



[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and GC*, 2023 SST 285

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

Decision

Appellant: X

Respondent: Canada Employment Insurance Commission

Added Party: G. C.
Representative: Ms. Jérémie Côté-Jones

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (480498) dated July 4, 2022
(issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Videoconference

Hearing date: March 15, 2023

Hearing participants: Employer's representative (Appellant)
Witness
Added Party (Claimant)
Added Party's representative

Decision date: March 17, 2023

File number: GE-22-2540

Decision

[1] The appeal is dismissed.

[2] The Claimant didn't lose her job because of misconduct, and she can receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. She says that she stopped working because of her tardiness. Essentially, she says that she had to wait for the person who took care of her daughter which is why she arrived 5 to 10 minutes late the days before she was let go.

[4] The Canada Employment Insurance Commission (Commission) accepted the Claimant's reasons and established a benefit period. On April 4, 2022, it told the employer about that decision. On May 4, 2022, the employer asked for a reconsideration of the Commission's decision. The employer argues that the Claimant didn't have good cause for being late or absent and that it used progressive discipline before letting her go. On July 4, 2022, the Commission issued a reconsideration decision saying that it was upholding its decision and that it would pay benefits to the Claimant.

[5] The employer disagrees with the Claimant and the Commission. The head of human resources indicates that the Claimant's tardiness and absences were recurring and unauthorized. It says that the last disciplinary notice issued told the Claimant that she hadn't followed the absenteeism procedure and that she would be suspended without pay on December 16, 20, 21, 22, and 31, 2021. Despite that, the Claimant didn't follow the absenteeism procedure on January 3, 4, 5, and 6, 2022, and she was let go.

[6] I have to decide whether the Claimant stopped working because of misconduct.

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

Issue

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

Analysis

[8] 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 she lost her job. Then, I have to determine whether the Act considers that reason to be misconduct.

Why did the Claimant lose her job?

[9] I find that the Claimant lost her job because she was late for work on January 3, 4, 5, and 6, 2022.²

[10] Although the Claimant explained she would be late to her team leader, since the babysitter was finishing her shift at 4 p.m. and she had to wait for her to arrive before leaving the house, the team leader didn't authorize her to be late. The Claimant was late for work on the days mentioned by 5 to 10 minutes depending on the day. The employer let the Claimant go because she had been late and absent multiple times and it had already warned her.

[11] The Commission, the employer, and the Claimant agree on why the Claimant lost her job.

[12] The Claimant admits to being late for work. I find that she acted as the employer says she did.

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

[13] The reason for the Claimant's dismissal isn't misconduct under the Act.

[14] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes

² GD2-14 and GD3-10.

³ See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[15] 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.⁶

[16] Also, reprehensible conduct doesn't necessarily constitute misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in dismissal.⁷

[17] 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.⁸ But, after analyzing and reviewing the Claimant's file, the Commission decided that she wasn't let go because of misconduct.

[18] The Commission says it is true that the employer was patient and tolerated several absences from the Claimant. But, it argues that the Claimant being late by 5 or 10 minutes on January 3, 4, 5, and 6, 2022, doesn't constitute misconduct under the Act. It argues that the Claimant's behaviour doesn't show such carelessness or negligence that it is almost wilful.

[19] The Commission says that the Claimant was late because of babysitting issues and that she could not leave her daughter alone. It says that the Claimant told her team leader about that situation and that she didn't act deliberately to be late.

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

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

⁶ See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

⁷ *Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The termination letter, dated January 7, 2022, indicates that the employer decided to sever the Claimant's employment because she was late four times in the same week without authorization and without just cause.

[21] At the hearing, the employer's head of human resources said that the Claimant's absenteeism rate was abnormal and very high. In 2021, this rate was about 41%. The Claimant received disciplinary warnings about the importance of her attendance and she was also suspended without pay on more than one occasion.

[22] The director of human resources also indicated that, when an employee is absent for more than three days, the absenteeism procedure states that they must submit a medical note to justify their absence. But, when an employee is absent repeatedly, this proof is no longer used to authorize an absence.

[23] The director of human resources says that they were sympathetic and that the Claimant was let go because of recurring tardiness and absences. The employer didn't authorize the Claimant to be late on January 3, 4, 5, and 6, 2022, and let her go.

[24] The employer's production manager testified at the hearing that the Claimant was often absent. He said that when an employee is absent, production in the factory is affected. Since the plant doesn't have many employees, an absence has a lot of impact on rotations. He says that he met with the Claimant to explain the guideline on absenteeism and that he followed the procedure that led to letting her go.

[25] The Claimant doesn't dispute these facts. She admits that she was late and absent. She says that she was five minutes late on January 3 and January 4, 2022, and 10 minutes late on January 5 and January 6, 2022. She says that she hoped to be able to make up her time at the end of the day.

[26] The Claimant says that her previous absences were because of medical issues or family obligations. She says that she contacted the employer each time to tell it she would be late or absent, and she provided text message conversations she had with her manager. The Claimant also provided medical notes for some of the days she was

absent, as well as a psychological assessment for her daughter. She also says that she was depressed after a difficult separation, that medication had been prescribed, and that a social worker from the CLSC [community health care clinics] helped her during that period.

[27] Concerning January 3, 4, 5, and 6, 2022, the Claimant says that she was late for work because the babysitter could not arrive before 4 p.m. This person worked until 4 p.m. and had to go to her residence. She says that she has responsibilities as a mother and that she could not leave her child alone. She says that her daughter is anxious and that she had to wait for the babysitter to arrive before leaving the house to go to work.

