Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Emerenciana Mendonca
Representative:	Jeremy Rubenstein
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (633049) dated December 29, 2023 (issued by Service Canada)

Tribunal member:	Nathalie Léger
Type of hearing:	In person
Hearing date:	March 15, 2024
Hearing participants:	Appellant Appellant's representatives
Decision date:	March 24, 2024
File number:	GE-24-649

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant isn't disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost her job. The Appellant's employer said that she was let go because she made a child touch his pants after he had wet himself. I will refer to this as the "June 2023 incident" and give the context later in this decision. The employer, a Montessori school, said this was not a practice approved by the school and that it went against Montessori's values.

[4] Even though the Appellant doesn't dispute that this happened, she says that it does not constitute misconduct under the Act. She says that it was not a prohibited practice and that she did not know she could be fired for doing it.

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

Issue

[6] I have to decide if the Appellant lost her job because of misconduct.

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

Analysis

Facts and context

[7] Before I begin the legal analysis, it is important to explain in more details the factual situation that existed before and at the time of the termination. This is because the legal analysis will be heavily influenced by the facts that were proven by both parties. Without them, the legal analysis means nothing.

[8] The Appellant had been a teacher with the employer for 29 years at the time of her dismissal. She testified that she had been teaching toddlers for the last 19 years. In 2006, she got her official AIM - Montessori certification.

[9] The Commission did not provide any evidence of what is, or is not, part of the Montessori values and principles or what is, or is not, part of the training. Furthermore, the two policies referred to in the termination letter were not submitted into evidence by the Commission.[2]

[10] For the last two years, a boy with Down syndrome was in the Appellant's class. She testified that she developed a great relationship with the child. The child's father agrees with this assessment.[3] The child stayed two years in the Appellant's class because, at the end of the first year, he had not met his milestones.[4] He needed more time to reach them.

[11] One of the milestones he needed to reach was to be able to go to the toilet on his own. She started toilet training with this child at the beginning of the year (September 2023). This milestone was difficult for him to reach since he did not always recognize when he needed to go nor did he immediately know when he wet himself. This is why the Appellant used the hand-over-hand method.[5]

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[2] The policies that have been provided refer to employee discipline and termination, and to forbidden form of discipline toward children. See GD3-42 to 47.
[3] See GD2-21 at paragraph 4.
[4] See GD2-21 at paragraph 3.
[5] The employer recognizes that this method had no disciplinary connotation. It was simply meant to help the child differentiate between wet and dry. See GD3-40

[12] She described this method as gently placing her hands over the child's hand and having him briefly touch his wet pants while saying the word "wet" or "this is wet". She would then invite the child to go to the bathroom and to change himself into dry clothes. This is something she does with all the kids in her class.[6]

[13] To help with this issue and with other learning the child needed to acquire, an Occupational Therapist (OT) was brought in to help him. The Appellant testified that this OT was not Montessori trained. She started working with the child, in collaboration with the Appellant, in February of 2023. She was there for a period of 2 hours every second week.

[14] The Appellant testified that sensory experiencing and training was important in her work. She says that she was taught, when she took the Montessori training, to have the children touch their wet clothes to learn the difference between dry and wet clothing.[7] This method is also referred to as hand-to-hand guiding, because it means the teacher will put her hand over the child's hand to guide him or her to do what is needed. This is not to force the child to do it, but to guide the child toward the element you want him or her to notice.

[15] The Appellant also says that this method of teaching had been discussed with the child's father, who had no issues with it.[8] She used this method with all the children in her care and she thinks the regular teacher for the other group of toddlers does it too.[9]

[16] In the "Toddler Handbook" provided by the employer to the Commission, there are only two paragraphs about toileting and toilet learning.[10] The employer also confirmed that there is no policy on "guiding" or on sensory exploration.[11]

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[6] See GD3-25,
[7] See GD3-73.
[8] See GD2-21.
[9] See GD3-52.
[10] See GD3-67.
[11] See GD3-40.

Legal analysis

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

Why did the Appellant lose her job?

