Citation: ***C. G. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 223**

Date: December 28, 2015

File number: GE-15-962

GENERAL DIVISION - Employment Insurance Section

Between:

C. G.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

and

The Massey Centre for Women

Added Party

Decision by: Eleni Palantzas, Member
General Division - Employment Insurance Section

Heard by Teleconference on November 10, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Ms. C. G., attended the hearing by teleconference. The employer, although advised of the hearing, did not attend.

INTRODUCTION

[1] The Claimant applied for employment insurance regular benefits on November 27, 2014 after having been dismissed by her employer on November 13, 2014 for taking an unauthorized vacation.

[2] On December 12, 2014, the Canada Employment Insurance Commission (Commission) determined that the Claimant lost her employment due to her own misconduct. On December 24, 2014, the Claimant requested that the Commission reconsider its decision. On February 4, 2015, the Commission maintained its decision and imposed an indefinitely disqualification to benefits effective November 16, 2014.

[3] On May 6, 2015, the Claimant appealed late to the General Division of the Social Security Tribunal (Tribunal). The Member allowed for the extension of time (GD5).

[4] The hearing was held by teleconference for the following reasons: (a) the fact that the credibility is not anticipated to be a prevailing issue (b) the fact that the Claimant was going to be the only party in attendance (c) the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] On September 29, 2015, the Member decided to add the employer as a party to this appeal. The Member determined that the employer had a direct interest in this appeal as this is a case of misconduct and the circumstances and reason(s) for the dismissal are important to the issue under appeal. Further, the Tribunal received a new record of employment where the reason for separation was changed to ‘laid off’ due to shortage of work (GD7 and GD8).

ISSUE

[6] The Member must decide whether the Claimant lost her employment by reason of her own misconduct and whether an indefinite disqualification should be imposed pursuant to sections 29 and 30 of the EI Act.

THE LAW

[7] Subsection 29(a) of the EI Act stipulates that for the purposes of sections 30 to 33, "employment" refers to any employment of the claimant within their qualifying period or their benefit period.

[8] Subsection 29(b) of the EI Act stipulates that for the purposes of sections 30 to 33, "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.

[9] Subsection 30(1) of the EI 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.

[10] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period 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.

EVIDENCE

[11] The Claimant was employed as a registered nurse at her place of employment for 12 years prior to her dismissal on November 13, 2014. The Claimant indicated that she requested permission 28 days in advance of her vacation, on October 3, 2014, as per the employer's policy; however, she was denied and threatened with termination. She notes that in 12 years, she had never been denied a vacation (GD3-3 to GD3-14). The Claimant advised that she was denied by her employer three times. On October 14, 2014, she changed her request to 2 vacation days and advised her employer that she was committed to flights and accommodations. On October 30, 2014, she emailed her supervisor to advise that she would be away on November 4 and 5, 2014 due to unalterable commitments. She returned to work on November 11, 2014 as scheduled and was fired on November 13, 2014 (GD3-16, GD3-17 and GD3-19).

[12] The employer advised the Commission that the Claimant was terminated simply because she took leave despite being denied (GD3-18 and GD3-23).

[13] On December 12, 2104, the Commission advised the Claimant that benefits are not payable as of November 16, 2014 because she lost her employment as result of her own misconduct (GD3-20).

[14] On December 24, 2014, the Claimant requested that the Commission reconsider its decision noting that the employer denied her request for 2 vacation days, 2 weeks after she requested it and 1 day after she had paid for her vacation. She requested the time off within the time limits of past practice. She considers the employer's lack of flexibility to be a form of aggression and harassment which she has taken to arbitration (GD3-21 and GD3-22). The Claimant advised the Commission that her direct manager told her that the denial of her vacation request was non-negotiable and that she could be fired if she leaves. She informed the union and took her request to the next level of management. Although she explained that she would not be away during "accreditation", management denied her again any way. The Claimant explained to the Commission that the CEO wanted her to resign/leave because she challenged the administration and she was the last person there with benefits (GD3-24).

