



Citation: *LW v Canada Employment Insurance Commission*, 2022 SST 1579

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

Decision

Claimant: L. W.
Commission: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (423923) dated June 29, 2021
(issued by Service Canada)

Tribunal member: Audrey Mitchell
Type of hearing: Teleconference
Hearing date: March 15, 2022
Hearing participant: Claimant
Decision date: March 21, 2022
File number: GE-21-2464

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the 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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. Her employer said that she was let go because she didn't report to for her scheduled shift. She did send her employer a doctor's note before then to support her absence from work.

[4] Even though the Claimant doesn't dispute that this happened, she says that it isn't the real reason why the employer let her go. The Claimant says that the employer actually let her go because she was off work for so long, and based on misinformation other employees gave them.

[5] The Commission accepted the employer's reason for the dismissal. They decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matters I have to consider first

The Claimant asked me to adjourn (that is, pause) the appeal

[6] The Claimant asked me to adjourn the hearing because she was sick. In the interests of natural justice, I granted the adjournment.

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

The Claimant's employer asked to be added as a party to the appeal

[7] The Tribunal sent the Claimant's employer a letter asking if they wanted to be a party to the appeal. The employer asked to be added, but did explain how they have a direct interest in the appeal. For this reason, I denied the employer's request.

[8] The employer appealed my decision to the Appeal Division of the Tribunal. I adjourned the Claimant's appeal, pending the outcome of the employer's appeal. The Appeal Division denied leave to appeal. Because of this, the Claimant's appeal proceeded.

Issue

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

Analysis

[10] 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?

[11] I find that the Claimant lost her job because she didn't report to work as expected and did not send her employer an updated doctor's note as required before the shift started.

[12] The Claimant and the Commission don't agree on why the Claimant lost her job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that they fired the Claimant because she didn't show up for her scheduled shift.

[13] The Claimant disagrees. The Claimant says that the real reason she lost her job is that she was off work for a long time. She says that a new employee had been giving her employer misinformation about her.

[14] I find that the Claimant lost her job because she didn't send her employer a doctor's note to support her absence from work. Without the supporting doctor's note, the employer concluded that the Claimant was late for work.

[15] The Claimant testified that she had an accident in July 2020 that left her with injuries. After the accident, she was in the hospital for six days. She could not work as a result. The Claimant said that her doctors first told her that she would be off work for at least three to six months. The Claimant confirmed at the hearing that her employer required her to send them doctor's notes. She told the Commission that she sent the doctor's notes to the head of human resources at least monthly.

[16] The Claimant sent her employer a doctor's note stating that she was unable to work from January 28, 2021 to February 28, 2021. She tried to see her doctor before February 28, 2021, but could not. She went to the doctor's office on Monday, March 1, 2021 and got a new note. The note said that the Claimant was unable to work until from February 28, 2021 to April 28, 2021. The Claimant sent the updated note to her employer at 3:40 p.m. on March 1, 2021.

[17] The employer sent a letter to the Claimant dated March 1, 2021. It informed her that they were firing her because they expected her to be at work on March 1, 2021 at 7:30 a.m. They referred to the Claimant's last doctor's note that said that she would be off work until February 28, 2021. The letter also referred to a previous written warning advising her that if she was late for work again, they would fire her.

[18] The Claimant agreed that she had been late to work a few times. But she said that these situations were out of her control and she always made up the time. She said that she feels that her employer treated her differently than her co-workers.

[19] The Claimant said that she believed the employer didn't want her as an employee because she had been absent for several months. She said that she thinks they used her not being at work as an excuse to fire her.

[20] The Claimant had been away from work for about seven and a half months before her employer fired her. The Claimant shared copies of her doctor's notes she

had sent to her employer. The only indication from the employer about the length of time the Claimant was off work was their question to her about applying for long-term disability. The employer told the Commission that the Claimant said she intended to return to work and she hadn't applied for long-term disability.

[21] I am not satisfied that the employer fired the Claimant because she was off work for too long. The Claimant had sent her employer monthly doctor's notes saying she was unable to work. I find from the Claimant's and Commission's evidence that the Claimant didn't send a note before February 28, 2021 to say that she continued to be unable to work.

[22] I find that the Claimant had been late for work in the past. I also find that the employer had warned her that if she was late again, they could fire her. The Claimant confirmed that her usual start-time for work was 7:30 a.m. Given this objective evidence, and the contents of the termination letter, I find the Claimant's statement that her employer fired her because she was off work for so long is speculative.

[23] I give more weight to the termination letter than to the Claimant's speculation. I find that the Claimant lost her job because she report to work as expected, and had not sent her employer an updated doctor's note to support her absence from work on March 1, 2021.

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

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

[25] 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

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.

[26] 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

[27] 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

[28] The Commission says that there was misconduct because the Claimant's employer had previously warned her that any other lateness would result in her dismissal.

[29] The Claimant says that there was no misconduct because she had told her employer that she would know more about her return to work after she had her appointment with a specialist in April 2021.

[30] I find that the Commission has proven that there was misconduct, because the Claimant knew that if she was late for work, her employer could fire her.

