[TRANSLATION]

Citation: *A. O. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 25

Appeal No: GE-14-32

BETWEEN:

A. O.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Jean-Philippe Payment

HEARING DATE: February 24, 2014

TYPE OF HEARING: In person

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE

The claimant participated in the hearing and brought her spouse and former co-worker as witnesses. The employer's representative participated in the hearing.

DECISION

[1] The Tribunal dismisses the claimant's appeal and finds that she is not entitled to receive Employment Insurance benefits as of September 15, 2013, because she lost her employment by reason of her own misconduct.

INTRODUCTION

[2] On October 17, 2013, the Canada Employment Insurance Commission (the Commission) approved the claimant's Employment Insurance benefit claim because the employer failed to provide enough information to show that the claimant lost her employment by reason of her misconduct (Exhibit GD3-19). On October 28, 2013, the employer requested a reconsideration of the Commission's decision to entitle the claimant to receive benefits (Exhibit GD3-21). In its revised decision following the employer's request for reconsideration, the Commission informed the claimant that on the basis of a second analysis, [translation] "the claimant's dismissal constituted misconduct" (Exhibit GD3-34). The claimant thus appeals from the Commission's revised decision to disentitle her from receiving benefits as of September 15, 2013.

TYPE OF HEARING

[3] The hearing was held in person for the reasons in the notice of hearing (Exhibit GD1-1).

ISSUE

[4] The Tribunal must determine whether the claimant lost her employment by reason of her own misconduct under sections 29 and 30 of the *Employment Insurance Act* (the Act).

APPLICABLE LAW

[5] Paragraphs 29(*a*) and (*b*) of the Act indicate that for the purposes of sections 30 to 33, (*a*) "employment" refers to any employment of the claimant within their qualifying period or their benefit period; (*b*) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers.

[6] Subsection 30(1) of the Act stipulates that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

> *(a)* the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> *(b)* the claimant is disentitled under sections 31 to 33 in relation to the employment.

[7] Subsection 30(2) of the Act stipulates that subject to subsections (3) to (5), the weeks of disqualification are to be served during the weeks following the waiting period for which benefits would otherwise be payable if the disqualification had not been imposed and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[8] In *Canada (Attorney General) v. Larivée* (2007 FCA 132), the Federal Court of Appeal established that the Commission must satisfy its onus of proving on a balance of probabilities that any action by the claimant constituted misconduct.

[9] In *Canada (Attorney General) v. Tucker* (A-381-85), the Federal Court of Appeal (the Court) specified what constitutes misconduct, which the Act does not do. Therefore, the Court established that in order to "… constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."

[10] In *Canada (Attorney General) v. Hastings* (2007 FCA 372), the Court described and refined the notion of misconduct. Therefore, the Court established that "… there can only be misconduct if the conduct is deliberate, that is, the actions that lead to the dismissal were conscious, wilful and intentional. In other words, there is only misconduct when the claimant knows or should have known that his conduct would impede on his ability to execute his obligations towards his employer and that, as a result, it was possible for him to be dismissed."

[11] In *Locke v. Canada (Attorney General)* (2007 FCA 262), the Court stated that for the alleged action to constitute misconduct, the claimant must have known that he would likely be dismissed as a result of his action.

[12] In *Canada (Attorney General) v. McNamara* (2007 FCA 107), the Court stated that the relationship between employment and misconduct is not one of timing, but one of causation.

[13] In *Canada (Attorney General) v. Cartier* (2001 FCA 274) and *Smith v. Canada (Attorney General)* (A-875-96), among others, the Court stated that there must be a causal link between the claimant's alleged misconduct and the loss of employment. The misconduct must cause the loss of employment and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while he or she was

employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment.

[14] In *Auclair v. Canada (Attorney General)* (2007 FCA 19), the Court stated that it was not for the Board of Referees to consider whether dismissal was the appropriate disciplinary action in view of the alleged misconduct.

