[TRANSLATION]

Citation: ***Centre de Santé et de Services Sociaux Haut Richelieu - Rouville v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 183**

Date: November 3, 2015

File number: GE-15-839

GENERAL DIVISION – Employment Insurance Section

Between:

Centre de Santé et de Services Sociaux Haut Richelieu — Rouville

Employer/Appellant

and

Canada Employment Insurance Commission

Respondent

and

S. D.

Added party

Decision by: Jean-Philippe Payment, Member, General Division — Employment Insurance Section

In-person hearing on October 13, 2015, City of Brossard, Province of Quebec

REASONS AND DECISION

PERSONS IN ATTENDANCE

The claimant added party appeared before the Tribunal with her representative. The Appellant's employer did not appear at the hearing

I INTRODUCTION

[1] The claimant filed an initial claim for benefit on October 1, 2014. (Exhibit GD3-14). Between June 20, 2012 and September 24, 2014, the claimant worked for the Centre de Santé et de Services sociaux du Haut-Richelieu—Rouville ("the employer" or the "CSSS") (Exhibit GD3-16). On November 5, 2014, the *Employment Insurance Commission of Canada* (the "Commission") informed the claimant of action taken in her claim for Employment Insurance benefits, and stated that it could not pay her benefits effective September 28, 2014 by reason of her misconduct (Exhibit GD3-22). On December 2, 2014, the claimant submitted a reconsideration request to the Commission (Exhibit GD3-24) and on January 14, 2015, the Commission reconsidered its decision in the claimant's favour (Exhibit GD3-54). Notified of the decision but dissatisfied with the Commission's reconsideration decision in the case of its former employee, the employer appealed the Commission's decision to this Tribunal (Exhibits GD2).

[2] At the hearing, the employer did not appear before the Tribunal despite the fact that it is the Appellant in this case. In a letter to the Tribunal on August 27, 2015, the employer pointed out that a proceeding before the Tribunal prior to the arbitration of the claimant's grievance would compromise the evidence supporting the case before the grievance adjudicator. The employer told the Tribunal that if the request for a postponement is denied, it would be absent from the hearing and the Tribunal could make its decision based on the evidence on file.

[3] Confronted with an argument such as this, the Tribunal can only remind the parties that the Tribunal must examine the constituent elements of misconduct within the meaning of the Employment Insurance Act. All other considerations aside, the Appellant/Employer within the meaning of the decision in *Canada (Minister of Employment and Immigration) v. Bartone* (A-369-88), is responsible only for proving misconduct within the meaning of the Act. Therefore,

the use of the right to appeal a decision of the Commission before the Tribunal cannot be placed in a context outside the *Employment Insurance Act.* Lastly, the Tribunal wishes to emphasize the fact that the obligations of an employer involved in an arbitration proceeding cannot be placed on hold because it prefers not to proceed with one hearing before the end of another appeal or grievance proceeding.

[4] In short, the Tribunal has established that the employer was notified of the hearing and that, for reasons unrelated to the case, it chose not to attend the hearing. The Tribunal is therefore authorized to proceed with the hearing pursuant to s. 12 of the *Social Security Tribunal Regulations*.

[5] This appeal was heard in person for the following reasons:

a) The fact that credibility may be a prevailing issue.

b) The fact that more than one party will be in attendance

c) The information on file, including the need for additional information

d) The fact that multiple participants, such as a witness, may be present.

ISSUE

[6] The Tribunal must determine whether the claimant lost his employment because of misconduct pursuant to sections 29 and 30 of the Employment Insurance Act (the Act).

THE LAW

Misconduct

[7] Paragraphs 29(a) and (b) of the Act state for the purposes of applying paragraphs 30 to 33, an "employment" (a) refers to any employment of the claimant within their qualifying period or their benefit period and (b) loss of employment includes 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.

[8] Subsection 30(1) of the Act provides 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.

[9] Subsection 30(2) of the Act provides 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.

[10] 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.

[11] In *Canada (Minister of Employment and Immigration) v. Bartone* (A-369-88), the Court confirmed that the onus is on the Employer-Appellant to prove misconduct in the case it wishes to bring before the Tribunal.

[12] In *Canada (Attorney General) v. Tucker* (A-381-85), the Court clarified what constitutes misconduct. Thus, 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."

[13] In Canada (*Attorney General) v. Hastings* (2007 FCA 372), the Court described and refined the concept of misconduct. It thus established that there "(...) will be 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/her conduct was such as to impair the performance of the duties owed to his/her employer and that, as a result, dismissal was a real possibility."

[14] In *Canada (Attorney General) v. Cartier* (2001 FCA 274) and *Smith v. Canada (Attorney General)* (A-875-96), among other cases, the Court held that there must be a causal relationship between the misconduct of which an employee is accused 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 employed by the employer and must constitute a breach of a duty that is explicit or implied in the contract of employment.

[15] In *Crichlow v. Canada (Attorney General)* (A-562-97), the Court determined that the (General Division) was perfectly entitled to conclude that the applicant had not committed the "misconduct" required for a disqualification under section 28 of the Act, and that the (Appeal Division) had no reason to interfere with the majority decision of the (General Division) as to the interpretation to be given to the facts and no jurisdiction to substitute its opinion for that of the Board as to the meaning of those facts.

