



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 51

Tribunal File Number: GE-15-3093

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: April 14, 2016

DATE OF DECISION: April 15, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. L., the claimant, attended the hearing via teleconference with his wife J. H. who attended as a witness and for support.

INTRODUCTION

[1] The claimant became unemployed and applied for Employment Insurance (EI) benefits on March 31, 2015. A reactivated claim for EI benefits was established on March 29, 2015. The Canada Employment Insurance Commission (Commission) denied the claim because it was determined that the claimant lost his employment as a result of his misconduct. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated August 28, 2015. The claimant appealed to the Social Security Tribunal (SST).

[2] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issue under appeal.
- b) The fact that the claimant will be the only party in attendance.
- c) The information in the file, including the need for additional information.

ISSUE

[3] The issue under appeal is whether the claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

THE LAW

[4] Subsection 30(1) of the EI Act states, in part, that a claimant is disqualified from receiving benefits if the claimant lost any employment because of his misconduct or voluntarily left any employment without just cause.

EVIDENCE

Information from the Docket

[5] The claimant applied to reactivate a claim for regular EI benefits stating that he was dismissed from his employment because his employer considered him unsuitable for the work he was hired or re-assigned to do and his employer did not explain why he was considered unsuitable for the work (Pages GD3-3 to GD3-14).

[6] The employer submitted a Record of Employment (ROE) indicating that the claimant began working as a maintenance worker on December 17, 2014 and he was dismissed from his employment on March 31, 2015 accumulating 552 hours of insurable employment (Page GD3-15).

[7] The employer was contacted by the Commission and she stated that the claimant was a casual employee as it was not a permanent position. She explained that the reason for the dismissal was because the claimant breached the policy and procedure regarding confidentiality. The employer further explained that the claimant gave information to people who were not privileged to that information. She stated that the claimant agreed that he had done this as he admitted to it. She stated that he was trying to solicit support to the board to have the employer terminated and have another employee reinstated. The employer stated that the claimant was quite surprised and in disbelief that he was dismissed and is grieving the termination through the union (Pages GD3-17 and GD3-18).

[8] The employer submitted the confidentiality agreement that was signed by the claimant upon orientation with the employer. This agreement, signed by the claimant on January 14, 2015, states that he has read the policy regarding confidentiality and he understands that he must keep, in the strictest confidence, any or all information he may learn during the course of his employment regarding the resident and the resident's medical information. He also understands that this policy includes information regarding other staff members and volunteers. He understands that a breach of this policy may be grounds for disciplinary action or dismissal from his employment (Page GD3-22).

[9] The claimant was contacted by the Commission and he explained that the employer let his wife go without reason so he was putting up letters to take to the foundation to get his wife her job back. He stated that the employer told him he could not do that and it was misconduct. He added that he was not worried about this employment because he wishes to reactivate an old claim. When the claimant was explained that it needed to be determined if he qualified for EI benefits based on the dismissal, he hung up. The Commission called back and confirmed the reasons provided by the employer and informed that the employer had provided the signed acknowledgement of Statement of Confidentiality. The claimant stated that he did not know or understand any of what he signed; the claimant then hung up again (Page GD3-23).

[10] The Commission sent a letter dated April 21, 2015 informing the claimant that he cannot be paid EI benefits because he lost his employment as a result of his misconduct (Page GD3-24).

[11] The claimant submitted a letter dated May 4, 2015 which the Commission accepted as a Request for Reconsideration. He explained that his wife worked for the same employer and when the claimant found out that his wife was let go without any reason just short of the 90 day probation period, he was upset. He stated that he copied her letter of release to show others that he worked with. He was called in to the office and was asked to leave the keys and phone and was given a letter that he was released because of gross misconduct. He added that the union is involved to see if he can get his job back. He further added that he worked before this job for 13 years and he only collected six weeks' worth of EI benefits and wondered why his previous claim was not restarted (Page GD3-25).