[15] On February 4, 2015, the Commission maintained its decision (GD3-26).

[16] On September 28, 2015, the Claimant provided a copy of a new record of employment indicating a change to the reasons for separation and a letter from her employer stating that the Claimant was laid off due to a shortage of work (GD7).

[17] At the hearing, the Claimant confirmed and reiterated her reasons for taking the 2 vacation days despite her employer's denial. The Claimant stated that the reason she was given upon termination was that her conduct constituted a violation of the collective agreement because (a) she had been absent for 3 shifts and (b) she did not advise her supervisor. The Claimant stated that she was only away for 2 shifts and she did advise her supervisor, so the employer made two errors in its termination letter. The Claimant and employer came to an agreement which resulted in the change to the reason for separation and the employer's letter to the Tribunal (GD7).

[18] The Claimant testified that she worked part-time and that in 12 years her vacation was never denied. She stated that her partner/colleague with whom she job shared the position, was subject to similar circumstances: she was denied a one-week vacation and threatened with termination, but she resigned. The Claimant stated that she followed the normal 4 week notice to her supervisor but was denied for the first time, 2 and a half weeks later and threatened with termination if she went. The next level of management also denied her request for 2 days of vacation stating that she already had vacation and that there were girls in late pregnancy, so she can't leave. The Claimant stated that there were others to cover for her, she prioritized the work for a girl that needed care and she was not going to be away during 'accreditation week' (October 20-24, 2014).

[19] The Claimant testified that she was advised that she "MAY be disciplined which may include firing". She did not know she would be fired. She expected some kind of discipline especially since her termination was already with the union's 2nd level.

SUBMISSIONS

[20] The Claimant submitted that her termination was unjust and for reasons other than those provided; her employer was not willing to negotiate or discuss her request. In her 12 years of employment, she had never been denied a vacation request. She followed the required protocol

for submitting her request and did not violate the collective agreement. The employer however took 2 and a half weeks to respond, after she had already paid for flights and accommodation and was committed to take the 2 vacation days. The Tribunal should note that the employer has since agreed to change the reason for separation as result of arbitration.

[21] The Respondent submitted that by consciously and deliberately deciding to take the unapproved leave, knowing that she was taking a risk of being fired, constitutes misconduct under the EI Act. The Claimant was formally warned by the employer in advance of her decision that she may be terminated. The fact that her employer was being unreasonable, does not justify her act of disobeying her employer and risking dismissal, and then expecting to be supported by employment insurance benefits (GD4). The fact that the Claimant and the employer have reached a settlement and the reason for separation has since been amended, does not change the Commission's position, especially given the evidence on file, that the Claimant was terminated due to her own misconduct (GD9).

ANALYSIS

[22] The Member recognizes that the legal test to be applied in cases of misconduct is whether the act under complaint was wilful, or at least of such careless or negligent nature that one could determine that the employee wilfully disregarded the effects his actions would have on job performance (McKay-Eden A-402-96, Tucker A-381-85). That is, the act that led to the dismissal was conscious, deliberate or intentional, where the claimant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[23] Further, the Member recognizes that the onus is on the employer and the Commission to show that the Claimant, on a balance of probabilities, lost her employment due to her own misconduct (Larivee A-473-06), Falardeau A-396-85).

[24] It must first be established that the Claimant's actions were the cause of her dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). The employer confirmed on two occasions to the Commission that the Claimant was dismissed simply because she took leave

despite being denied (GD3-18 and GD3-23). At the hearing, the Claimant testified that she was also advised by the employer that she was terminated for violating the terms of the collective agreement by being absent for 3 shifts and not advising her supervisor. The Claimant consistently stated to the Commission, and at the hearing, that she did advise and email her supervisor of the 2 days she planned to take off. The Member finds therefore, that in the absence of any evidence to the contrary, and given the Claimant's direct and consistent statements, the Claimant was not terminated because she was absent for 3 shifts without advising her supervisor. The Member finds however, that it is undisputed evidence that the Claimant requested 2 vacation days and that her request was denied by the employer; she took the 2 days off any way and was terminated as a result. The Member finds therefore that the Claimant's actions were the cause of her dismissal. The Member further finds that the Claimant committed the alleged offence of taking 2 days of vacation despite the employer's denial of her request.