[28] The Claimant says that before the COVID-19 pandemic, she could count on her mother to watch her daughter. But, because she and her daughter had had flu-like symptoms over the holidays, her 70-year-old mother could not watch her daughter like she usually did. The Claimant says that she tried to find a solution, and that she notified her team leader each day that she had babysitting issues and that she would probably be a few minutes late.

[29] I note that my role isn't to determine whether letting her go was the appropriate measure in this case. I don't have the authority to determine whether **the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal**.⁹ I will assess whether the Claimant's behaviour amounts to misconduct under the *Employment Insurance Act* (Act), and whether being 5 to 10 minutes late on January 3, 4, 5, and 6, 2022, constitutes misconduct.

[30] From the facts before me, it seems clear to me that the Claimant didn't want to shirk her obligations toward her employer. The file shows that she came across several obstacles, but that she notified her manager each time. In 2021, during the COVID-19

⁹ *Attorney General of Canada v Marion*, 2002 FCA 185.

pandemic, the Claimant had health issues, parental obligations, and went through a difficult separation.

[31] Concerning the 5- to 10-minute delays on January 3, 4, 5, and 6, 2022, the file shows that the employer told the Claimant on January 4, 2022, that her shift was now from 4:30 p.m. to 1:30 a.m., starting the next day.¹⁰ Despite being told this at the last minute, the Claimant found someone to watch her daughter in the evenings in her absence. Since she could not rely on her mother as usual, she quickly found another solution. But, the babysitter for her daughter on January 3, 4, 5, and 6, 2022, worked until 4 p.m. and the Claimant had to wait for her to arrive before leaving her home. Even though the Claimant has given reasons why she had to stay with her daughter until her babysitter arrived, including there being anxiety, I note that the daughter was 9 years old at the time.

[32] I find that the Claimant found a quick solution and that she responded quickly to her manager, telling him that she was available for work the next day.

[33] The facts in the Commission's file and the Claimant's testimony convince me that she wanted to make sure she met the obligations she had toward her employer. She quickly responded to the employer to confirm she would be at work and notified her team leader that she would be late by a few minutes.

[34] Although I understand that the employer applied its absenteeism procedure, the head of human resources admitted at the hearing that, when making the decision to let the Claimant go, she wasn't aware of all these explanations. And, if that had been the case, the decision might have been different, since the employer had in-house assistance and it offered certain accommodations, particularly for babysitting issues.

[35] The employer may take measures to supervise employee attendance. The facts show that the Claimant's absences are numerous and recurring, and I understand that the organization of work is affected when an employee is absent from the factory.

¹⁰ GD2-56.

[36] But, I am of the view that the Claimant followed the absence procedure by notifying her team leader that she would be late. Especially in this case, the facts show that the employer asked the Claimant, with little notice, to work shifts on a different schedule, from 4:30 p.m. to 1:30 a.m. The Claimant quickly accepted her work schedule and notified her team leader that she could be late by a few minutes due to her babysitting issues.

[37] Even though the head of human resources said that it is accepted that the team leader isn't a person of authority and that he can't authorize coming in late or being absent, since this task is the director's responsibility, the facts show that, as of January 3, 2022, the Claimant worked in a different part of the factory. She said that she had informed the person in charge during her shifts.

[38] In my view, the Claimant followed the employer's absence procedure by notifying her team leader that she would be late by a few minutes, since she had to wait for the babysitter before leaving her home. Also, as the Claimant argued at the hearing, her behaviour doesn't show that she wanted to harm the employer or that she acted in a way that didn't respect her obligations toward the employer.

[39] As the Federal Court of Appeal noted in *Tucker*, employees are human:¹¹

[Th]ey may get ill and be unable to fulfill their obligations and they make mistakes under pressure or through inexperience [...]
Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces wilful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behaviour which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent [...]

[40] While I understand that the Claimant had a very high rate of absenteeism, she has shown that it was because she was sick or because she had family obligations that she was absent or late. Most importantly, she notified her employer each time.

¹¹ *Tucker*, A-381-85.

[41] Disciplinary notices the employer sent the Claimant on March 25, 2021, and December 7, 2021, indicate that the Claimant was absent without **ever** providing a doctor's note¹² [my emphasis]. But, the Claimant's evidence shows that she provided medical notes to her manager—the witness who was at the hearing.

[42] While I understand that the employer feels justified in letting the Claimant go because it used progressive discipline before doing so, as I said at the hearing, my role isn't to determine whether letting her go was an appropriate measure in this case.

[43] Finally, the exceptional circumstances surrounding the COVID-19 pandemic led to more absences due to the onset of flu-like symptoms in the Claimant or her daughter. It is conceivable that she had to follow public health guidelines.

[44] I can't find that the Claimant acted in a way that didn't follow the employer's rules. On the contrary, concerning her tardiness on January 3, 4, 5, and 6, 2022, she told her team leader she would be late and indicated that she was available to make up her time at the end of her shift.

[45] The Claimant's actions don't amount to misconduct under the Act.

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

[46] Based on my findings above, I find that the Claimant didn't lose her job because of misconduct. The Claimant acted as the employer says she did, but those acts don't constitute misconduct under the Act.

Conclusion

[47] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

¹² GD2-4.