Citation: *SN v Canada Employment Insurance Commission*, 2023 SST 1427

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (516332) dated September 28, 2022 (issued by Service Canada)

Tribunal member:	Stuart O'Connell
Type of hearing:	Videoconference
Hearing date:	April 7, 2023
Hearing participant:	Appellant
Decision date:	June 9, 2023
File number:	GE-22-3600

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost his job as a nurse. The Appellant's employer said that he was let go for the following reasons:

> 1) he failed to document patient care adequately within a six-day period (December 29, 2021 to January 3, 2022), and
>
> 2) he attended a clinic (the X) from which he had been expressly banned due to his non-compliance with policies regarding the use of PPE (personal protective equipment).

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[5] Did the Appellant lose his job because of misconduct?

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

Evidence

The Appellant's Evidence

[6] At the hearing, the Appellant gave evidence under oath which included the following.

Attending the Clinic

- His employer told him that he was not to see any clients at X, as he had not followed PPE requirements. He was never told that he could not attend the clinic for purposes other than to see clients.

- Nurses were required to put on PPE when dealing with clients at the clinic. However, they were not required to wear PPE when doing tasks that did not involve patients, such as administrative work on the clinic's computer.

- The employer sent him to the clinic to get supplies when needed. And when there was no one at the clinic to see a client, the employer was quick to call on him to see the client at his home.

- When he attended the clinic, he did so to access the clinic's computer as he was having issues with his computer and wanted to view a client list. An individual from the employer's IT department had advised him to view the information at the clinic. While at the clinic, he did not deal with any patients. He also visited a colleague while there.

Documenting Client Care

- There was a shortage of nurses at his workplace, and some clients were not receiving the care that they deserved.

- He frequently worked past the end of his scheduled work shift (sometime to 2:00 am or 3:00 am) to render care for sick clients.

- His documentation of client care sometimes lagged, but it was not non-existent.

- He documented client care within the period December 29, 2021 to January 3, 2022 (which he submitted to his supervisor sometime in January).

- The employer operates a clinical record system. He did not enter the client care information for this six-day period into the record system.

The Commission's Evidence

[7] The Commission provided the following evidence, which it obtained through the employer.

Attending the Clinic

- Contrary to its policies, to which the Appellant was subject, the Appellant had failed to use proper PPE and had not completed mandatory COVID 19 training modules.

- As a result, the employer received a notice from its funder to release the Appellant from servicing clients at the clinic. Management then informed the Appellant that he was no longer to attend X.

- On March 10, 2022, despite the employer's instruction not to, the Appellant attended the clinic.[2]

- The Appellant denied that he had accessed the employer's computer equipment when he visited the clinic and stated that his purpose in attending the clinic was to see a friend and colleague.

Documenting Client Care

[8] Complaints from the employer's funder resulted in an internal investigation, which concluded, among other things, that the Appellant had not adequately documented patient care for six patients from Dec 29, 2021 to Jan 3, 2022.

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[2] GD3-36.

[9] The Appellant admitted that he did not document care for these patients in the employer's clinical record system.

[10] The employer had internal policies and procedures in place respecting documentation, including #4.11.0 Interprofessional Documentation. The College of Nurses of Ontario sets standards of practice for the profession, and the Appellant was also bound by these.

Analysis

[11] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[12] The Commission says that the Appellant had failed to use proper PPE and was, subsequently banned from X by his employer. Despite being banned from attending the clinic, the Appellant attended this clinic, nonetheless. This constituted misconduct and was one of the reasons the employer terminated his employment.

[13] The Appellant says he was only prohibited from seeing clients at the clinic. This is supported by the Appellant's claim that on occasion the employer had him attend the clinic to obtain supplies. Additionally, the employer had patients visit the Appellant at his home.

[14] I accept the Appellant's claim that he was not told that he was barred from the clinic for all purposes.

[15] The notice from the funder to the employer was that the Appellant "not service clients at the clinic".[3] It is likely that the employer communicated this statement to the Appellant, not that he was prohibited from ever attending the clinic.

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[3] GD3-36.