[12] The claimant submitted an email dated June 16, 2015 from his union representative who stated that the union is disputing the claimant's termination and has an active grievance on the matter that is being processed according to the collective agreement. The union is arguing that the employer did not have just cause to terminate the claimant (Page GD3-27).

[13] The claimant was contacted by the Commission and he confirmed that he made a copy of his wife's letter of release and he showed other co-workers and tenants at his place of employment. He stated that the employer dismissed his wife without reason; she was very well liked there and he wanted other people to know what happened so they could go to management and tell them she should get her job back. The claimant further confirmed that he signed the

policy on confidentiality but he did not think his wife's release letter was considered confidential adding that it was wrong for the employer to dismiss her without reason and he wanted other people to know what the employer had done (Page GD3-28).

[14] The employer was contacted by the Commission and confirmed that she did go over the confidentiality policy with the claimant before he signed it stating that she has been in the business for 20 years and she had a clear conversation about confidentiality, its importance, what constitutes confidentiality and the ramifications of breaking the policy. She stated that the claimant knew that his showing another employee's personal confidential information was against the policy. She further stated the claimant's wife asked him to not show the letter or talk to other people at work about what happened. She added that the claimant knew it was wrong. She further stated that the claimant was dismissed for this one infraction because he was a casual employee and had clearly disobeyed the policy (Page GD3-29).

[15] The claimant submitted his Notice of Appeal stating that his union representative proved at a meeting with the board that this was not gross misconduct because the information that was given was not private information as they had just released his wife with that letter. His dismissal is in the grievance process and is going to arbitration (Page GD2-6).

[16] The claimant submitted his wife's termination letter dated March 27, 2015 which states that her employment is being terminated effective immediately. They appreciated the time she had worked with them but her services were no longer required (Page GD2A-9).

[17] The claimant submitted information from his My Service Canada Account. He further submitted the employer's response to the union's grievance (Page GD2A-3 to GD2A-8).

[18] The claimant submitted a memorandum from his union representative providing the union's view as to the likelihood of successfully arbitrating the grievance of unjust termination. The union noted that the claimant's wife's termination letter was not marked confidential however, it was addressed the claimant's wife. The claimant requested office staff to make copies of the termination letter with the intent of garnering internal support from other employees to go to the board to have his wife reinstated; he posted five copies of the letter in areas where staff could read and sign them and this included one area in the facility that tenants

could access. He further spoke with two of the residents that he knew very well at the same facility. The union stated that the claimant did not attempt to talk to the employer before distributing the letters and the letters were removed by the claimant's supervisor within a couple of hours (Pages GD7-3 to GD7-4).

[19] The union stated that according to the collective agreement, the employer must show that what the claimant did was so grave and the consequences so serious that there was no choice but to remove him from his employment for a first offence. The union presented mitigating factors stating that the odds of this behaviour ever coming up again are almost non-existent; he reacted to a very specific set of circumstances that will not come up again. His behaviour was not repetitive and he did not plan it ahead of time. His actions were not meant to be malicious or defamatory to the employer but were an attempt to protect his wife's employment. The union further stated that the claimant's willingness to see his error, apologize for it and correct future action is evidence of his remorse and the effectiveness of corrective action. The union confirmed that the claimant's disciplinary record is clear and there have been no performance or behavioural issues brought forward by the employer; his supervisor stated that the claimant had a good work ethic; his work performance was satisfactory and there was no previous corrective action taken by the employer (Page GD7-6).

[20] The union stated that breach of trust is not evidenced and the claimant's actions will neither affect his ability to do his job nor are they serious enough to destroy the working relationship. He did not distribute false information or confidential information covered by the confidentiality form. He used poor judgement but not maliciousness or dishonesty, told the truth right away and showed remorse. The claimant did not disobey a direct order and he accepted responsibility for his actions and apologized (Page GD7-10).