[15] In *Fleming v. Canada (Attorney General)* (2006 FCA 16), the Court stated that it is not the role of the Tribunal to determine whether the employer was guilty of misconduct by dismissing the applicant such that this would constitute unjust dismissal, but whether the applicant was guilty of misconduct and whether this misconduct resulted in his losing his employment.

[16] In *Fleming v. Canada (Attorney General)* (2006 FCA 16), it is indicated that even by admitting that the employer was overzealous and always targeting the claimant, this overzealousness or determination to watch out for the claimant's shortcomings does not do away with their existence and does not reduce their importance.

[17] In *Fakhari v. Canada (Attorney General)* (A-732-95), the Court maintained that "… An employer's subjective appreciation of the type of misconduct which warrants dismissal for just cause cannot be deemed binding on a Board of Referees. It is not difficult to envisage cases where an employee's actions could be properly characterized as misconduct, but the employer's decision to dismiss that employee will be rightly regarded as capricious, if not, unreasonable. We do not believe that an employer's mere assurance that it believes the conduct in question is misconduct, and that it was the reason for termination of the employment, satisfies the onus of proof which rests on the Commission under section 28."

EVIDENCE

[18] The documentary evidence in the file is as follows:

a) On September 9, 2013, the claimant did not report for work and failed to inform her employer that she would not be reporting for work (Exhibit GD3-6);

b) An initial benefit claim dated September 11, 2013 (Exhibit GD3-13);

c) A Record of Employment indicating the claimant's name and the employer's name and Code M, or dismissal, as the reason for being issued (Exhibit GD3-14);

d) A pre-intervention report from Human Resources on the claimant's attitude toward clients and certain co-workers (Exhibit GD3-25);

e) A summary of the Human Resources meeting with the claimant that took place in late August, and a final note stating that the employer should meet with the claimant at the start of the week following the email dated September 6, 2013 (exhibits GD3-26 and 27);

f) A summary of the steps provided by Human Resources that led to the claimant's dismissal (Exhibit GD3-28);

g) The company's work schedule indicating [translation] "A. O.: I no longer want to be on this schedule. I no longer want to do any urgent work." (Exhibit GD3-30);

h) A letter of dismissal signed by the employer's representative and addressed to the claimant (Exhibit GD3-31);

i) When the claimant was hired, she did not sign a job description, but she had to be available 24 hours a day, seven days a week (Exhibit GD3-32);

j) Technicians are normally on a day schedule (Exhibit GD3-32);

k) If technicians are not at a disaster site, they work at the employer's warehouse, and after 40 hours or after their normal day, technicians are paid overtime (Exhibit GD3-32);

l) In September 2013, the employer changed the work schedule for a trial period, and since the schedule did not [translation] “work,” the employer returned to the old schedule (Exhibit GD3-32).

[19] The documentary evidence provided at the hearing is as follows:

a) A timesheet for the claimant and her spouse for the week of September 9 to 13, 2013 (Exhibit GD8-2);

b) A document signed by a few former co-workers stating that the claimant organized a “No show” day for September 10, 2013 (Exhibit GD8-3).

SUBMISSIONS OF THE PARTIES

[20] The claimant stated the following:

a) The employer did not explain to her the reason for her dismissal (Exhibit GD3-16);

b) One week before her dismissal, her employer met with her to inform her of complaints made by clients concerning her behaviour (Exhibit GD3-16);

c) The claimant did not report for work on September 9, 2013, because she was outside the region and she decided to extend her weekend (Exhibit GD3-16);

d) She failed to notify her employer that she would be absent from work on Monday, September 9, 2013, because her cellphone was not working (Exhibit GD3-16);

e) She did not organize a “No show” day, but stated that she had heard about it (exhibits GD3-18 and GD3-33);

f) She did not report for work late on Tuesday, September 10, 2013 (Exhibit GD3-18);

g) She arrived at work late on Tuesday, September 10, 2013, because of traffic (Exhibit GD3-33);

h) It is a stretch to state that, at 120 lbs, she could make a house vibrate (Hearing);

i) There was not much of a difference between her normal attitude and her attitude in her last weeks of work for the employer (Hearing);

