Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *H. T. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 75

Tribunal File Number: GE-15-4295

BETWEEN:

H. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Valeant Pharmaceuticals

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: May 13, 2016

DATE OF DECISION: May 13, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Ms. H. T., the Appellant (claimant) along with her representative Ms. Melissa Shurvell attended the hearing.

Valeant Pharmaceuticals, the employer **did not** attend.

INTRODUCTION

[1] On January 11, 2015 the Appellant established a claim for employment insurance benefits. On November 9, 2015 the Canada Employment Insurance Commission (Commission) denied the Appellant benefits because it was established she lost her employment by reason of her own misconduct. On November 24, 2015 the Appellant made a request for reconsideration. On December 21, 2015 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal).

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

a) The complexity of the issue(s) under appeal.

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

c) The information in the file, including the need for additional information.

d) The fact that the appellant or other parties are represented.

e) 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.

ISSUE

[3] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the *Employment Insurance Act* (the Act) because she lost her employment due to her own misconduct.

THE LAW

[4] Paragraphs 29(a) and (b) of the Act states for the purposes of paragraph 30(a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[5] Subsection 30(1) of the Act states:

> (1) 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 employment; and
>
> (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

EVIDENCE

[6] In her application for benefits she indicated that she was dismissed from her employment because she refused to work a shift or different schedule. She stated that she had been working half time for 5 years and it was increased to 24 hours per week. She stated three month prior she was offered full time hours but declined due to family circumstances. She stated there no changes to her work schedule but refused to health and other concerns. She stated that it has been very stressful being a parent of a child with a mental illness. She stated she declined the full time hours as she needed the spare time to support her son. She stated there was no written documents to her knowledge that is she was to take full time she would be terminated, which she feels is the wrong reason and it is unfair (GD3-8 to GD3-9).

[7] A record of employment indicates the Appellant was employed with Valeant Pharmaceuticals from March 14, 2014 January 6, 2015 and left due to restructuring (GD3-16).

[8] On February 19, 2015 the Commission contacted the employer stating that the Appellant was originally hired on full time basis back in 1996. In November 2008 the Appellant's schedule was authorized for part time 3 days a week. She stated the Appellant signed a contract and one of the clauses indicates the employer can revise the agreement once a year to determine if it still required and it is signed by the Appellant. In August 2014 the Appellant was advised that the part-time arrangement will no longer be available starting in the new year of 2014 and full time will be required from the employee. She stated they worked on a possible schedule arrangement such as split days, week-end work, early or late shift start but the Appellant couldn't agree with any accommodation. The employer stated they had to dismiss the employee as she couldn't work the full-time schedule anymore. She stated that back in August all employees on part-time were requested to back to full-time, it wasn't just the Appellant (GD3-17).

[9] On February 19, 2015 the Commission contacted the Appellant who stated she refused to return to full time and refused the accommodations offered by her employer because of her son's random episodes and she would have to go home. She stated she cannot do full-time work because of her family situation. She stated her son is in Grade 3 and suffers from frequent stress episodes and she had to go and pick him up. She stated it could happen 1 to 2 times a week and then some weeks it doesn't happen. She stated the faster she can get to the school to get him the quicker he recovers from them. She stated she did have day care arrangements but that was 7 or 8 months prior and it was no longer possible to have this arrangement. She stated after that her husband dropped and pick up their son, but that was no longer possible. She stated she is a Quality Assurance chemist looking for part-time employment. She then stated she was available to work full time. She stated she didn't look for work after she was advised in August 2014 of her schedule change because she didn't think she would lose her job over it (GD3-18).

[10] A letter dated November 4, 2008 outlines the agreement to change the Appellant's schedule to 3 days of 24 hours per week along with the conditions which includes the agreement will be reviewed and evaluated on an annual basis in order to determine merit and to

ensure that this agreement continues to be satisfactory for both the Appellant and the company (GD3-20 to GD3-21).

[11] On November 9, 2015 the Commission denied the Appellant regular benefits because it was determined she lost her employment due to her own misconduct (GD3-22).