[21] Following the claimant's union arbitration, the employer submitted an amended ROE which shows the reason for issuing as "other" commenting "Mutual agreement to end the employment relationship" (Page GD8-2).

[22] The claimant further submitted the Settlement Agreement and Release dated March 23, 2016 which states that the matter is resolved in full; the employer must provide a "without just cause employment release letter" to replace the current termination letter and a revised ROE.

The claimant was to receive four weeks' pay at full-time hours for relinquishing his right to future employment (Page GD8-3).

Testimony at the hearing

[23] The claimant's wife testified at the hearing that both she and the claimant worked for this employer and she had been employed not quite 90 days when she was let go. She stated that she was devastated by this so she went to find her husband because she did not understand why she was let go; no reason was given. She stated that the claimant took her letter and was trying to protect her honour and he showed the letter to other people. The employer stated that this letter was confidential information and said the claimant's act was gross misconduct.

[24] The claimant's wife stated that the claimant's union representative said that this was not gross misconduct. She stated that anyone that left the office is no longer part of the confidentiality agreement because it was given to her and she had left the property and therefore she could do anything she wanted with the letter; keep it hidden or she could leave it out in the open and she chose to leave it out in the open.

[25] The claimant's wife stated they have since been through the arbitration process and it was concluded that the claimant's actions were not misconduct and the employer has reconsidered and the parties had jointly agreed that the claimant was no longer capable of being employed but the claimant was not terminated for misconduct; the claimant was given four weeks' severance pay which they waited a year for.

[26] The claimant's wife stated that the Commission always seemed to call when she was not home and the claimant does not have the wherewithal sometimes to get through something like this and he gets totally flustered and gives answers that he has not thought through like other people would however, he has to be accountable for the way he treated the Commission when they called and when he hung up on them.

[27] The claimant stated that he was really frustrated because he had already gone so long without money and when he spoke to the Commission and they told him he could not have EI because of misconduct he was frustrated and he hung up. He stated that he did not want to talk to the Commission because he did not understand and it was frustrating.

[28] The claimant's wife stated that the claimant has worked for as long as she has known him and this was the first time that he has ever lost a job. She stated that he did his due diligence and found a job so they only received a few months of EI benefits. They applied for EI again and they cannot get it. She stated that it is really tough in their situation because the claimant was the breadwinner and they are now in the process of losing their house because they have had no income for the last year. She added that the claimant is 63 years old and he is over qualified everywhere he has looked and he has looked everywhere but there is nobody that wants to take him on. She stated that for the town they live in, he cannot get a job because of the gossip system.

[29] The claimant confirmed that he knew why he was terminated from his employment because his employer told him that he was not to show that letter to anybody. He was asked why he applied for EI benefits stating that he was unsuitable for the work that he was hired to do. He stated that that was not the case at all, that he was told that he was let go for misconduct because he was trying to protect his wife and get her job back. He stated that when the employer let his wife go, the letter stated that they no longer needed her service and they did not give any reason why they fired her on the spot. He stated that he took the letter and he wanted other employees to sign the letter to try to get her job back. The claimant's wife interrupted stating that she has to bring him back to focus and asked him to look at the EI application where he indicated that he was unsuitable for the work and the claimant responded that that was not the case at all. He stated that he marked that wrong and the answer should have been no because he was doing everything over there from changing light bulbs to repairing water systems. He stated that he does not know why he answered that questioned the way he did because he has been doing maintenance all his life. He confirmed that this was just an error.

[30] The claimant further confirmed that he was aware of the confidentiality agreement.

[31] The claimant's wife explained that she did not want him to post the letter because she was embarrassed that she had lost her job. She stated that she worked for many years as an accountant and never had an issue. She stated that her husband saw how much of a wreck she was and she understands that he did what he did out of love for her. She stated that she was embarrassed and told the claimant not to put it around town and he did not do that; the letter

was posted in the building where the workers are because she needed a job, they need a job. She stated that employers are looking for someone who will be there 20 years and who are young and fit however, the claimant has already had two stints put in his heart and is an insulin dependent diabetic.