j) Regarding the points discussed with Human Resources, there was no plan for corrective action or date set for a subsequent follow-up meeting (Hearing);

k) She was unaware of the meeting on Monday, September 9, 2013, presented by the employer (Hearing);

l) If she had known that she would be subject to disciplinary action on Monday, September 9, 2013, the claimant would have reported for work (Hearing);

m) She sometimes asked her co-workers for urgent work hours because she enjoyed her work (Hearing);

n) She did not instigate the “No show” day (Hearing);

o) The new type of schedule would have placed her at a major financial disadvantage (Hearing);

p) When she was hired, although she did not sign a contract, she was informed that she had to start at 8:00 a.m., and she never knew when she would finish (Hearing);

q) She did not want to start, based on the new schedule, at noon after a day of urgent work, and at the meeting when the new schedule was presented, the employees were clearly informed that they could refuse to accept the new schedule (Hearing);

r) She did report for work late on Tuesday, September 10, 2013, but not more than an hour late, about thirty minutes (Hearing);

s) She went to see her boss immediately after arriving on Tuesday, September 10, 2013 (Hearing);

t) She was ready to face the consequences for the day that she failed to report for work (Hearing);

u) One of her former co-workers met with her and her spouse at home to encourage her to take part in a "No show" day (Hearing);

v) She found that the employer was not consistent in its arguments because in an internal email, the employer indicated that it wanted to dismiss her because she did not change her behaviour following a meeting with Human Resources, and in a conversation between the employer and Service Canada, the employer stated that it did not dismiss her as a result of her behaviour (Hearing);

w) She was not informed of the reasons for her dismissal (Hearing);

x) She did not intend to leave her employment, but she wanted to return to school (Hearing);

y) Her immediate supervisor is known in the company as a person who behaves erratically and as a person who has difficulty interacting with others (Hearing);

z) She deduced that she was the target of her immediate supervisor's temperament in her last weeks of work (Hearing);

aa) Within a short timeframe, she was offered two wage increases, which shows that she was valued by her employer (Hearing);

bb) She was dismissed only because of the presumption that she arranged the "No show" day (Hearing);

cc) She was not informed when she was dismissed that she was dismissed because of the alleged "No show" day (Hearing).

[21] The witness stated the following:

a) The behaviour of the claimant's supervisor was very erratic, he did not have a great deal of tact, he was rude and he gave curt orders (Hearing);

b) The claimant's supervisor took specific training on how to interact with others (Hearing).

[22] The employer stated the following:

a) The employer met with the claimant one week before her dismissal because of her inappropriate behaviour at a client's residence (Exhibit GD3-17);

b) The claimant reported for work over an hour late on Tuesday, September 10, 2013, but she was not dismissed for that reason (Exhibit GD3-17);

c) The claimant tried to organize a "No show" day to protest against the new measures for urgent work (Exhibit GD3-17);

d) The employer received a number of complaints about the claimant's behaviour and work from clients, co-workers and supervisors (Exhibit GD3-20);

e) All employees are on call and required to be available to work nights and weekends, but the claimant wrote on the schedule [translation] "I no longer want to be on this schedule. I no longer want to do any urgent work." (Exhibit GD3-22);

f) At the meeting scheduled for Monday, September 9, 2013, the employer would have met with the claimant to inform her that if she no longer wanted to do urgent work, she could no longer work for the company (Exhibit GD3-22);

g) In the end, only she and her spouse participated in the "No show" day (Exhibit GD3-22);

h) On Tuesday, September 10, 2013, an hour after the normal start time, she reported for work without seeing her supervisor to discuss her late arrival the day before or specifically her late arrival on that day (Exhibit GD3-22);

i) The claimant sent text messages to the employer's technicians to encourage them not to report for work (Exhibit GD3-22);

j) At the meeting with the claimant on September 11, 2013, the claimant was aware of the reason for the meeting and she informed her employer of her intention to return to school (Exhibit GD3-22);

