Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *AT v Canada Employment Insurance Commission*, 2020 SST 1109

Tribunal File Number: GE-20-1728

BETWEEN:

A. T.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: August 26, 2020

DATE OF DECISION: August 28, 2020

Canada

Decision

[1] The appeal is allowed. The Commission has not proven, on a balance of probabilities, the Claimant lost her employment because of her misconduct. This means she is not disqualified from receiving employment insurance (EI) regular benefits.

Overview

[2] The Claimant worked as an Early Childhood Educator in a daycare. She worked in the infant room with children who were up to 18 months old. The employer said it dismissed the Claimant when she failed to follow its policies three times. The Claimant applied for EI benefits. The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost her employment because of her misconduct and disqualified her from receiving regular EI benefits. The Claimant does not agree with the Commission's decision. She says that she did not violate the policies three times, she was not told that she could lose her job if she violated policy three times and that the employer should give employees training rather than dismissing them when they do not follow policies.

Matters I have to consider first

This is a re-hearing of the Claimant's appeal to the Social Security Tribunal

[3] The Claimant appealed the Commission's decision to the General Division of the Tribunal on February 25, 2020. Her appeal was numbered GE-20-677. A hearing was scheduled for May 5, 2020, but the Claimant did not attend. The General Division Tribunal Member then dismissed the Claimant's appeal on May 13, 2020.

[4] The Claimant appealed the May 13, 2020, decision to the Tribunal's Appeal Division. The Appeal Division held a settlement conference. The Claimant told the Appeal Division that she did not see the notice of hearing attached to the email she received from the Tribunal. The Commission agreed the Claimant should have an opportunity to be heard. The Appeal Division returned the Claimant's appeal to another General Division Tribunal Member for a new hearing. The appeal was re-numbered to GE-20-1728 and this decision arises from the new hearing on appeal GE-20-677.

The employer is not an added party to the appeal

[5] Sometimes the Tribunal sends the employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal did not send the employer a letter. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

The Commission made a clerical error

[6] The Commission submitted that it made an error in the notice it sent to the Claimant on February 7, 2020. The Commission said the notice indicates that the Administrative Review decision[1] was sent to the Claimant on February 10, 2020, when in fact it was sent to her on January 10, 2020.

[7] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal.[2] Because the Commission's error did not prevent the Claimant from seeking appeal the Administrative Review decision, I find that the error does not cause the Claimant any prejudice or harm.

Issues

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

[9] To answer this question, I have to decide two things. First, I must decide why the Claimant lost her job. Then I have to decide whether the law considers the reason the Claimant lost her job is misconduct.

Reasons for my decision

Why did the Claimant lose her job?

[1] Also called a Reconsideration decision
[2] *Desrosiers v. Canada (AG)*, A-128-89. This is how I refer to the court decisions that I must apply to this appeal.

[10] I find the Claimant lost her job because her employer said she violated their policies three times and it was their policy to dismiss employees after three policy violations.

[11] The Commission spoke to a representative of the employer, "LS." The Claimant identified LS as the person responsible for accounting and income tax paperwork. LS told the Commission that the employer has policies governing the care of the children who are placed with them. There is a Medication policy and a Food and Nutrition policy. LS told the Commission the employer also has a policy that employees are dismissed for the third policy violation. LS told the Commission the Claimant violated the Food and Nutrition policy once and then violated the Medication policy twice. When the Claimant violated the Medication policy for the second time it was her third violation and she was dismissed. I find the conduct that led to Claimant losing her job was the violation of an employer's policy for the third time.

The reason for the Claimant's dismissal is not misconduct under the law

[12] The representative of the employer, LS, told the Commission the employer dismissed the Claimant because she violated the employer's policies three times. LS said the first violation happened when the Claimant violated the Food and Nutrition policy when she fed solid food to a child who was only to receive pureed food and fed pureed food to a child who was only to receive solid foods.

[13] The Claimant testified that she started the infant room when she was hired. Infants are children under the age of 18 months and require a ratio of 2 to 3 children to one Early Childhood Educator. The food for the children is prepared in an on-site kitchen by another employee. Parents tell the day care what foods their children can have and sign a form indicating when a child is allowed to have solid foods. The Claimant testified that she never fed solid food to a child who was only to have pureed food. The Claimant testified that there was one child who was 13 months old who did not have all his teeth who was eating solid foods. He was so slow at eating that he would rarely finish his lunch, the main meal of the day, prior to the scheduled nap time. This meant that the child would be put down for a nap when he was not full. The Claimant took some of the pureed food prepared for another child, who regularly did not eat all the food provided, and fed it to the 13 month old. The Claimant explained that she had talked to

the parents of the 13 month old about his eating and they okayed her feeding the child pureed food. She did not get the parents' consent in writing.

[14] The Claimant said that her actions were seen by a visiting supervisor "M" who reported her actions. Her regular supervisor "E" called the Claimant into the office and asked her to sign a "writing." I take this "writing" to be a written warning. The Claimant did not read the warning. She said when she went to the office the warning was all written up and she was asked to sign it. The Claimant was not given a copy of the warning to take home with her. The Claimant explained to her regular supervisor E that the parents okayed the pureed food; E replied that she understood but E had to follow the rules.

[15] LS told the Commission the second incident occurred when the Claimant used a wet paper towel to clean a child when changing the child's diaper. The policy required that a wipe be used. LS said the parents saw the paper towel being used and complained. The Claimant testified that the washroom in the infant room is not visible from the infant room or outside the infant room. She said that sometimes a parent will ask that wipes not be used and she has used a wet paper towel on occasion. The Claimant testified that she did not think she got a warning for this.