SUBMISSIONS

[32] The claimant submitted that:

- a) This was not gross misconduct because the information that was released was not private information. They had released his wife from her employment with the letter which he showed others. The Commission said that this was not an allowable reason for dismissal when they were contacted (Page GD2-3).
- b) This event was a specific set of circumstances that does not fall under the confidentiality policy easily. The confidentiality form signed by the claimant focuses mainly on information regarding residents, resident abuse and residents' medical and personal information learned during the course of his employment. The form does refer to information regarding other staff members and volunteers however; the termination letter received by the claimant's wife is not a confidential document or information covered by the confidentiality agreement. The claimant was not blatantly disregarding the employer's policy but simply did not consider the document to be covered under the policy (Page GD7-7).
- c) The employer contends that all correspondence produced is covered under the confidentiality agreement however, it is unclear how the policy determines that a non-confidential termination letter to a family member of an employee is covered under this policy. Further, the information contained in the termination letter would have become common knowledge very quickly; the letter simply stated that the claimant's wife's services were no longer required and there was no confidential reason stated for why the employer terminated the claimant's wife (Page GD7-7).
- d) The confidentiality policy does not cover any and all documents produced by the employer but is in place to ensure that sensitive personal and medical information of residents and employees is protected. It was not clearly communicated to the claimant

that every single document produced by the employer is confidential (Pages GD7-7 and GD7-8).

- e) A finding of “gross misconduct” where termination is the only viable alternative may be found in cases of extreme or repeated insolence, insubordination or defiance. The phrase is commonly understood to encompass acts that are malicious, violent, fraudulent or possibly criminal and done intentionally. In other words, the employees have shown such disregard and disrespect for the employers, management or policies that there can be no expectation of an effective working relationship. In this case, purposeful, willful defiance of the employer’s direct order cannot be shown, he did not intend to harm the employer; he simply wanted to assist his wife and get her job back in a way which was not malicious (Page GD7-9).
- f) He would like to get EI benefits while he looks for work. He has not been able to find work having applied to many companies in the area but because of his skill level or his age, he is over qualified or too old. He has only collected EI for about six weeks and asked that his previous claim be restarted. He worked for 13 years for one employer and wants to go back on those benefits (Page GD2-6).
- g) He is in bankruptcy and has shown in court that they cannot make the required payments; they are living off of his wife’s wage or EI benefits and have had to ask their kids for money monthly to make ends meet. This is not how he expected his golden age would end up (Page GD2-7).

[33] The Commission submitted that:

- a) The employer dismissed the claimant for misconduct for the act of copying his wife’s letter of release and showing it to tenants and staff members, as it was against their confidentiality policy. The employer submitted a copy of their “Statement of Confidentiality and Abuse”, signed by the claimant on January 14, 2015, stating that he “...must keep, in the strictest of confidence, any or all information [he] may learn, during the course of [his] employment...this policy includes information regarding other staff members.” The claimant said he did not think that his wife’s release letter was considered confidential, and he copied and shared the letter with the intent of motivating

his co-workers and others to appeal to the employer for his wife to get her job back (Page GD4- 3).

- b) Jurisprudence has shown that violation of company policy can constitute misconduct when the claimant made a wilful choice to disregard the effect his actions would have on his employment. The claimant knew the policy regarding confidentiality. The claimant knowingly violated the confidentiality policy of the employer, and he wilfully disregarded the effect his actions would have on his employment (Page GD4-3).

ANALYSIS

[34] The EI Act does not define misconduct. The Federal Court of Appeal (FCA) has explained the legal notion of misconduct for the purposes of this provision as acts that are wilful or deliberate, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Tucker v. Canada (Attorney General)*, A-381-85)

[35] The FCA has further explained that wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Secours v. Canada (Attorney General)* , A-1342-92).