[16] Whether he was visiting a colleague or accessing the computer for work-related reasons, the Appellant was not interacting with clients when he attended the clinic on March 10, 2022, and therefore did not violate the directive communicated to him by his employer.

[17] I therefore find that the Appellant did not commit the act alleged by the Commission, that is, attend X contrary to the instructions of his employer.

[18] However, I find that that the Appellant lost his job because he did not document client information over a six-day period, contrary to the requirements of his employment. This omission was one of the reasons for his termination, as explained in the termination of employment letter, dated April 1, 2022.[4]

[19] The Appellant admits that he was lagging behind in documenting client care.

[20] While he claims to have completed some documentation during the six-day period, at the hearing he agreed that he did not enter this information into the employer's clinical record system.[5]

[21] The employer's internal investigation of the matter supports this.

[22] I therefore find that the Appellant committed the omission alleged by the Commission. He did not complete adequate documentation of client care over a six-day period.

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

[23] The reason for the Appellant's dismissal is misconduct under the law.

[24] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] The Appellant doesn't have to have

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[4] GD3-35.
[5] See also GD3-35.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he/she doesn't have to mean to be doing something wrong) for his/her behaviour to be misconduct under the law.[8]

[25] There is misconduct if the Appellant knew or should have known that his/her conduct could get in the way of carrying out his/her duties toward his/her employer and that there was a real possibility of being let go because of that.[9]

[26] The Commission has to prove that the Appellant lost his/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 Appellant lost his/her job because of misconduct.[10]

[27] The Commission says the Appellant failed to complete the required documentation on patient files, violating the employer's policies and procedures on documentation of patient care, policies as stipulated by provincial and federal regulations, and standards set by the College of Nurses of Ontario.[11] Refusal to obey or comply with these norms constituted misconduct as the Appellant should have known that his actions could have resulted in a loss of his employment.

[28] The Appellant says that there was no misconduct:

- though he admits to lagging behind, he says he has evidence of documentation that he completed between December 29, 2021 to Jan 3, 2022;
- the Commission has not produced evidence of inadequate documentation of client care; and
- delays in completing documentation were caused by (or at least partially caused by) the employer, as there was a shortage of nursing staff.

[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[11] See for instance, GD3-43.

[29] There have been immense pressures on Ontario's health care system in the last few years because of the COVID 19 epidemic. The surge in need over the last few years has been felt by many Ontario health care workers.

[30] I accept that the Appellant's motives were good and that he prioritized the immediate health needs of those he cared for, often working beyond his set hours. Despite his laudable motives, however, the Appellant did not meet his employer's policies in relation to the documentation of patient care, at least not from December 29, 2021 to January 3, 2022.

[31] While the Commission did not provide any policy document from the employer, the requirement to record patient care information adequately is an industry standard, as evidenced in some of the general norms promulgated by the regulatory body for nurses in the province, the College of Nurses of Ontario, of which I take notice.[12]

[32] The evidence was that there was a clinical record system in operation and that the Appellant either did not document patient care information for the six-day period (he denies this) or he did not enter it into the record system (he admits this), though he was providing care for clients during this period. Either omission was sufficient to violate the employer's policies and procedures governing clinic practice.

[33] While I empathize with the Appellant who was overworked, adequate documentation of patient care was a core responsibility. Not inputting patient care information into the employer's internal record system resulted in an inadequate documentation of care. And while the lapse was short, only six days, it still breached a requirement of his employment. The Appellant was aware that his omission could jeopardize his employment, especially given the practical importance of timely and complete documentation to patient health outcomes, the employer's internal procedures for dealing with patient care information (such as the record system), and industry

[12] For instance, the CNO's *Documentation, Revised 2008* practice standard explains the regulatory and legislative requirements for nursing documentation.

standards which require the documentation of all phases of the nursing process, the maintenance of which would have been an expectation of his employer.

[34] The lapse was deliberate as it resulted from the Appellant prioritizing some of the responsibilities of his job over others.

[35] I find that the Commission has proven that there was misconduct.

So, did the Appellant lose his job because of misconduct?

[36] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

[37] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[38] This means that the appeal is dismissed.

Stuart O'Connell

Member, General Division – Employment Insurance Section