[18] I find that the Appellant lost her job because of the June 2023 incident.

[19] The Appellant agrees that this is the reason why she lost her job.[12]

[20] The Commission seems to argue that the Appellant lost her job for more than this single incident. When explaining why it believes the Appellant's conduct was wilful, the Commission refers to past disciplinary measures that were given to the Appellant for other conduct.[13]

[21] But later on in its argumentation, the Commission states, "there is no question that the act of June 2023, occurred and that the client was dismissed for her actions of hand guiding the child". In the next paragraph it says, "The Commission concluded that the Claimant's actions of having the child touch their wet clothing constituted misconduct within the meaning of the Act (…)".[14]

[22] Furthermore, in the termination letter dated September 18, 2023, the employer clearly puts the emphasis on the June 2023 incident and concludes that "the incident" cannot be justified and irreparably damaged the employment relationship.[15]

[23] Finally, when the employer spoke with the Commission, both in the first inquiry and in reconsideration, the emphasis was placed on the June 2023 incident.[16]

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[12] See GD2-15, paragraph 18.
[13] See GD4-7.
[14] See GD4-7, 6th and 7th paragraphs.
[15] See GD3-55 and 56.
[16] See GD3-25 and GD3-

[24] I find that even if the employer used past disciplinary measures as compounding the impact of the June 2023 incident to support the dismissal, it is really that incident that led to the dismissal. This conclusion stems from the fact that it is that incident which led to a complaint and to the termination. The other incidents had not been considered sufficient to warrant a dismissal. Only this one was.

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

[25] The reason for the Appellant's dismissal isn't misconduct under the law.

[26] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[17] Misconduct also includes conduct that is so reckless that it is almost wilful.[18] The Appellant 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.[19]

[27] There is misconduct if the Appellant 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.[20]

[28] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.[21]

[29] The Commission, in its written argumentation says that only two conditions must be met for a situation to constitute misconduct: that the action be wilful, and that there is a causal relationship between the misconduct and the dismissal.[22]

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[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[19] See *Attorney General of Canada v Secours*, A-352-94.
[20] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[21] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[22] See GD4-7.

[30] I disagree. As seen in the preceding paragraphs, the jurisprudence is clear. The Commission has the burden to prove three things: [23]

a) That the Appellant's action was wilful.

b) That she knew or ought to have known that it could get in the way of carrying out her duties to her employer.

c) That she knew or ought to have known that there was a real possibility of being let go because of this action.

[31] I will look at each of these in turn.

– **Wilfulness**

[32] There is no dispute that the incident of June 2023 was wilful.[24] The Appellant testified that this is how she was taught to do toilet training and that she was using the same method will all the children in her class.[25]

[33] It is important to note, again, that wilfulness does not imply negative intent. An action can be wilful without an intention to hurt or punish. In this case, the employer recognized that the Appellant did not have the intent to punish the child and that it was used as a learning method.[26] What the employer says is that this method was not appropriate and not part of the Montessori approved methods of teaching.

[34] The Commission says that the action was wilful because the Appellant continued using "teaching practices" that she had been warned not to use in two previous disciplinary measures.[27] This is simply untrue. Those disciplinary measures had nothing to do with toilet training, guiding, or the hand-over-hand method. The February 2021 measure dealt with relations with other staff members in her classroom[28] while the

[23] The fourth part of the test, which is to prove the causal relationship between the alleged misconduct and the dismissal, has already been dealt with in the previous section.
[24] See GD2-15.
[25] See GD3-52.
[26] See GD3-40.
[27] See GD4-7.
[28] See GD3-57.

January 2023 measure dealt with an incident where she briefly put a child outside as a way to calm in down.[29]

– **Impact on her duties to the employer**

[35] I find that the Appellant did not, and could not have reasonably known, that her action could interfere with her duties to her employer.