EVIDENCE

[16] The evidence in this case is as follows:

a) a claim for Employment Insurance benefits dated October 1, 2014 (Exhibit GD3-14);

b) a record of employment showing the last day worked as September 24, 2014 and Code M, for dismissal, (Exhibit GD3-16);

c) a termination of employment letter dated September 25, 2014 (Exhibit GD3-19 and 20);

d) a grievance form (Exhibit GD3-33 to 40);

e) documents from the claimant's human resources file (Exhibits GD19).

PARTIES' ARGUMENTS

[17] The Appellant argued that:

a) the client had been dismissed following an internal investigation into a complaint concerning inappropriate behaviour at work involving a child under 2 years of age (Exhibit GD3- 17);

b) the claimant resorted to unnecessary physical constraint (Exhibit GD3-17);

c) such behaviour toward a child was intolerable, considering this clientele's known inability to understand the medical procedures performed, and for reactions are not always calm and quiet (Exhibit GD3-17);

d) the situation was reported to the Ordre des Infirmières et Infirmiers du Québec (Exhibit GD3-17);

e) the Appellant would attend the Tribunal hearing if the date of the hearing followed arbitration of the grievance in this case (Exhibit GD15-1).

[18] The Claimant submitted that:

a) her dismissal was caused by a complaint from a patient following investigation (Exhibit GD3- 7);

b) the employer had given an exaggerated interpretation of the code of ethics (Exhibit GD3-7);

c) she claims she acted to stop a child from screaming (Exhibit GD3-21);

d) her action had been blown out of proportion and the colleague of the client who witnessed the action changed her version of the facts, from initially describing it as a minor action to an excessive action at the investigation (Exhibit GD3-21);

e) she was dismissed because of staff cutbacks (Exhibit GD3-30);

f) the alleged behaviour was not wilful, reckless or negligent (Exhibit GD3-30);

g) the methods used must be considered in the subjective context of the incident (Exhibit GD3-30);

h) the alleged behaviour is an alternative method for calming a child in order to administer the required care (Exhibit GD3-31);

i) the mother of the little girl was asked to leave the room but refused (Hearing);

j) she tried various unsuccessful maneuvers on the child's veins (Hearing);

k) her colleague was the one who had the mother hold the child during the procedure as well (Hearing);

l) after wrapping the child tightly in a blanket, she reached the vein at the first attempt and begin filling her vials (Hearing);

m) suddenly, the child started moving her legs and practically broke free from the hold of three adults and screamed (Hearing);

n) she tried every possible means of calming the child with a song, caressing her forehead and cheek, making horse sounds (Hearing);

o) no matter what she tried, the child could not hear her because she was crying so loudly (Hearing);

p) when she tried to install a retaining board to prevent the child from closing her arm on the IV tube, the child ripped off all of the stickers (Hearing);

q) the mother was no longer holding the child as she should (Hearing);

r) suddenly the child gave a piercing scream that caused her to release the child and the child tried to rip off the drip, which is when she caught her attention (Hearing);

s) she used the "touch" technique that she had learned in university (Hearing);

t) she placed two fingers on the child's mouth and she stopped screaming (Hearing);

u) the technique is used to get the patient's attention (Hearing);

v) it is not widely used with a child clientele, but the situation was unusual (Hearing);

w) the child could still breathe, she simply placed her fingers on the child's mouth and said, "S. D. doesn't want you to shout like that" (Hearing);

x) she did not place much pressure on the child's mouth (Hearing);

y) her tone of voice was no lower than it would have been normally since the child had been crying a few moments earlier);

z) after speaking to her a little, the child calmed down and she apologized to the mother (Hearing);

aa) she has an unblemished record with the employer (Hearing);

bb) she was unaware of the employer's policy (Hearing);

cc) the Syndic did not uphold any complaint made to the Order);

dd) the incidents occurred in July 27, 2014 (Hearing);

ee) the employer met with her, but the meeting went in circles (Hearing);

ff) during the second week of August 2014, while she was on vacation, she was called to the hospital to be told that some positions were being cut in their department (Hearing);

gg) her position had been cut, and she was referred to the person who had appealed the Commission's reconsideration decision (Hearing);

hh) this person was in charge of her reorientation regarding the cuts and management of the complaint (Hearing);

ii) she may have reacted inappropriately to a stressful situation, but it was not misconduct (Hearing);

jj) when the employer met with her to say that her position had been abolished, she did not have an opportunity to give her version of the facts (Hearing);

kk) the cause and effect relationship is circumstantial, but her position was abolished and a complaint was made concerning her actions at the same time (Hearing).

