Citation: *TP v Canada Employment Insurance Commission*, 2024 SST 1656

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (671025) dated July 19, 2024 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Teleconference
Hearing date:	September 11, 2024
Hearing participant:	Appellant
Decision date:	September 12, 2024
File number:	GE-24-2930

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (as that term is explained, below).

[3] This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[4] The Appellant worked as an assistant manager at a retail store.

[5] The Appellant had a history of coming to work late. On February 15, 2024, her employer advised her both verbally and in writing that if she continued to come in late, she could be terminated.

[6] The Appellant was late for work on February 25, 2024. She had texted her supervisor at midnight the night before to advise her that she had an esthetician appointment the next morning and would be coming in late.

[7] The next morning, her supervisor responded that she was expected in on time. The Appellant says she left the esthetician as soon as she got her supervisor's text and was only about 30 minutes late for work.

[8] The Appellant's employer terminated her for being late. She applied for EI benefits.

[9] The Commission says it can't pay the Appellant benefits because she was terminated due to her own misconduct.

[10] The Appellant says her employer shouldn't have terminated her. She says that previous incidents of lateness that led to the February 15th warning were beyond her

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

control and were justified. In her view, her employer never should have issued the February 15th warning.

[11] The Appellant says she believed her reason for being late on February 25, 2024, would be tolerated. She claims her employer had tolerated lateness in similar circumstances in the past.

[12] The Appellant contends that she was an excellent employee and added value to the company. She didn't think her employer would actually terminate her just for being late, despite the written and verbal warnings she'd received.

[13] She argues that the Commission hasn't proven that her conduct was wilful or that she should have known there was a real chance she could be terminated for being late.

Matters I must decide first

Additional documents were added to the record

[14] At the hearing the Appellant indicated that she had sent the Tribunal documents the night before. I hadn't received those documents at the time of the hearing.

[15] The registry office followed up with the Appellant and had her resend the documents. They have been labelled GD6 and form part of the record.

A support person was present at the hearing

[16] The Appellant's mother was present at the hearing. She indicated that she would be participating as a support person.

[17] She wasn't sworn in as a witness, as she had no direct knowledge of the facts at issue. Her knowledge was limited to what she'd been told by the Appellant. So, she wasn't permitted to testify. But I did allow her to prompt the Appellant as to what facts the Appellant should include in her testimony.

Issue

[18] Was the Appellant terminated due to her own misconduct?

Analysis

[19] To answer the question of whether the Appellant was terminated because of misconduct, I have to determine two things. First, I have to determine why the Appellant was terminated. Then, I have to determine whether the law considers that reason to be misconduct.[2]

Why was the Appellant terminated?

[20] I find that the Appellant lost her job because she was late for work on February 25, 2024.

[21] This is the reason the Appellant's employer gave the Commission for having terminated her.[3]

[22] The Appellant doesn't dispute that this is why she was terminated. She argues that her supervisor didn't like her, and that other supervisors wouldn't have dealt with the situation in the same way. But she recognizes that being late is the reason she was terminated.

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

[23] I find that being late for work on February 25, 2024, was misconduct under the law.

[24] The term **misconduct**, as it is used in the *Employment Insurance Act*, doesn't have the same meaning as it does in common language. There doesn't have to be wrongful intent (in other words, you don't have to mean to be doing something wrong) for your behaviour to be misconduct under the law.[4]

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[2] The Commission has the burden of proving that the Appellant lost his job because of misconduct. It has to do so on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct. See *Minister of Employment and Immigration v Bartone*, A-369-88.
[3] GD3-20.
[4] See *Attorney General of Canada v Secours*, A-352-94.

[25] Misconduct is conduct that a claimant knew or should have known could get in the way of carrying out their duties toward their employer and could result in them being let go.[5] The conduct has to be wilful (in other words, conscious, deliberate, or intentional).[6] Or, it has to be so reckless that it's almost wilful.[7]

[26] The Appellant had been warned several times by her employer that her lateness was an issue. She received written warnings on November 30, 2023, and on February 15, 2024. The February 15th warning said that she could be terminated if she was late again.[8] And when she was given that written warning her supervisor told her if she was late one more time by even a minute she would be "finished".[9]

[27] Despite these warnings, the Appellant came to work late on February 25, 2024. She says she was leaving on vacation and needed to see her esthetician before leaving. At midnight the night before, she texted her supervisor to inform her she would be coming in late. Her supervisor didn't acknowledge the text and didn't give her permission to be late. But the Appellant went to her appointment, nonetheless.

[28] While at her appointment, the Appellant's supervisor let her know that she was expected to be in and that her lateness wouldn't be tolerated. She claims that she immediately left the appointment and went to work. She says she was about 30 minutes late.[10]

[29] The Appellant says she assumed her supervisor would give her permission to be late because another staff member was scheduled to be at the store when her shift was supposed to start. She says that other supervisors had allowed this in the past. And her current supervisor had allowed another employee to be late in similar circumstances. She admits she made the wrong judgment call when assuming this.[11]

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] GD3-24.
[9] GD3-10.
[10] Her employer told the Commission it was an hour, but I'm prepared to give her the benefit of the doubt.
[11] GD2-10.

