and the challenge of dealing with the employer after unfair events she feels she went through, the Appellant was trying to find a solution. She didn't intend to stop working in the job she had had for about 15 years, but she would have liked the situation to improve. She saw a psychologist, and she reviewed job opportunities.

[54] Also, on February 10, 2021, she sent the information the employer had asked for—her academic results.<sup>15</sup> She didn't think she could be dismissed for that reason, even if she was unable to continue with her training, especially since she thought that the employer didn't have a regular position for her given that the school year had already started.

[55] The employer was aware of the issue of the conflict between the Appellant and her co-worker. The principal had imposed some rules in 2019, and the Appellant felt that she was biased in favour of her co-worker.

[56] In the circumstances to be weighed, I have to consider that this conflict is involved in the Appellant's return to work. It is also part of the circumstances of her

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<sup>15</sup> GD3-26.

absence. The Commission says that the employer asked the Appellant to go back to work, while the Appellant says that the employer dismissed her because it no longer approved her leave without pay but that it didn't let her go back to work. She wasn't given a work schedule, and no return-to-work agreement was discussed.

[57] For this reason, I find that the Appellant could not have expected to be let go on March 9, 2021.<sup>16</sup> I give preference to the Appellant's testimony at the hearing because her consistent statements strike me as reliable. The Appellant tried several solutions to resolve the situation. For example, she saw a psychologist, and she tried to complete training to be able to work in another work team, but the employer didn't discuss her return to work with her.

[58] Based on the facts presented at the hearing, I find it more likely than not that the Appellant wanted to go back to work. What made her ambivalent was the ongoing work atmosphere, but she didn't intend to leave a position she had been in for about 15 years. At best, she would have liked to improve the situation.

[59] Additionally, it isn't clear that the Appellant was let go just for the reason the employer gave. Since the employer wasn't at the hearing to give its version of the facts, I accept that steps were taken to resolve the conflict between the Appellant and one of her co-workers but that there was no follow-up to resolve the situation once and for all.

[60] On this point, the Appellant argues that she got a note from her doctor—who was aware of the situation—putting her off work pending further action in response to this conflict. The employer can require a doctor's note to justify an unauthorized absence.

[61] Also, even though the employer approved leave without pay for studies, the letter approving the leave doesn't say that the Appellant will be let go if she doesn't pass her courses, if she experiences difficulties, or if she can't continue with the training. The

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<sup>16</sup> The Appellant got the letter on March 9, 2021, but she was notified over the phone in early March 2021.

letter authorizes the Appellant to take training for a period not exceeding 12 months, from August 25, 2020, to June 30, 2021.<sup>17</sup>

[62] As the Court of Appeal mentioned in *Tucker*, employees are human:<sup>18</sup>

[T]hey may-get ill and be unable to fulfill their obligations and they may make mistakes under pressure or through inexperience.

[...]

Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent ....

[63] The Appellant could not have anticipated that she would be let go. Her leave without pay was approved for training, but she experienced difficulties in her learning, and she was unable to continue with her training. The facts show that the employer didn't give the Appellant the option to go back to work and that it let her go.

[64] Even though the Appellant told the Commission that she could not go back to work, this statement actually shows the distress she was feeling when she didn't feel up for it.<sup>19</sup>

[65] The Appellant knew that her leave without pay had been approved for training. Even though she dropped her courses for the winter 2021 term because of difficulties she had experienced and this act can be considered reprehensible, given the facts presented, I can't find that this act amounts to misconduct under the Act.

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<sup>17</sup> GD3-27 and GD3-29.

<sup>18</sup> *Tucker*, A-381-85.

<sup>19</sup> GD3-19.

**So, did the Appellant lose her job because of misconduct?**

[66] Based on my findings above, I find that the Appellant didn't lose her job because of misconduct. The Appellant acted as the employer says she did, [and] this act is reprehensible, but it doesn't amount to misconduct.

**Conclusion**

[67] The appeal is allowed.

Josée Langlois

Member, General Division – Employment Insurance Section