[TRANSLATION]

Citation: *H. G. v. Canada Employment Insurance Commission,* 2015 SSTGDEI 34

Appeal #: GE-14-4559

BETWEEN:

H. G.

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 18, 2015
TYPE OF HEARING:	In-person
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

The Claimant attended the hearing with her representative.

DECISION

[1] The Tribunal allows the Claimant's appeal and determines that she should not be disqualified from receiving benefits under sections 29 and 30 of the *Employment Insurance Act* (the Act).

INTRODUCTION

[2] The Claimant filed a claim for regular benefits on August 22, 2014 (Exhibit GD3-15). On October 1, 2014, the Canada Employment Insurance Commission (the Commission) informed the Claimant in writing that Employment Insurance benefits would not be paid to her because of her presumed misconduct (Exhibit GD3-30). On October 14, 2014, the Claimant requested that the Commission reconsider its initial decision (Exhibits GD3-27 and 28). On November 10, 2014, the Commission gave written notice of its decision to uphold its initial decision not to pay Employment Insurance benefits because of misconduct effective August 24, 2014 (Exhibit GD3-58). The Claimant therefore filed an appeal to this Tribunal from the Commission's decision to disqualify her from receiving benefits (Exhibit GD2).

TYPE OF HEARING

[3] The hearing was held for the reasons given in the Notice of Hearing (Exhibit GD1-1).

ISSUE

[4] The Tribunal must decide whether the Claimant lost her employment because of her own misconduct under sections 29 and 30 of the Act.

APPLICABLE LAW

[5] According to paragraphs 29(*a*) and (*b*) of the Act, 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; and (*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] According to subsection 30(1) of the Act, 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 states 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 312), the Federal Court of Appeal established that the determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts.

[9] In *Canada (Attorney General) v. Tucker* (A-381-85), the Court specified what constitutes misconduct. The Court established that "in order to constitute misconduct the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance".

[10] In *Canada (Attorney General) v. Hastings* (2007 FCA 372), the Court qualified and refined the concept of misconduct. The Court established that there is misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[11] 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.

[12] In *Canada (Attorney General) v. Cartier* (2001 FCA 274) and *Smith v. Canada (Attorney General)* (A-875-96), among other decisions, the Court stated that there must be a causal relationship between the misconduct of which a claimant is accused and the loss of their 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 employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment.

[13] In *Fakhari v. Canada (Attorney General)* (A-732-95), the Court argued 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 would 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 ... "

EVIDENCE

[14] The evidence in the file is as follows:

(a) description of a typical day of a department manager for the employer (Exhibits GD3-22 and 46);

(b) description of the tasks of a department manager for the employer (Exhibits GD3-44 and 45);

(c) description of the tasks of a customer service representative for the employer (Exhibits GD3-47 and 48);

(d) description of a typical day of a customer service manager for the employer (Exhibit GD3-49);

(e) a change of position notice dated September 5, 2012, according to which the Claimant was demoted from department manager to sales representative (Exhibit GD3-21);

(f) results of medical imaging dated March 21, 2013, which show an inactive frontal meningioma (tumour) and pansinusitis resulting from the mass (Exhibit GD3-32);

(g) an oral warning for failing to comply with the employer's policy on respect for others dated April 11, 2013 (Exhibit GD3-52);

(h) a first written warning for not completing the tasks requested by the employer in accordance with the employer's directive on discipline, dated June 25, 2013 (Exhibit GD3-53);

(i) a second written warning for showing a lack of respect toward colleagues and superiors in accordance with the employer's directive on discipline, dated November 14, 2013 (Exhibit GD3-54);

(j) a third written warning for not completing the tasks requested by the employer, dated June 20, 2014 (Exhibit GD3-55);

(k) a last-chance letter addressed to the Claimant and dated August 12, 2014, in which the Claimant is told to complete the tasks of her position (Exhibits GD3-20 and 56);

(l) a Record of Employment indicating that the last day paid is August 19, 2014, and the issue code is M or Dismissal (Exhibit GD3-17);

(m) a claim for Employment Insurance regular benefits dated August 22, 2014 (Exhibit GD3-15);

(n) a note from an ophthalmologist dated October 4, 2014, whose findings are illegible (Exhibit GD3-30);

(o) the employer had told her she would be temporarily replacing a department manager, and she agreed (Exhibit GD3-23 and Hearing);

(p) when the Claimant asked to be a customer service representative again, the employer offered her only 28 hours a week and broke the agreement signed in 2012 (Exhibit GD3-23 and Hearing);

(q) her temporary assignment from representative to manager was never formalized by a contract (Exhibit GD3-23);

(r) according to the employer, if the Claimant refused to return to her position of department manager, she could have continued with a full-time schedule of between 28 and 40 hours a week, but there was no guarantee of 37.5 hours a week as was the case with the position of department manager (Exhibit GD3-35).