[16] LS told the Commission that the Claimant violated the Medication policy when she took a child to the playground without their medication. The Claimant testified that she did receive a warning for this. She said that medications for all the children are kept in a medical / emergency bag. When the child leaves the infant room the medical / emergency bag is to be taken with the child. In this case, the child's doctor told the parents the child might be allergic to eggs, so Benadryl and an epi-pen were provided. The playground is a play area that is part of the day care's property. It is just outside the infant room and reached by a door from that room. The Claimant testified that one day this child work up early from a nap and she took the child outside. She did not take the medical / emergency bag with her. Someone came to the infant room, checked the medical / emergency bag and found the Claimant had not taken the medication with her. She said she could easily reach the medicine if required, but recognizes that this was her fault. The Claimant signed a written warning for this incident. She was not given a copy of the warning.

[17] The final warning given to the Claimant occurred when she was observed applying diaper cream to an infant without wearing gloves as required by the Medication policy. The Claimant testified that she did not violate the policy because she was applying coconut oil, at the request of the child's parents, and coconut oil was not considered to be medicine. The Claimant said that the child had diaper rash continuously and she had discussed the rash with the child's parents. She and the parents decided the child's diaper would be changed every two hours but that did not help. The Claimant suggested to the parents that they bring coconut oil to the day care to use on the child when she was being changed. The parents agreed with this.

[18] The Claimant testified that another employee was present when she applied the coconut oil to the baby without using gloves. The Claimant said the next day she was called into the office with E and M. E told her that she had been seen using medicated cream without gloves and asked her to sign a paper. The Claimant tried to explain what happened but was not allowed to do so. The Claimant was not given a copy of this warning. After she signed the paper about applying the medicated cream the Claimant was told that she could no longer work at the day care and was sent home. She was escorted out of the office, got her personal items and was walked out of the day care.

[19] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it approaches willfulness.[4] The Claimant does not have to have a wrongful intent, or mean to do something wrong, for her behavior to be misconduct under the law.[5]

[20] There is misconduct if the Claimant knew or ought to have known that her conduct could impair the performance of the duties she owed to her employer and, as a result, that dismissal was a real possibility.[6]

[21] The Commission has to prove, on a balance of probabilities, meaning it is more likely than not, that the Claimant lost her job because of misconduct.[7]

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[3] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] *Attorney General of Canada v Secours*, A-352-94.
[6] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] *The Minister of Employment and Immigration v Bartone*, A-369-88.

[22] The Commission says that it concluded the Claimant's actions were misconduct because she knowingly violated two policies and was aware her actions could result in her termination. The Commission said that the Claimant acted in such a way that she knew or ought to have known her actions would have a negative affect on the employment relationship. The Commission noted the Claimant had violated the Medication policy twice and the Food and Nutrition policy once and due to these violations was dismissed from her employment. The Commission said the Claimant told them, 'it's not a big deal to not wear gloves." The Commission contended that although the previous incidents for which the Claimant received warnings were potentially a result of her negligence, her lack of regard for the use of gloves was wilful.

[23] I find that, it is more likely than not, the Claimant did not know and could not have known that she could be fired for using coconut oil without gloves. LS told the Commission that she would send the Commission copies of the employer's policies but there are no policies in the appeal file. The Claimant testified that when she was hired she was shown to a room, given an iPad and told to read the employer's policies on the iPad. There were a lot of policies, including the Medication and the Food and Nutrition policies. She said she read about 15 to 20 pages. No one from the employer went through the policies with the Claimant. She was not given a printed copy of the policies. There is no evidence to support that the Claimant was given an employer policy that stated she would be dismissed after three warnings. The Claimant was not given copies of the warnings that were written up prior to her meeting with E and S. She was told to sign those warnings and did not read the warnings. There is no evidence to support that any of the warnings indicated the Claimant could be dismissed if she got a third warning.

[24] The Commission recorded the Claimant as saying that she was aware that she could lose her job if she was going against the employer's policy. The Claimant testified that statement was not correct. She was confused when she was talking to the Commission. She testified that she did not think that she would be dismissed for not wearing gloves while applying cream. It has happened in the past that the employer has run out of gloves and she has had to apply cream without gloves. The employer would be aware of that. The Claimant testified that she did not realize that she could lose her job over this. She did not realize that the written warnings had that much of a consequence. I find the Claimant's testimony to be more compelling and give it more

weight because of its consistency and because she appeared before me and gave direct evidence, which I find more reliable than a Commission agent's recounting of what he or she believed the Claimant said.

[25] Finally, the Claimant testified that she applied the coconut oil to the child with the parent's agreement. I accept the Claimant's evidence, as a trained Early Childhood Educator, that the use of gloves may impact a child's self esteem. I also accept the Claimant's evidence, given directly to me, that the coconut oil was provided by the parents, was not considered to be a medication and as such the Medication policy requiring that she use gloves did not apply. The Claimant testified that she was given the warning about not using gloves the day after she had applied the coconut oil to the child. A new employee started work that morning, and the Claimant was called in to the office to meet with E. As before, E had the warning prepared for the Claimant to sign. The Claimant testified that she was not allowed to provide an explanation of her actions. This evidence tells me that the employer had made up its mind that the Claimant had committed a third violation of policy and its intention was to dismiss her without hearing her explanation. I find that the Claimant's explanation, given directly to me, demonstrates there was no violation of the Medication policy. As such, I find that the Claimant could not expect to be dismissed from her job for applying coconut oil to a child without the use of gloves. Accordingly, I find the Commission has not met its burden of proving the Claimant's conduct amounted to misconduct.

Conclusion

[26] The Claimant did not lose her job due to misconduct. This means that the Claimant is not disqualified from being paid EI benefits.

[27] The appeal is allowed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	August 26, 2020

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. T., Appellant