k) The employer met with the claimant in late August after ten complaints were made about her by clients or co-workers (Hearing);

l) It is true that the claimant did not know that the employer prepared for a Human Resources meeting on Monday, September 9, 2013 (Hearing);

m) The employer did not see an improvement in the claimant's attitude after the first Human Resources meeting that took place in late August (Hearing);

n) There was no longer any contact between the claimant and her immediate supervisor (Hearing);

o) After seeing that co-workers were reporting for work despite the "No show" day organized by the claimant, she and her spouse decided to report for work (Hearing);

p) It is false to state that the claimant tried to return to work (Hearing);

q) It is true that the claimant's immediate supervisor received training to help him with his temperament and that he could have mood swings, but they were never aimed at anyone in particular (Hearing);

r) The employer questioned the claimant's integrity in this case (Hearing);

s) Improvement plans were applied only very recently to employees in the company (Hearing);

t) The claimant genuinely committed misconduct and should not be entitled to receive benefits (Hearing).

[23] The Respondent stated the following:

a) It is the responsibility of the Commission to gather all the information required to determine whether or not a person lost his or her employment by reason of his or her own misconduct (Exhibit GD4-6);

b) The employer is expected to explain precisely what actions or omissions led to the dismissal and what information was relied upon to conclude that the person in question committed such actions or omissions (Exhibit GD4-6);

c) The employer is not required to prove that the actions or omissions in question constitute misconduct under the Act nor is the Commission to rely solely on the employer's belief that the act in question constituted misconduct (Exhibit GD4-6);

d) In many instances, the versions of the facts provided by the parties differ appreciably, when they are not flatly contradictory. The officer must rely on the good faith of those providing evidence and weigh the credibility of the information and testimony given (Exhibit GD4-7);

e) It gave credibility to the employer's version rather than the claimant's version because the employer provided the details and evidence to show all the claimant's actions that resulted in her dismissal (Exhibit GD4-7);

f) The claimant's explanations lack credibility because in her first version, she denied arriving late on September 10, 2013 (Exhibit GD4-7);

g) The claimant did not provide any evidence to contradict all the detailed information given by the employer (exhibits GD4-7 and 8);

h) The only evidence that the claimant could provide is the testimony of her spouse, who worked for the same company and who is no longer working there, which casts a strong doubt on the information that he could provide for the claimant's benefit (Exhibit GD4-8);

i) In this case, the employer provided all the details and evidence showing that the claimant acted deliberately to lose her employment (Exhibit GD4-8).

ANALYSIS

[24] Subsection 30(1) of the Act states that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct, and subsection 30(2) of the Act states that the weeks of disqualification are to be served during the weeks following the waiting period for which benefits would otherwise be payable if the disqualification had not been imposed. *Larivée* (2007 FCA 132) established that the Commission must satisfy its onus of proving that any action by the claimant constituted misconduct. However, given that the Act does not establish what constitutes misconduct, *Tucker* (A-381-85) defined misconduct by indicating that the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance. More recently, *Hastings* (2007 FCA 372) added that there can only be misconduct if the conduct is deliberate, that is, the actions that led to the dismissal were conscious, wilful and intentional. In other words, there is only misconduct when the claimant knows or should have known that his conduct would impede on his ability to execute his obligations towards his employer and that, as a result, it was possible for him to be dismissed.

[25] In *Locke* (2007 FCA 262), the Court stated that for the alleged action to constitute misconduct, the claimant must have known that he would likely be dismissed as a result of his action. In addition, *Auclair* (2007 FCA 190) and *Flemming* (2006 FCA 16) indicated that it was not for the Tribunal to consider whether dismissal was the appropriate disciplinary action in view of the alleged misconduct or whether the employer was guilty of misconduct by dismissing the applicant such that this would constitute unjust dismissal, but whether the applicant was guilty of misconduct and whether this misconduct resulted in his losing his employment.

