



[TRANSLATION]

Citation: *NL v Canada Employment Insurance Commission*, 2021 SST 957

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

Decision

Appellant: N. L.
Representative: M. J.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (424384) dated June 30, 2021
(issued by Service Canada)

Tribunal member: Manon Sauvé
Type of hearing: Videoconference
Hearing date: September 17, 2021
Hearing participants: Appellant
Representative
Decision date: October 1, 2021
File number: GE-21-1390

Decision

[1] The appeal is dismissed. The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct. This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[2] For a few years, the Claimant worked as an orderly in a private residence for seniors with decreasing independence. On March 15, 2021, she was let go because of misconduct.

[3] The employer says that the Claimant left her post without permission. She had done it before. She had been warned that, if it happened again, she could lose her job again.

[4] The Claimant, on the other hand, argues that she could not perform all the duties required by her employer. She went on medical leave for overwork. When she went back to work, a process that was supposed to be gradual, the employer suspended her and then dismissed her.

Issue

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

Analysis

[6] 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.

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

Why did the Claimant lose her job?

[7] I understand that the Claimant worked as an orderly in a private seniors' residence. She was in charge of the second floor. She had to care for people with dementia, Alzheimer's, or other degenerative diseases.

[8] There were 13 residents on the floor, plus the partner of one of the residents, who spent his days with her. She started her shift at 2:45 p.m. and finished at 10:45 p.m. Her duties included preparing snacks, distributing dinner, giving medication, bathing residents, and meeting their needs.

[9] On July 16, 2020, the Claimant left her post without permission. And she was absent a few days without informing your [sic] employer. A one-day suspension notice was issued on September 3, 2020.

[10] On December 15, 2020, the Claimant left her post, leaving residents unattended.

[11] On December 17, 2020, she was absent from work without permission. On December 18, 2020, she left her post at 3:25 p.m.

[12] On December 28, 2020, she stopped working because of illness. On January 4, 2021, she applied for EI sickness benefits. A benefit period was established effective December 20, 2020.

[13] On March 1, 2021, her doctor cleared her to go back to work gradually. The employer applied a five-day suspension for the incident of December 15, 2020.

[14] When the Claimant went back to work on March 15, 2021, the employer dismissed her for insubordination and for leaving her post on December 18.

[15] I find that those are the actions attributed to the Claimant and that led to her dismissal.

[16] The Claimant admits to the actions attributed to her. But, in her view, they don't amount to misconduct, and the employer was looking for a pretext to dismiss her because of her involvement in the union.

[17] I find that the Claimant was let go because she left her post on December 18, 2021. She hasn't persuaded me that she lost her job because of her involvement in the union.

[18] I find it more likely that she was let go because she left her workplace on December 18, 2020.

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

[19] The reason for the Claimant's dismissal is misconduct under the law.

[20] 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 for her behaviour to be misconduct under the law.⁴

[21] 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 of being let go because of that.⁵

[22] 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

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.

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

[23] At first, the Commission granted EI benefits to the Claimant. In its view, this wasn't a case of misconduct.

[24] The employer asked the Commission to reconsider. The Commission investigated the employer and the Claimant.

[25] The Commission says that the Claimant lost her job because of misconduct. Her alleged actions amount to misconduct because she knew or should have known that leaving her post on December 18, 2020, would get her dismissed.

[26] I understand from the Claimant's testimony that she had to care for 13 residents, but the partner of one of the residents lived with her. So, there were 14 residents on the floor.

[27] The residents are vulnerable. They can easily become disorganized. Most of the time, the Claimant was alone in caring for them. Among other things, she had to prepare snacks, give medication, change bedding, prepare dinner, wash the dishes, and put residents to bed. On top of that, health measures due to COVID-19 increased the workload.

[28] She had help from the third-floor orderly, a part-time equivalent. The mobile team could help, but rarely.

[29] The Claimant saw a doctor on December 28. She was put off work from December 28, 2020, to January 11, 2021, for an adjustment disorder and burnout. When she testified, she said she didn't see a doctor right away because she thought she could manage on her own.

[30] I understand that the Claimant showed up for work on December 18, 2020. She asked the head nurse for help. It was the general manager who came. She told the Claimant that she was capable of performing her duties and that, if she intended to leave her post, she would lose her job. She left her post.

[31] She says she left her post because she could not keep working due to her health. She had previously left her job for the same reasons before December 18, 2020.

[32] She explains that, on July 16, 2020, she left work because she was alone at her post. The employer gave her a one-day suspension for this. On December 15, 2020, before coming in to work, she was sick next to her car. She asked the nurse to examine her. He refused, and she left her workplace. She doesn't remember whether she worked on December 16, but she did work on December 17.

[33] She denies making racist comments to an orderly who had to help her.

[34] On December 18, 2020, she asked the head nurse for help. It was the general manager who came, and she told her she was capable of doing the work. She wasn't feeling well and left her job. She handed over her keys because they belonged to the employer.

[35] She doesn't remember the manager telling her that she would be dismissed if she left her post. The manager had come with the head of human resources.

[36] The Claimant saw a doctor on December 28. She was put off work from December 28, 2020, to January 11, 2021, for an adjustment disorder and burnout. She was then followed by her attending physician. When she testified, she said she didn't see a doctor right away because she thought she could manage on her own.

[37] For its part, the employer told the Commission that the Claimant had help at dinner time but was alone the rest of the time.

[38] On July 16, 2020, she left her post to see the manager. She left her unit unattended and didn't tell a staff member.

[39] On December 15, 2020, the Claimant went to see the manager again. She abandoned her post. She was told that she would be dismissed if she left her post a third time. She left her post anyway.

[40] When she went back to work, the employer applied the penalties. It won't stand for an employee breaching the rules of the residence and the code of ethics she signed. She wasn't allowed to leave residents alone. They were unattended.

[41] According to the Commission, it has shown that the Claimant's actions on December 18, 2020, amount to misconduct. She knew she would be dismissed if she left her post without permission again.

[42] She breached her duties under her employment contract. She could not leave residents alone and unattended. They are vulnerable people who need someone around to ensure their safety.

[43] I find that the Claimant's act of leaving her post on December 18, 2020, is misconduct under the *Employment Insurance Act*. In making my finding, I considered the evidence on file and the Claimant's testimony.

[44] This wasn't the Claimant's first time leaving her post. She would leave residents unattended. She had received a one-day suspension in September for a similar act. On December 15, 2020, she did it again. On December 18, 2020, the manager came to see her to tell her that she could not leave her post; otherwise, she would be dismissed. She decided to leave regardless of the consequences.

[45] I understand that she saw a doctor a few weeks later. But, when she decided to leave her post despite the manager's warnings, she should have expected to lose her job.

[46] The Claimant says that the employer was quick to replace her so that residents weren't left alone. This doesn't support a finding that the Claimant didn't commit misconduct. I have to consider the Claimant's behaviour, not the employer's behaviour.⁷ And the employer's priority is to keep residents safe.

⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[47] She had a duty to care for residents who are vulnerable because of their conditions. She should have known that, by leaving her post again, she was breaching her duties and that she would be dismissed.

[48] The Claimant wilfully abandoned her post. She knew the consequences. I give little weight to her explanations. As I said, she had already received a one-day suspension for a similar act. On December 15, 2020, she left her post once more, and again on December 18, 2020.

[49] In the circumstances, I find that the Commission has proven that the Claimant lost her job because of misconduct.

Conclusion

[50] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[51] This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section