Does the Claimant's conduct constitute misconduct?

[25] According to the EI Act, in order for misconduct to exist, the Claimant's actions have to be conscious and deliberate, where she knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.

[26] In this case, the Claimant, by her own admission, knew she was not approved to take the 2 vacation days off work. The Claimant consciously disregarded the employer's denial to take the said shifts off work. The Member understands that the Claimant had never been denied a vacation request in the past and expecting approval, she went ahead and made arrangements prior to receiving a response to her vacation request from her employer. Unfortunately, the employer denied her request and she was faced with a dilemma. The Claimant chose to take the time off despite not being approved. By doing so, the Claimant breached her duty to her employer and their employee/employer relationship.

[27] Further, the Claimant advised the Commission that she was told by her supervisor that the denial of her vacation request was non-negotiable and that she could be fired if she leaves (GD3-24). At the hearing, she testified that she was advised by her employer that she "MAY be

disciplined which may include firing". Although the Claimant testified that she did not know she would be fired, she did expect some form of discipline. The Member finds therefore, that the Claimant's actions were conscious and deliberate and she knew, or ought to have known, that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.

[28] The Member understands that the Claimant's position that the employer, after 12 years of employment, was being inflexible and unreasonable, and that she feels justified in taking just 2 shifts off despite being denied. The Member finds however that the legislation is clear, that when determining whether a Claimant's actions amount to misconduct, it is the actions of the Claimant that are to be considered, and not those of the employer. The Tribunal's jurisdiction is not to comment on whether the sanctions of the employer were appropriate; nor can it comment on the manner or behaviour of the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (McNamara 2007 FCA 107; Fleming 2006 FCA 16). The Federal Court is clear:

> "… In the interpretation and application of section 30 of the Act, the focus is clearly not on the behaviour of the employer, but rather on the behaviour of the employee. This appears neatly from the words "if the claimant lost any employment because of their misconduct". There are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits." (McNamara A-239-06)

[29] The Member also acknowledges that, as a result of arbitration, the employer has amended the reason for separation indicating that the Claimant was laid off due to shortage of work (GD7). The Member agrees with the Commission however, that the Tribunal must consider the evidence and the conduct of the Claimant within the meaning of the EI Act and not the provisions of other legislation and/or any settlement or agreement between the employer and the Claimant. In a similar case as the one at hand, the Member's position is supported by the Federal Court of Appeal decision in the *Attorney General of Canada v. Morris* (A-291-98) that stated:

> "It is the Board's function to assess the evidence and to arrive at its own conclusions. It is not bound by how the employer and employee characterize the grounds on which the employment was terminated. In the present case, there was sufficient documentary evidence available to the Commission and the Board to justify a finding of misconduct.
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> The fact that the settlement agreement required the employer to withdraw the allegation of dismissal for cause cannot be treated as conclusive of whether there was actually misconduct for purposes of the Act. This is particularly true since the settlement agreement did not include an admission by the employer, either express or implicit, that the dismissal for cause was not fully justified."
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> (Application for leave to appeal was dismissed by the Supreme Court of Canada: Canada (AG) v. Morris, [1999] S.C.C., No. 304)

[30] The Member finds therefore, that by consciously and deliberately deciding to take the unapproved leave, knowing that she was taking a risk of being fired, the Claimant's actions constituted misconduct under the EI Act. The Member finds that, on a balance of probabilities, the Claimant lost her employment as result of her own misconduct and an indefinite disqualification must be imposed effective November 16, 2014 pursuant to section 29 and 30 of the EI Act.

CONCLUSION

[31] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section