[12] On November 24, 2105 the Appellant made a request for reconsideration reiterating her reasons for not accepting a full time position (GD3-23 to GD3-24).

[13] On December 15, 2015 the Commission contacted the Appellant who clarified she had not told the previous agent that she was available and seeking full-time employment. She stated she was told by her employer in August 2014 she would have to return to full time but she didn't want to and she asked her manager if she could stay part-time. She states she was told it wasn't her decision and that the Appellant should start looking for child care arrangements. She stated in October she was given a letter for the full time job which she did not sign for various reasons and one was her salary was not correctly stated and once brought to the manager's attention it was corrected. She stated she asked what would happen if she didn't accept the job offer and the manager told her she would have to accept the consequences but she didn't ask what they would be. She stated she further spoke to Human Resources and asked what consequence she could face if she did not accept the offer and was told the employer would then look at her employment opportunities with them. The Appellant stated that the employer liked her so she was never expected they would let her go. She stated other coworkers assured her that the employer would never let her go and she had nothing to worry about. The Appellant stated she was told in August to start looking for day care she didn't do it. She stated she knew there were no child providers that would take her child. The Appellant stated that she believed if she accepted the full time position she would not be able to return to her part time hours. She stated that when she did have daycare while she was working Monday to Wednesday from 8 AM to 4 PM and she lost her babysitter her employer allowed her to change her schedule to 6 AM to 2:30 PM and allowed her to work on other days to make up any time she had to leave to care for her son. The Appellant stated two years ago the employer had conducted a work reduction and asked for voluntary resignations and she asked for one but they were not able to

offer her this option. She stated she had hoped she would have been offered a separation package. The Appellant stated she never considered working full time (GD3-25 to GD2-26).

[14] On December 21, 2015 the Commission contacted the employer who reiterated that there was a contract in place and there was a clear understanding that she would always be asked to go back to full time employment. She stated that during their conversations with the Appellant she was clearly interested in a separation package. She stated that they were willing to work with the Appellant and asked what they could do to help accommodate her working hours and schedule but she refused to take part in all the conversations. She would only state that she needed to work part-time for her family reasons. She stated that Appellant wanted a separation and she hired a lawyer and sued them to which the employer decided to pay her out (GD3-27).

[15] On December 21, 2015 the Commission notified the Appellant that the original decision on misconduct was being maintained and provided her with the information on how to appeal to the Tribunal. The Appellant stated she did not agree it was misconduct as she did not do anything wrong (GD3-28 to GD3-30).

[16] On December 21, 2015 the Commission notified the employer the original decision was maintained and provided the information on how to appeal to the Tribunal (GD3-31 to GD3-32).

[17] On December 22, 2015 the Appellant's representative filed a Notice of Appeal stating the Appellant maintains that she did not lose her employment due to her own misconduct (GD2-1 to GD2A-4).

[18] On May 16, 2016 the Appellant's representative submitted a Memorandum of Settlement (GD7-1 to GD7-8).

EVIDENCE AT THE HEARING

[19] The Appellant's representative summarized the information in docket. She stated that the Appellant is only able to work part time because she has a child with special needs and provides details in (GD3-8 and GD3-9). She stated that as the mother she was the best one to

care for her son. She stated that the Appellant never believed her employer would terminate her and that they would be able to work something out. She stated the Appellant spoke to Human Resources who told her that they would look at employment opportunities with her and she believed this up until the final moment. She stated the Appellant would still be working with the employer had she been provided the opportunity to work part time.

[20] The Appellant's representative stated that all the proposed accommodations offered by the employer were based on the Appellant working full time. On January 6, 2015 the employer called the Appellant into the office and provided her with a package and she was dismissed. The reason on the record of employment was indicated at other.

[21] The Appellant's representative refers to the Digest 7.1.0 "In that in order to constitute misconduct, the actions or omissions complained of must have been voluntary or willful or of such a careless or negligent nature that it appears to have been committed deliberately".

[22] The representative stated that the record of employment indicates "K" which means other and in this case it is due to restructuring. She stated that restructuring should not be considered misconduct.

