



[TRANSLATION]

Citation: *SD v Canada Employment Insurance Commission*, 2023 SST 1187

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

Decision

Appellant: S. D.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (553733) dated November 29, 2022 (issued by Service Canada)

Tribunal member: Denis Bourgeois
Type of hearing: Teleconference
Hearing date: April 19, 2023
Hearing participant: Appellant
Decision date: May 25, 2023
File number: GE-22-4085

Decision

[1] The appeal is dismissed. The Appellant lost her job because of misconduct. This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[2] The Appellant worked at a factory in Edmundston, New Brunswick. The boss told staff that they would be off work for two weeks. He asked them to choose the dates to be off work. Staff chose the dates from July 17, 2022, to July 30, 2022.

[3] The Appellant contacted her supervisor to ask whether she could have three and a half additional days off. She wanted to be able to visit her brother who came from Abitibi-Témiscamingue. She hadn't seen him since the pandemic started.

[4] She never got a clear answer about whether she could take those days off. She decided to take the days without permission.

[5] When she returned, she was told that she had left her job. She says that she didn't leave her job, but was let go.

Issues

[6] Did the Appellant voluntarily leave her job?

[7] If so, did she have just cause for voluntarily leaving her job?

[8] If not, did she lose her job because of misconduct?

Analysis

[9] I find that the Appellant didn't voluntarily leave her job.

[10] Just cause exists if you have no reasonable alternative to leaving your job, considering a list of circumstances. The test to apply is whether the Appellant had no reasonable alternative to leaving her job when she did.¹

[11] The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.²

[12] A claimant is disqualified from receiving benefits if they lost their job because of misconduct or if they voluntarily left their job without just cause. The law says that when deciding whether a claimant voluntarily left their job, the question to ask is whether the claimant had the choice to stay or leave their job.³

Did the Appellant voluntarily leave her job?

[13] The parties don't agree that the Appellant voluntarily left her job.

[14] I find that the Appellant didn't voluntarily leave her job.

[15] The Canada Employment Insurance Commission (Commission) says that the Appellant voluntarily left her job because she chose to take leave without her employer's permission. The Commission says that not going to work for four days can be interpreted as voluntary leaving.

[16] The Appellant disagrees. She says that she asked for three and a half days off. Her supervisor told her [translation] "that she was playing with her job."⁴ Her boss didn't say yes or no. He let her make the decision. She decided to take those days off without permission.

[17] At the hearing, she said that she went to work after her days off. She returned on the date that she had said she would, August 8, 2022. She was ready to work. Her supervisor told her that she could not return to work because she had left her job. She

¹ See *Green v Canada (Attorney General)*, 2012 FCA 313.

² See *Canada (Attorney General) v White*, 2011 FCA 190

³ See *Canada (Attorney General) v Peace*, 2004 FCA 56.

⁴ See GD2-4.

then met with the boss. He repeated that she had left her job because she didn't show up for work. He told her that her Record of Employment had already been sent. She could apply for her job if she wanted. She refused.

[18] She says that everyone at work knew where she was when she was away. The employer knew why she wasn't at work. She had told her boss that she would return to work on August 8, 2022, after her three and a half additional days off. She says that the employer let her go.

[19] I find that the Appellant was let go. She wanted to keep her job, but the employer ended it. She never said she was leaving her job. There was enough work, and she was willing to work. She didn't have the choice to stay or leave her job.

[20] At the hearing, she insisted that she didn't voluntarily leave her job. She arrived at work on August 8, 2022, ready to work. Her arguments are credible. It is clear that the employer ended her job.

Did the Appellant lose her job because of misconduct?

[21] The Appellant lost her job because of misconduct.