[19] The Respondent submitted that:

a) The Commission did not obtain the employer's version of events following the request for reconsideration of the decision to disqualify the claimant from benefits (Exhibit GD4-3);

b) the alleged act is to have tried to calm the child by placing three fingers on the child's mouth and simply constituted another way of trying to calm the child in order to administer the required care, after an hour of difficult and repeated intervention (Exhibit GD4-3 and 4);

c) the claimant wanted the child to be able to hear her voice and immediately get her attention (Exhibit GD4-4);

d) the fingers did not obstruct the child's airways (Exhibit GD4-4);

e) the action alleged against the claimant is not a violation of a specific instruction issued by the Employer (Exhibit GD4-4);

f) it concluded that the claimant did not lose her employment by reason of her own misconduct because the employer was unable to prove that the claimant knew or ought to have known that her conduct would lead to dismissal (Exhibit GD4-4);

g) the claimant's conduct occurred in the heat of the action when a prompt response was necessary and, having regard for misconduct, it is difficult to conclude that the alleged action caused by this situation was wilful (Exhibit GD4-4).

ANALYSIS

[20] Subsection 30(1) of the Act provides that claimants are disqualified from benefit if they lose their employment by reason of misconduct, and subsection 30(2) of the Act provides that the disqualification applies to weeks in the claimant's benefit period that follow the waiting period in which the claimants would otherwise be entitled to benefits. In *Larivée* (2007 FCA 132), it was established that the determination of whether a claimant's action constitutes misconduct leading to termination of employment essential entails a review and a determination of the facts. However, since the Act offers no definition of misconduct, *Tucker* (A-381-85) has clarified or better defined the concept of misconduct by stating 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 (*Tucker,* A-381-85). More recently, the decision in *Hastings* (2007 FCA 372) adds 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/her conduct was such as to impair the performance of the duties owed to his/her employer and that, as a result, dismissal was a real possibility."

[21] In its arguments, the Commission stated that it did not obtain the employer's version following the request to review the claimant's disqualification from benefit. In the Commission's view, the alleged act is to have tried to calm a child by applying three gingers to the child's mouth, and simply constituted an alternative means of trying to calm the child in order to administer the care that the child needed, after one hour of difficult, repeated intervention. The Commission explained that the claimant wanted the patient to hear her voice and then immediately distract her attention, and that her fingers had not obstructed the child's airways. The claimant's alleged conduct did not violate any specific instructions issued by the employer, in the Commission's view. The Commission does not believe that the claimant lost her employment by reason of her own misconduct because the employer was unable to prove that, by her actions, the claimant would know or ought to know that her dismissal was a real possibility. Lastly, the Commission considers that the claimant behaved as she did in the heat of the moment, when a fast response was required and that, having regard to misconduct, it is difficult to conclude that the alleged act was wilful given the situation.

[22] From the employer's standpoint, the claimant was dismissed after an internal investigation into a complaint for inappropriate behaviour at work involving a two-year old child. Moreover, the claimant used unnecessary physical constraint, and such behaviour toward a child is unacceptable. For the employer, this clientele is known to be unable to understand medical procedures, and do not always respond in a calm, quiet manner. The employer adds that this situation was reported to the Ordre des Infirmières et Infirmiers du Québec.

[23] In the present case, the Tribunal has concluded that the employer did not prove that the claimant committed misconduct. As mentioned in the introduction, in the case of an appeal by the employer related to a misconduct dispute, the said employer is responsible for proving the misconduct, as explained in *Canada (Minister of Employment and Immigration) v. Bartone* (A-369-88).

[24] Unfortunately, the lack of information provided by the Employer in its own appeal prevents the Tribunal from findings that the claimant committed misconduct within the meaning of the Act. Moreover, the evidence on file and arguments in support of the employer's position are either missing or so scant as to make it impossible to find that the claimant knew or ought to have known that her conduct could lead to her dismissal.

[25] On examining and weighing the facts, as the decision in *Larivée* (2007 FCA 312) explains, the Tribunal cannot quality the claimant's actions as "misconduct." During the course of the incidents, the claimant did not put the patient's life in jeopardy and did not violate any rules submitted to the Tribunal. To merely assert without supporting evidence that the claimant "resorted to unnecessary physical restraint" is not sufficient proof of misconduct within the meaning of the decision in *Hastings* (2007 FCA 372) and *Tucker* (A-381-85).

[26] At most, the claimant's actions were awkward or inappropriate for a clientele such as that she was called on to treat, but they did not amount to misconduct of a nature that the Tribunal cold officially recognize. In the absence of credible testimony to the contrary, the technique that the claimant used to calm the client does not appear to have been offensive, did not involve undue force and was not violent or inappropriate in the circumstances.

[27] The claimant raised the causal relationship the case before the Tribunal within the meaning of *Cartier* (2001 FCA 274). Unfortunately, the claimant offered proof that, while certainly curious, is on balance highly anecdotal. The claimant did not clearly establish that the cause of her dismissal related to cuts in service, and that the complaint was simply a pretext in this regard. To the Tribunal's knowledge, it is plausible that the two incidents, though separate, occurred at the same time. Moreover, no additional arguments or testimony was submitted in this regard by the claimant. The matter of veiled dismissal is without substance in the absence of compelling evidence that, although the actions occurred at the same times as service cuts, the cuts in question were not responsible for termination of the claimant's employment.

CONCLUSION

[28] The appeal is dismissed.

Jean-Philippe Payment
Member, General Division — Employment Insurance Section