[23] The representative stated that the Appellant had no reason to believe she would have been terminated and that her decision to work part time was family related.

[24] The representative stated that there was a written agreement (GD3-21) was based on the employee meeting expectations and the employer may end the contract with two weeks written notice if this condition was not satisfied. The Appellant believed her work performance was satisfactory. The agreement also said it will be reviewed annually to ensure this agreement continues to be satisfactory to both parties. The representative stated that the Appellant had the ability to negotiate.

[25] Lastly the representative stated the Commission submitted this could also be looked as a voluntary leave however the Appellant submits she did not voluntary leave but rather she was terminated. However if the Tribunal determines it to be voluntary leave they submit the Appellant has just cause to so under 29(c) (iii) (v) (vii).

[26] The Appellant stated that she signed a contract in 2005 and 2008 when she was asked to increase her hours. In 2005, she and another coworker agreed to job share, however in 2008 her employer asked her to increase her hours to 24 per week to allow her to get full benefits.

[27] The Appellant confirmed she was well aware that she could be made to return to full time. She didn't know when it was coming and that her manager said they would take it day by day.

[28] The Appellant stated that in August she was called into the manager's office to see what she thought of working full time, she stated the manager was aware of her son's situation but he was told he was told to ask her and he was just delivering the message. He gave her two weeks' notice to let him know. She stated there was another coworker who was given the same notice. Two weeks later she came back and told him she wanted to stay part time because of her child. Later on he sent a letter and that she had to sign it that she was going back to full time, she asked what would happen if she didn't sign it and he told her she would have to face consequences. She went to see the Human Resources (HR) and asked about consequences, as those were harsh words. She stated she told them she wasn't ready to sign and told them about her family situation and the manager was understanding and said they would do their best to keep her there as they value her performance.

[29] The Appellant stated later on after that meeting, she did have a deadline to sign the letter, and for some reason she went back to the manager to clarify it and she was told it was up to the top, so she went to HR as it was getting close to the end of the year. At that time things were different, and she asked what would happen if she didn't sign and HR said they would have to take a look at her employment opportunities. She had been told all along that they value her, so she had no reason to believe her employer would terminate her. She stated there was a break between Christmas and New Years and when she came back they called her in the office and gave her a package, they said that it was a business decision and they could not accommodate her.

[30] The Appellant stated it was true the employer tried to accommodate her (GD3-17) but what they offered was still based on full time.

[31] The Appellant was asked by the Tribunal if anything prevented her from trying to work full time. She stated that she knew that once she signed to go back full time she would not have been able to go back part time. When in August she was told to find day care, she was on a waiting list at the Y for maybe a year, she looked at the EAP several times but she knew that it would take a long time.

[32] The Appellant was asked to clarify the conflicting statement (GD3-25 and GD3-18) regarding her able to work full time, however she does not recall conflicting herself, there was a lot of conversation going on.

[33] The Appellant stated that since the time she was told in August of the upcoming changes to return to full time, she didn't look for other work, there was lots going on in her head, what should she do, and her employer had reassured her she was a valued employee. This gave her a piece of mind as over the years she was accommodated but her circumstances changed and the reasons were because of her child. Things changed when he went to school full time.

[34] The Appellant confirmed that it was clear she was hired full time and that it could go back, however her representative stated it was based on being satisfactory to both parties.

[35] The Appellant sated that the employer's statements in (GD3-27) were wrong, and that the employer knew of her situation. The representative referenced (GD7-2) where statements say "whereas" are agreed upon statements and that she did inform her employer of her situation. They are not disputing the employer offered accommodations but they were all in the context of working full time.

[36] The representative further referenced (GD7- forth statement) which stated "whereas Ms. H. T. through her counsel has alleged that the Employer's requirement that Ms. H. T. change her work schedule and termination constituted a failure to accommodate Ms. H. T.'s childcare responsibilities and that such was discrimination on the bases of family status a prohibited ground under The Human Rights Code" Further Appellant received $50,000.00 with $7500.00 being for general damages. The representative agreed that the settlement was based on allegations and that there were no findings. But they did pay.