SUBMISSIONS OF THE PARTIES

[15] The Claimant submitted the following:

(a) since she was not a dedicated department manager, she could not make price changes as requested by her employer (Exhibit GD3-9);

(b) it was stress and dizziness that forced her to request a demotion in 2012 (Hearing);

(c) the employer wanted to end its 2012 agreement with the Claimant in order to cut costs (Exhibit GD3-33);

(d) the position of manager was much too stressful for her (Hearing);

(e) it was the employer who offered her the conditions of employment in customer service (Hearing);

(f) the human resources manager in Toronto informed her that [translation] "only a dedicated department manager can make price changes" (Hearing);

(g) for her, temporarily means a few weeks or a month (Hearing);

(h) in a meeting with the employer, the human resources manager confirmed to her that if the department manager she was replacing temporarily did not come back to work, she would tear up the agreement reached in 2012 between the parties (Hearing);

(i) she was harassed and intimidated by an assistant manager (Hearing);

(j) when she agreed to temporarily take over the position of department manager, the employer changed her position title on her pay stub (Hearing);

(k) the employer's intention was to dismiss her, and she was not given the option of returning to her position as representative (Hearing);

(l) the employer knew that if it offered her the position of department manager full-time, she would decline (Hearing).

[16] The Respondent submitted the following:

(a) the Claimant did not provide any documentation to prove that she could not perform the tasks requested, including price changes, because of her health (Exhibit GD4-10);

(b) it was unable to accept the medical argument because the Claimant did not prove that her refusal to perform the task in question was necessary because performing the task was medically contra-indicated and potentially dangerous for her (Exhibit GD4-11);

(c) the Claimant should have understood that the offer related to the work of the department manager would be for an indefinite period, not for a month or only on a replacement basis (Exhibit GD4-11);

(d) it is therefore clear that she should have chosen either to accept the position of department manager, which involved more responsibilities but also offered in return a stable schedule of 37.5 hours a week, or to remain a customer service representative but with some modifications, namely, less money and no guarantee of a fixed schedule (Exhibit GD4-11);

(e) she admitted that she refused to make price changes and she took a stand against her employer (Exhibit GD4-11);

(f) the order from the employer and/or her superiors was legitimate and reasonable, and given that causation was shown, the refusal to obey or to comply is considered misconduct (Exhibit GD4-12);

(g) the Claimant's behaviour was inappropriate and inexcusable, her actions were wilful, they were committed despite the foreseeable consequence, namely, the loss of employment, and these actions constituted misconduct within the meaning of the Act (Exhibit GD4-12).

ANALYSIS

[17] Subsection 30(1) of the Act provides that a claimant is disqualified from benefits if he or she loses an employment because of misconduct and subsection 30(2) of the Act provides that the disqualification is served during the weeks following the waiting period for which benefits would otherwise be payable. *Larivée* (2007 FCA 132) established that the determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts. However, since misconduct is not defined in the Act, *Tucker* (A-381-85) defined it by instructing that the alleged act must have been wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. More

recently, *Hastings* (2007 FCA 372) added that there will be misconduct where the conduct of a claimant was wilful, i.e., in the sense that the actions which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to his or her employer and that, as a result, dismissal was a real possibility.

[18] In addition, *Auclair* (2007 FCA 190) and *Flemming* (2006 FCA 16) stated that it is 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 or her losing his or her employment. Moreover, in *Fakhari* (A-732-95), the Court argued 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. …"

[19] In this case, the Commission argued that the Claimant did not provide any documentation to prove that she could not perform the tasks requested, including price changes, because of her health. In short, the Commission indicated that it was unable to accept the medical argument because the Claimant did not prove that her refusal to perform the task in question was necessary because performing the task was medically contra-indicated and potentially dangerous for her. The Commission found that the Claimant should have understood that the offer related to the work of the department manager would be for an indefinite period, not for a month or only on a replacement basis. It is therefore clear to the Commission what the Claimant should have chosen. In short, she should have agreed either to accept the position of department manager, which involved more responsibilities but also offered in return a stable schedule of 37.5 hours a week, or to remain a customer service representative but with some modifications, namely, less money and no guarantee of a fixed schedule. For the Commission, since the Claimant admitted that she refused to make price changes and she took a stand against her employer, the refusal to obey or to comply is considered misconduct. As a result, the Claimant's behaviour was inappropriate and inexcusable, her actions were wilful and were committed despite the foreseeable consequence, namely, the loss of her employment.