[22] To find that the acts amount to misconduct, it is enough for the Appellant's alleged act to be "wilful"—that is, conscious, deliberate, or intentional.⁵ The notion of misconduct isn't defined by the law and is analyzed in light of principles from case law. The law requires "for disqualification [from receiving benefits] a mental element of wilfulness, or conduct so reckless as to approach wilfulness."⁶

[23] The Appellant acknowledges that taking leave from work without permission caused her to lose her job. This act amounts to misconduct under the *Employment Insurance Act* (Act). When she asked whether her leave was approved, her boss simply said, [translation] "It's you who knows that." This was their last conversation before the

⁵ See *Canada (Attorney General) v Tucker* A-381-85; and *Canada (Attorney General) v Mishibinijima* 2007 FCA 85.

⁶ See *Canada (Attorney General) v Tucker* A-381-85; and *Canada (Attorney General) v Mishibinijima* 2007 FCA 85.

leave. At the hearing, she said that she felt it was up to her to make the decision. She said that she thought she would face consequences if she chose to take leave. She asked the boss whether she could be let go. He said, [translation] “We’re not there yet.”

[24] The Appellant admits that she was wrong to take leave without permission. She made a decision that was conscious, deliberate, and intentional. Even though she didn’t think she would lose her job by taking this leave, it was this act that caused her to lose her job. She says that if the employer had been clearer about the consequences she might face, she would not have taken this leave.⁷

[25] She thought the employer might give her a warning letter or suspend her for three days to a week. She was a good employee. She never took sick leave. She didn’t expect to lose her job.

[26] Case law has established that the Tribunal’s role isn’t to assess whether the dismissal was justified or whether the penalty imposed on the Appellant was appropriate. Instead, the Tribunal’s role is to determine whether her actions amount to misconduct under the Act.⁸

[27] The employer told the Commission that the Appellant voluntarily left her job because she didn’t show up for work. It said she had to provide justification. She had to make a formal leave request in writing with the reason for the request.⁹ The employer said that she refused to provide a formal leave request. The Appellant said that, even though she wasn’t aware of this policy, she regrets not having made her request in writing. The employer also told the Commission that the Appellant was properly warned of the consequences of taking leave without permission. The courts have said that the failure to attend work as required without the employer’s consent is misconduct.¹⁰

[28] The employer also told the Commission that the Appellant was used to being off work this way. It said that this was the third time she had left and returned. The

⁷ See *Canada (Attorney General) v Jamieson*, 2011 FCA 204.

⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

⁹ See GD3-33.

¹⁰ See *Canada (Attorney General) v Jamieson*, 2011 FCA 204.

Appellant said that this wasn't true and that her other absences were due to a shortage of work.

[29] The Commission argues that the Appellant failed to exhaust all reasonable alternatives before leaving her job. It says that she could have gone to work on August 2, 2022, as the employer wanted. The Commission also says that she could have changed her plans and seen her family at another time.

[30] The Appellant says that she hadn't seen her brother since the pandemic started. She only has one brother and she really wanted to see him. She could not see him during the plant closure because he hadn't yet arrived in Quebec City.

[31] I agree with the Commission. The Appellant failed to exhaust all reasonable alternatives before leaving her job. She chose not to report for work. She could have seen her brother on weekends. At the hearing, she said Friday was usually a half-day of work.

[32] Perhaps the employer wasn't clear enough that it didn't want the Appellant to take additional days off work. But the Appellant knew that she would face consequences when she returned. In a Federal Court of Appeal decision called *Fleming*, it is clear that the focus should be on the employee's conduct, not the employer's.¹¹

[33] The Commission says that the Appellant voluntarily left her job. But the Appellant argues that she was let go. It doesn't matter who initiated the severance of the employment relationship because both issues relate to a disqualification.¹²

[34] I find that the Appellant's decision was intentional and deliberate. It is the direct cause of her loss of employment.

[35] The Appellant lost her job because of misconduct.

¹¹ See *Fleming v Canada (Attorney General)*, 2006 FCA 16.

¹² See *Canada (Attorney General) v Desson*, 2004 FCA 303.

Conclusion

[36] The appeal is dismissed. This means that the Appellant is disqualified from receiving EI benefits.

Denis Bourgeois
Member, General Division – Employment Insurance Section