[26] In this case, the Commission argued that it gave credibility to the employer’s version rather than the claimant’s version because the employer provided the details and evidence to show all the claimant’s actions that resulted in her dismissal. The Commission added that the claimant’s explanations lack credibility because in her first version, she denied arriving late on

September 10, 2013, and she did not provide any evidence to contradict all the detailed information given by the employer. The Commission stated that the only evidence that the claimant could provide is the testimony of her spouse, who worked for the same company and who is no longer working there, which casts a strong doubt on the information that he could provide. Lastly, the Commission emphasized that in this case, the employer provided all the details and evidence showing that the claimant acted deliberately to lose her employment.

[27] The employer stated that it met with the claimant in late August 2013 because about 10 people, including clients, complained about the claimant's attitude. The employer stated that the claimant did not report for work on September 9, 2013, but she would not have been dismissed for that reason if she had not organized a "No show" day, in which the other employees did not take part. The employer mentioned the fact that the claimant indicated on the work schedule that she did not want to be on the schedule and she no longer wanted to do urgent work. The employer added that when the claimant was hired, it was agreed that she had to be available for work 24 hours a day, seven days a week. The employer stated that the day that it wanted to meet with the claimant, she did not report for work, and the following day she did not try to explain her absence for either the previous day or the current day. The employer stated that the claimant sent text messages to other employees to encourage them not to report for work on Tuesday, September 10, 2013. The employer stated that during the meeting with the claimant on Wednesday, September 11, 2013, the claimant seemed to know the reason for the meeting and that it is false to state that the claimant tried to return to work after that day. The employer also explained that it is true that the claimant's immediate supervisor received training on staff management and that he could have mood swings, but they were never aimed at anyone in particular. Lastly, the employer stated that the follow-up plans were applied to employees only very recently in the company.

[28] The claimant stated that she did not know, on the day of her dismissal, the reasons why she was dismissed. She stated that it is true that she did not report for work on Monday and that she was ready to face the consequences. The claimant stated that she did not contact her employer on Monday, September 9, 2013, or on the morning of Tuesday, September 10, 2013, to inform her employer that she may be arriving late. In addition, the claimant stated that she

did not organize the “No show” day, but she was informed about it by a co-worker who was the instigator of that day. The claimant stated that the employer’s version seemed to contain contradictions regarding its intention to dismiss her and when it believed was the right time to do so. The claimant stated that on the one hand, the employer indicated that if she had not organized the “No show” day, she would have remained employed, but on the other hand, the employer indicated that she would have been dismissed regardless because the employer found that her attitude had not changed since her meeting with Human Resources. The claimant confirmed that she was the one who signed the timesheet stating that she refused to accept the new type of schedule, but that it was a stretch to state that she could make a house vibrate at her weight and that there was not much of a difference between her attitude in her last weeks of work and her attitude in the weeks before. The claimant stated that she did not receive from the employer a corrective action plan or dates for subsequent meetings to follow up on the Human Resources meeting in late August. Lastly, the claimant stated that she enjoyed her work and that she was valued. She provided as evidence the fact that she was offered two wage increases in a short timeframe, which shows that she was valued, but that she was the target of her immediate supervisor’s erratic behaviour in the weeks before her dismissal.

[29] In this case, the Tribunal determined that the Commission proved that the claimant committed misconduct. However, in a case of misconduct such as this one, it is not important for the Tribunal to know or recognize what constitutes misconduct in the context of the company. Instead, the Tribunal will analyze all the claimant’s actions that resulted in her dismissal in this case, as proposed in *Fakhari* (A-732-95).

[30] It is therefore clear to the Tribunal that the claimant must have known that a failure to be prompt or to show a collaborative attitude could result in her dismissal, following her meeting with the employer in late August 2013. The claimant’s acts or omissions on Monday, September 9, and Tuesday, September 10, 2013, constitute misconduct for the Tribunal.

[31] When she was advised to change her attitude in late August, the claimant should have known that the employer’s Human Resources would closely monitor her actions even without

a specific or objective analytical framework. The Tribunal cannot assess the relevance of a monitoring framework's implementation in the company, as described by the claimant, because the company's Human Resources methods and procedures are not reviewable under the Act and it is not for the Tribunal to criticize them.