[36] The Commission pleads that the Appellant's actions were misconduct because they "were contrary to the employer policy, and the Code of Ethics for the Montessori Teacher."[30]

[37] To reach this conclusion, the Commission relies solely on the termination letter.[31] Again, neither the Code of Ethics for the Montessori Teachers or the policy that is referred to in the termination letter has been entered into evidence.

[38] The Appellant testified that she has been taught to use the hand-over-hand method for toilet training. For her this made sense since the Montessori principles are geared toward sensory learning.[32] She also said that she has been using this method for close to 19 years, with all the children, without ever have been told that it was inappropriate.[33]

[39] When questioned by the OT about this method of teaching, the Appellant answered that it was "Montessori-approved". This is not denied by the Commission or the employer.[34] It must also be noted that the complaint made by the OT to the school director was not entered into evidence. It is therefore impossible to know how the incident was described to the employer.

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[29] See GD3-58.
[30] See GD4-6.
[31] See GD4-7. Pages GD3-55 and GD2-24 are cited in support of this statement. Those are copies of the termination letter.
[32] See GD3-73.
[33] See GD3-52, GD3-73.
[34] See GD3-55, 2nd paragraph of the termination letter.

[40] What is in evidence is an email that was sent by the OT to the Appellant where she recommends no longer using this method and where she provides a link to an article “that discusses rethinking the hand-over-hand approach”.[35]

[41] This is not determinative of the appropriateness of using this method of teaching or of its correspondence with the Montessori way of teaching. First, the Appellant testified that, to her knowledge, the OT was not Montessori-trained. Second, the OT is an outside consultant and does not have any disciplinary or supervisory power over the Appellant. Finally, nothing was entered into evidence by the Commission (or the employer) to show that this method of teaching could not be used.

[42] Furthermore, the Appellant testified that the child was not at all troubled by the fact of touching his wet pant. His father signed an affidavit in which he says that he did not see this method of teaching as problematic – on the contrary, he said he “was not upset or concerned” about it.[36] If it had been upsetting to the child, then it would have been reasonable for the Appellant to question this method of teaching. But nothing in the evidence shows that it was.

[43] It is clear from all of the above that the Appellant did not know, or ought to have known, that her employer did not approve of the hand-over-hand method of teaching in the context of toilet training. I therefore find that the Commission has not met this element of the legal test.

– **Possibility of dismissal because of the misconduct**

[44] I find that the Appellant did not know and could not have known that she could be terminated for the alleged misconduct.

[45] The Commission again relies on past disciplinary measures about other incidents, unrelated to the hand-over-hand method of teaching toilet training to submit that the Appellant should have known she could be fired for what she did.[37] But because

[35] See GD3-60.
[36] See GD2-21.
[37] See GD4-7.

they were about totally different facts, I do not see how the Appellant should have known she could be dismissed because of the June 2023 incident.

[46] Again, the Appellant has testified (and maintain throughout her discussions with the Commission and the employer) that she has been using this method of teaching with the children in her care for close to 20 years.[38]

[47] There is nothing in evidence that suggests that she had ever been warned that it was not an approved method of teaching. There is nothing in evidence that suggests she should have known in any other way – through guidelines or training by the employer for example – that his method of teaching was not, or no longer, permitted. And there is nothing in the evidence to show that it had such a detrimental effect on the child or on the other children under her care that she should have questioned herself about using this method of teaching.[39]

[48] Therefore, I must reach the conclusion that the Commission has not met its burden of proving that the Appellant knew or ought to have known that she could be dismissed because of the June 2023 incident.

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

[49] Based on my findings above, I find that the Appellant didn't lose her job because of misconduct.

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[38] See GD2-17.

[39] It is important to note that my decision is not concerned about the appropriateness of the measure imposed by the employer or the other concerns (public image) that seem to underpin their decision. The only decision I have to make is this : does the action constitute misconduct under the Employment Insurance Act.

Conclusion

[50] The Commission hasn’t proven that the Appellant lost her job because of misconduct. Because of this, the Appellant isn’t disqualified from receiving EI benefits.

[51] This means that the appeal is allowed.

Nathalie Léger
Member, General Division – Employment Insurance Section