[20] In this case, the Claimant said it was work-induced stress and her health that pushed the employer to offer her a demotion in 2012. The Claimant said that, at the time, the employer kept her compensation and schedule intact. However, the employer allegedly deceived her by asking her to replace a sick colleague who was a department manager. The Claimant said that, by offering her this position, the employer wanted to terminate the 2012 agreement in order to cut costs. The Claimant told the Tribunal that in a meeting with the employer, the human resources manager of the branch confirmed that, if the department manager she was replacing were not to return to work, she would tear up the agreement made in 2012 between the parties, which would mean that she would then be in the position of department manager. The Claimant appears convinced that the employer gave her the position and she submitted to the Tribunal two pay stubs showing a change of position declared by the employer. The Claimant told the Tribunal that, had the employer offered her a full-time department manager position, the employer knew she would decline the offer. Lastly, the Claimant told the Tribunal that the elements accepted against her were without merit because the human resources manager from Toronto told her that [translation] "only a dedicated department manager can make price changes" and that she was not a dedicated department manager; she therefore could not make price changes as requested by her employer.

[21] In this case, the Tribunal is of the opinion that the Commission did not prove the Claimant's misconduct. The Tribunal notes that misconduct is not defined by the violation of the employer's rules or regulations, but by the result of actions that the Claimant knew or ought to have known were such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility (*Hastings*, 2007 FCA 372).

[22] In this case, the Tribunal finds the Claimant very credible. The significant elements brought forth by the Claimant in this case did not seem to induce a response from the employer, even though the employer was invited to attend the hearing before the Tribunal. In short, this means that certain elements raised by the Claimant were not contested.

[23] In this case, the Claimant said that her primary human resources contact at the company's head office had been very clear in stating that only a dedicated department manager could make price changes in the store. The Claimant said she had not been a dedicated department manager

since her demotion in 2012. However, the Tribunal noted that the Claimant agreed to take on the position of department manager temporarily and that one of her tasks in this position was to make price changes. However, given the Claimant's medical condition, which was known by her superiors and colleagues, as well as the employer's clear intention toward the Claimant (Exhibit GD3-35) and the notion undisputed by the employer of reducing the hours of work while violating the Claimant's 2012 contract of employment, the Tribunal is of the opinion that the Claimant's dismissal, for alleged misconduct, involves a relationship of timing, not of causation as required by *McNamara* (2007 FCA 107).

[24] In fact, knowing that the Claimant had health issues ultimately affecting her morale and her motor function, the employer knew that the Claimant was uncomfortable with a long-term assignment as a department manager, but asked her to fill the position on a temporary basis. The Tribunal finds that the employer knew the Claimant was unable to perform the duties of the position of department manager in the long term, but decided to push aside this knowledge in order to [translation] "normalize" how the claimant was treated in the company. Recognizing, as the employer did, that the Claimant would not meet the expectations of the position, while knowing she was incapable of performing the task in question is not the basis of the presumed misconduct. The Tribunal determines that the employer's actions confirm this analysis because the employer informed the Commission that it had a [translation] "large file" on the client, but it had still offered her a management position with no known legal obligation on its part.

[25] In short, the Tribunal determines that the Claimant's dismissal was not caused by her refusal to do certain tasks, but by the employer's desire to unreasonably normalize the Claimant's situation in the company. Given the lack of convincing arguments from the employer and recognizing the Claimant's full credibility in this case, the Tribunal concludes that the relationship between the Claimant's actions and the termination of her employment is one of timing, not of causation within the meaning of *McNamara* (2007 FCA 107).

[26] Lastly, the Tribunal determines that *Fakhari* (A-732-95) is relevant in this case and realizes that the simple fact for an employer of being satisfied that a claimant's actions constitute misconduct does not satisfy the burden of proof that rests with the Commission.

CONCLUSION

[27] The appeal is allowed.

Jean-Philippe Payment
Member, General Division

DATE OF REASONS: February 23, 2015