[32] Regarding the supposed "No show" day, the employer provided a statement signed by employees indicating that the claimant organized the day of protest. It is not for the Tribunal to criticize an employee's approach to protesting the employer's procedures. However, the Tribunal must assess whether the action, within the context of the claimant's work, constituted misconduct. Since it appears that this day of protest did not take place in the end and that the employer failed to provide probative evidence on the subject, it seems that the idea for the day cannot be attributed to the claimant based on the mere suspicions or complaints of a small group of people who may benefit from blaming a former co-worker who has already been dismissed. At the hearing, the claimant also stated that the protest day was absolutely not her idea. It was solely the idea of a former co-worker, who she identified at the hearing, who the Tribunal will not name for obvious confidentiality reasons, and who seems to still work for the company. For these reasons, the argument of the "No show" day's organization is not conclusive and cannot be accepted in the analysis of the facts surrounding the claimant's alleged misconduct in this case.

[33] At the hearing, the claimant referred to the fact that the employer changed its version of why it intended to dismiss her during the discussion process with the Commission. According to the claimant, the employer's intention went from not dismissing her for failing to report for work without informing her supervisor on Monday, September 9, 2013, to dismissing her outright a few days later. Unfortunately for the claimant, the Tribunal cannot accept this argument because whether an employer dismisses her on the basis of certain facts or whether the thought process resulting in her dismissal evolves is outside the Tribunal's control and jurisdiction. The mere fact that the employer's thought process can evolve or shift does not change the acts committed by the claimant against her employer. The subjective follow-up on the consequences for the acts committed by the claimant is solely the employer's responsibility.

[34] At the hearing, the claimant argued, with the support of her witness, that she experienced two difficult weeks with her supervisor before her dismissal. The supervisor, who behaved erratically, was allegedly more irritable with her than with other employees. Even though the employer acknowledged that the supervisor in question was sometimes cantankerous, the fact remains, as indicated in *Fleming* (2006 FCA 16) that [translation] “even by admitting that the employer was overzealous and always targeting the claimant, this overzealousness or determination to watch out for the claimant’s shortcomings does not do away with their existence and does not reduce their importance.” In other words, the supervisor’s extreme behaviour, as observed by the claimant, could have been reported to the company’s highest authority, who could have taken action in due course with respect to the supervisor.

[35] Lastly, the Tribunal finds that the claimant’s actions on Monday, September 9, 2013, and Tuesday, September 10, 2013, amounted to misconduct pursuant to the Act and the case law.

[36] The claimant was monitored by her employer and her employer had been asking her to change her attitude and actions since late August 2013. It was certainly possible that the claimant, by deliberately not reporting for work on Monday and by not informing her employer of her absence, could face the disciplinary consequences of her choices. The Tribunal finds that the claimant could have expected a penalty, which she herself anticipated, or a penalty up to and including dismissal following the discussion with the employer in late August 2013. Since the claimant herself anticipated a disciplinary consequence for her actions on Monday, September 9, 2013, the claimant’s situation on that day falls under the definitions of misconduct in *Tucker* (A-381-85) and *Hastings* (2007 FCA 372). The Tribunal finds that her late arrival for work on Tuesday, September 10, 2013, with or without a “No show” day, sealed the employer’s decision to dismiss her. As the claimant told the Tribunal previously, she had a cellphone, which enabled her to call while on the road, or before leaving the house, to inform her employer that she would likely be late and why. Since she acknowledged that her late arrival the day before was deliberate, the claimant should have known that arriving

late for work on Tuesday without informing her employer would likely result in her dismissal, as argued in *Locke* (2007 FCA 262).

[37] Lastly, the Tribunal finds that the claimant committed misconduct pursuant to the Act and the case law and that, as a result, she must be disentitled from receiving Employment Insurance benefits.

CONCLUSION

[38] The appeal is dismissed.

Jean-Philippe Payment
Member, General Division

DATE OF REASONS: April 11, 2014