[31] The Claimant's employer told the Commission that they had warned the Claimant about being late. They sent them an email they had sent to the Claimant after firing her. In that email, they listed previous warnings they had given her, leading to her termination. This included four occasions where the Claimant was late or didn't show up to work.

[32] The Claimant's employer also sent a statement the Claimant signed. They say she signed it on April 23, 2020. In the statement, the Claimant acknowledged previous warnings about late arrival to work and that the employer should have fired her on April 23, 2020 when she was late. The statement says that the Claimant understands that she will have "one final opportunity to arrive to work on time daily".

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

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

[33] The Claimant says that she signed the statement only because she didn't have a choice. She said that none of the things in the statement are legitimate reasons for her to receive a warning. The Claimant confirmed that she had been late for reasons outside of her control, but said she had always made up the time.

[34] The Claimant said that the employer had told her that they would remove the warning letters from her record. She said that the reason is that an employee had admitted to being wrong about a written warning. The Claimant told the Commission that the employee had written a warning that said she didn't follow COVID-19 procedures.

[35] The Claimant testified that she knew that if she was late for work, her employer could fire her. I accept her statement as fact and find that she knew she could be fired for not reporting to work on time. So I don't agree with her statement that the references to lateness in her signed statement are not legitimate reasons for her to receive a warning. I also note that the signed statement does not refer to a warning about not following COVID-19 procedures.

[36] As noted above, the Claimant had been sending her employer monthly doctor's notes to support her absence from work. She sent a note for her absence up to February 28, 2021. Her employer says that they expected her to be at work at 7:30 a.m. for her shift on March 1, 2021. The Claimant sent her employer an updated doctor's note on March 1, 2021 at 3:40 p.m.

[37] The employer told the Commission that they last heard from the Claimant on February 1, 2021. They say she told them she hoped to return to work on March 1, 2021.

[38] The Claimant disputes this. She said that she was still in pain and had an appointment with a specialist in April 2021. She said that she meant when she replied to the employer was that she hoped to return to work at some point in the future. She states she spoke to the employer in February 2021 when she got the April 2021

appointment to see a specialist. She says she told the employer that she would update them after her appointment with the specialist.

[39] The Claimant included her response to the employer's February 1, 2021 questions. She said that she hoped to return to work, but hadn't applied for long-term disability.

[40] From the February 1, 2021 email exchange, I don't find that the Claimant told her employer that she'd be back at work on March 1, 2021. However, I don't find that the Claimant gave the employer enough information to know that she would not be at work on March 1, 2021.

[41] The Claimant sent copies emails she had sent to her employer from after her accident. She sent these emails with attached medical notes about her absences to the head of human resources. The Claimant says that in February 2021, she spoke to the owner, who is the husband of the head of human resources. She told him about her appointment in April 2021, and said she would let him know how that went.

[42] The head of human resources representing the employer told the Commission that if the Claimant had spoken to her husband about not being able to return to work, he would have told her. She added that if the Claimant was not going to be at work, she should have contacted her as head of human resources.

[43] I find the employer's statements about whom the Claimant should have contacted about not being able to work are reasonable and credible. I do so because the Claimant sent all of her emails with attached medical notes, including the last one on March 1, 2021, to the head of human resources.

[44] The Claimant told the Commission that she assumed that her employer knew that she wouldn't be at work on March 1, 2021. Given the warnings the Claimant's employer had given her in the past, I find that the Claimant should have exercised more care by letting her employer know in writing that she wouldn't be at work on March 1, 2021.

[45] I asked the Claimant if she had contacted her employer on Friday, February 26, 2021, to let them know that she couldn't get a doctor's note before February 28, 2021. She said she did not because her doctor was supposed to call her and she thought she would get the note. I asked her if she emailed her employer since she hadn't gotten the note before February 28, 2021. The Claimant said that she didn't do so because they're not in on weekends. She added that they knew that she wouldn't be in until April.

[46] I don't find that the Claimant intended not to be clear with her employer about her absence on March 1, 2021. But, I find that she acted in a reckless way by not letting her employer know in writing that she would not be at work on March 1, 2021 and not explaining that she would have a doctor's note for them on March 1, 2021, updating her absence beyond February 28, 2021. For this reason, I find that there was misconduct.

[47] It is not my role to determine whether the employer firing the Claimant for not reporting on March 1, 2021 at 7:30 a.m. as expected was justified or appropriate. One could argue that the employer could have called the Claimant to confirm if she had an updated doctor's note. However, my role is only to determine if the Claimant's action constitutes misconduct.⁷

[48] I sympathize with the Claimant given her present circumstances. She is still dealing with the effects of the injuries she sustained from her fall. She has lost her job, and now faces an overpayment since she is disqualified from benefits. While I sympathize with the Claimant's situation, I can't change the law.⁸

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

[49] Based on my findings above, I find that the Claimant lost her job because of misconduct.

⁷ See *Canada (Attorney General) v. Caul*, 2006 FCA 251.

⁸ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

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.

Audrey Mitchell

Member, General Division – Employment Insurance Section