[36] Furthermore, the FCA has explained that to determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment. The misconduct must not be an excuse or pretext for dismissal; it must cause the loss of employment (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Nguyen v. Canada (Attorney General)*, 2001 FCA 348; *Brissette v. Canada (Attorney General)*, A-1342-92).

[37] The onus of proof, on the balance of probabilities, lies on the Commission to establish that the loss of employment by a claimant was "by reason of their own misconduct" (*Minister of Employment and Immigration v. Bartone*, A-369-88).

[38] In this case, the employer and the claimant both agree that the claimant was terminated from his employment because he copied his wife's letter of release and had shown it to other staff members and tenants in an attempt to get his wife's job back. The Tribunal finds that there is no dispute as to why the claimant was terminated from his employment and further finds that the causal link between the reasons for dismissal and the claimant's employment has been proven.

[39] The Tribunal recognizes that the claimant filed a grievance through his union for unjust termination and this was successfully arbitrated with a Settlement Agreement dated March 23, 2016. However, it is important to note that the Tribunal operates under the EI Act and not the employer's collective agreement and therefore, the Tribunal must still determine whether the claimant's actions of copying his wife's termination letter and posting it in the workplace was a breach of the employer's policy regarding confidentiality and must further determine whether this is considered misconduct within the meaning of the EI Act.

[40] The employer stated that she explained the confidentiality policy to the claimant as well as the ramifications of breaking the policy and the claimant knew that his showing another employee's personal confidential information was against the policy. The claimant argued that this letter was given to his wife and while his wife initially did not approve of the claimant posting her letter for public consumption, the Tribunal accepts the claimant's wife's testimony that she did give permission to post the letter in the building where they worked.

[41] In the FCA decision *Canada Employment and Immigration Commission v. Joseph*, A-636-85, Justice Dubinsky states:

“To prove misconduct by an employee it must be shown that he behaved in some way other than he should have. Accordingly, such an allegation is not proven simply by showing that the employer found his employee's conduct to be reprehensible, or charged him with misconduct in general terms. For a board of referees [now the Tribunal] to conclude that there was misconduct by an employee, it must have before it sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behavior was reprehensible.”

[42] Further, in the FCA decision *Crichlow v. Canada (Attorney General)*, A-562-97, Justice Marceau states:

“A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation and suppositions, and it is for the Commission to convince the Board, the pivotal body in the resolution of unemployment insurance disputes, of the presence of such evidence irrespective of the opinion of the employer.”

[43] The Tribunal finds that the claimant did not lose his employment as a result of his misconduct. The Commission argued that the Statement of Confidentiality and Abuse states that the claimant must keep any and all information in the strictest confidence regarding the residents and the residents' medical information. It also stated that this policy includes information regarding other staff members. The Commission further argued that the claimant knew the employer's policy and he knowingly violated the policy disregarding the effect his actions would have on his employment. However, the Tribunal is satisfied that the claimant's wife's termination letter does not include any information of a confidential nature and simply states that her services were no longer required. Further, the letter was addressed to his wife but the claimant's wife gave him permission to use it to attempt to get her job back. Therefore, the Tribunal is satisfied that the claimant did not wilfully breach the employer's policy regarding confidentiality because the claimant had permission to share the information and the information in the letter was not revealing personal confidential information.

[44] The legal test also requires that the claimant know that his actions could lead to his dismissal. The employer stated that the claimant was surprised and in disbelief that he was being dismissed from his employment. The information presented by the union representative stated that the claimant acknowledged his error, apologized and showed remorse. From this, the Tribunal is unable to conclude that the claimant knew or ought to have known that his conduct was such that it would result in dismissal; he did not believe that his wife's termination letter was included in the confidentiality agreement and therefore it cannot be said the claimant consciously or deliberately breached an express duty resulting from the contract of employment.

[45] For these reasons, the Tribunal concludes that the claimant did not lose his employment due to his own misconduct pursuant to subsection 30(1) of the EI Act.

CONCLUSION

[46] The appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section