[30] The Appellant claims that one of her district managers had told her it was alright to be 5-10 minutes late. But this was before she'd received the February 15th written and verbal warnings. After receiving them, I'm of the view that she should have understood that being 5-10 minutes late would no longer be tolerated. And in all events, in this case, she was more than 10 minutes late.

[31] The Appellant argues that the Commission hasn't met its burden of proof. I disagree. I find that the Commission has proven that the Appellant was terminated due to her own misconduct.

[32] The Appellant's conduct was clearly wilful. She made a decision to go to the esthetician, knowing that it would make her late for work. Her conduct was conscious and deliberate. The fact that she assumed there wouldn't be consequences doesn't change that.

[33] The Appellant says she had to go to the esthetician that day because she was leaving on vacation that evening. But this isn't an urgent or compelling reason not to be at work when scheduled. She didn't have to go to the esthetician. She chose to go. Being late wasn't beyond her control.

[34] The Appellant says she assumed her supervisor would give her permission to be late. She says there was no need for two employees to be present at 9 am because the store only opened at 10 am. And she claims that in the past, employees were permitted to be absent when another employee was present prior to the store opening.

[35] But given the Appellant's history of lateness, the written warning that further lateness could result in termination, and the clear verbal warning she received that if she was so much as a minute late, she'd be terminated, I don't see how she could have made such an assumption.

[36] I also don't accept her pretension that it isn't necessary for two employees to be at the store at 9 am. If she and another employee were both scheduled to be there at that time, I have to conclude that her employer felt her presence was necessary.

[37] Moreover, the Appellant only informed her supervisor that she would be late by sending her a text at midnight the night before—only 9 hours before her shift was scheduled to start. When she went to her appointment she hadn't yet heard back from her supervisor. But she went to the appointment, nonetheless.

[38] If the Appellant assumed she'd receive permission to be late in these circumstances, I find her conduct to have been reckless to the point that I consider it wilful.

[39] The Appellant says she didn't know that being late on February 25, 2024, would result in her termination. I don't see how she could possibly say this. Given the clear written and verbal warnings she received on February 15, 2024—only 10 days prior—the Appellant certainly should have known that by coming in late on February 25, 2024, there was a real risk she'd be terminated. If she didn't, it was wilful blindness in my view.

[40] The Appellant argues that her employer should have never given her the February 15th warning in the first place. She says the incidents that led to that warning were beyond her control—she had to be treated for lice, her mother was being treated for cancer, she had been sick, and her dogs had died. She says she should have contested the notice but didn't know that she could.

[41] The Appellant believes she was wrongly terminated and that her employer should have applied a less drastic sanction.

[42] The Appellant argues that she was a long-standing employee who received accolades from all of her other supervisors.[12] She claims the supervisor she had at the time she was terminated didn't like her very much. She says any of her other supervisors would have tolerated her being late on February 25, 2024. She says her supervisor at the time had no compassion and created a hostile work environment.

[12] She provided a note from a former supervisor attesting to this (GD6-5).

[43] Whether or not the Appellant deserved the February 15th warning, whether or not another supervisor would have allowed her to be late, and whether or not she was wrongfully terminated aren't relevant to determining if her conduct is misconduct under EI law.

[44] Case law makes it clear that I'm not to consider the employer's conduct when deciding if a claimant was terminated due to their own misconduct.[13]

[45] So, even if the Appellant's employer shouldn't have issued the February 15th warning, even if it should have tolerated her lateness, and even if it wrongly terminated her, it's not for me to decide those issues. They don't impact my decision that she was terminated due to her own misconduct.

[46] The Appellant was scheduled to begin her shift on February 25, 2024, at 9 am. Her employer expected her to be at work at that time. But instead of going to work at 9 am she went to a 9 am esthetician appointment and was late for work. She failed to fulfil her obligation to her employer to be present when scheduled.

[47] The Appellant had been clearly warned that if she was so much as a minute late, she would be terminated. She hadn't received permission to be late, but chose to go to her esthetician appointment, nonetheless. If the Appellant didn't understand the risks of her conduct, she certainly should have. Her employer made them perfectly clear on February 15, 2024. She should have known that she might be terminated if she was late again after receiving the February 15th verbal and written warnings.

[48] The Appellant's arguments don't convince me. There's no doubt that the Appellant was terminated due to her own misconduct, as that term is applied under EI law.

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[13] See *Canada (Attorney General) v McNamara* 2007 FCA 107; *Paradis v Canada (Attorney General),* 2016 FC 1282*; Dubeau v Canada (Attorney General),* 2019 FC 725; *Canada (Attorney General) v Caul*, 2006 FCA 251.

Conclusion

[49] The appeal is dismissed.

[50] I find that the Commission has proven that the Appellant was terminated due to her own misconduct.

[51] Because of this, she's disqualified from receiving EI benefits.

Elyse Rosen
Member, General Division – Employment Insurance Section