[37] The representative and Appellant both confirmed (GD7-4) Paragraph 6 – “It is agreed by both parties that the payments made by the Employer to Ms. H. T. as set out in paragraph 1 are not and are not deemed in any way to be an admission of the liability on the part the Employer”.

[38] The Appellant stated she was able to start work at 6 AM, which her husband would take their son to care provider and then when she was off work at 2:30 PM she could pick him up. She stated that if her son was ill while she was working and if she was in the middle of something her husband would go.

[39] The Appellant stated that she was expected to work from 8-4:30 PM that would not have been suitable for her family needs, but when asked by the Tribunal is she would have still been able to begin work 6 AM, she stated she thought so.

[40] The Appellant stated she couldn’t accept working the same shift 5 days a week, as she was able to figure out the three days she needed the other 2 days as she volunteered at the school and her presence there seems to help her son. Also if the episodes happened on a Thursday and Friday, she was there and could get her son home right way. The other days she works 45 minutes away from home so it made it harder.

[41] The Representative references (A-352-94 *Secours*) quoting the umpire that it’s not wrongful intent. She stated the Appellant’s decision was not a willful disregard. It was family related, as she has special needs child and she is the primary care giver, she was the only one who could calm him down, and she needed to work part time as she had in the past 10 years.

[42] The Appellant confirmed that her son has special needs however she does not have any medical documentation to support that she couldn’t work full time because of her son’s condition.

SUBMISSIONS

[43] The Appellant along with her representative submitted that:

a) She is only able to work part time because she has a child with special needs;

b) She never believed her employer would terminate her and that they would be able to work something out. She stated the Appellant spoke to Human Resources who told her that they would look at employment opportunities with her and she believed this up until the final moment. She stated the Appellant would still be working with the employer had she been provided the opportunity to work part time.

c) The Appellant's representative refers to the Digest 7.1.0 "In that in order to constitute misconduct, the actions or omissions complained of must have been voluntary or willful or of such a careless or negligent nature that it appears to have been committed deliberately".

d) The record of employment indicates "K" which means other and in this case it is due to restructuring. She stated that restructuring should not be considered misconduct.

e) There was a written agreement (GD3-21) based on the employee meeting expectations and the employer may end the contract with two weeks written notice if this condition was not satisfied. The Appellant believed her work performance was satisfactory. The agreement also said it will be reviewed annually to ensure this agreement continues to be satisfactory to both parties. The representative stated that the Appellant had the ability to negotiate.

f) All the proposed accommodations offered by the employer were based on the Appellant working full time;

g) The Commission submitted this could also be looked as a voluntary leave however the Appellant submits she did not voluntary leave but rather she was terminated. However if the Tribunal determines it to be voluntary leave they submit the Appellant has just cause to so under 29(c)(iii)(v)(vii).

[44] The Respondent submitted that:

a) The Appellant was hired by her employer as a full time employee and the employer accommodated her for a number of years to work part-time. However the contract clearly states that the agreement is to be reviewed each year and has to be satisfactory to both parties. Obviously, the employer needed for the Appellant to return to full-time employment and gave her plenty of notice to make arrangements so that she can work full-time. However the Appellant failed to meet her obligations to her employer;

b) The employer was more than willing to work out a schedule that worked for her family situation, but the Appellant made no efforts to try working full time or even discuss a schedule that would work for her family needs;

c) The Commission contends that the Appellant's family issues are personal matters that are not considered under the Act. The Appellant should have made childcare or other arrangements to deal with personal matters and then started working at the position that she was hired to work full time;

d) The Commission submits that misconduct has been proven, as the Appellant should have known or ought to have known that not returning to her full time position would lead to her dismissal;

e) As stated in Easson, the reason for separation can be looked as voluntary leaving or a dismissal and in this case has been adjudicated as misconduct, however it can also be looked at as voluntary leaving and just cause would not be shown as the Appellant did not exhaust all reasonable alternatives. In this case the Appellant could have secured other part-time employment prior to having to return to full time work with her employer, or agreed to a schedule with her employer that met her family needs. The Appellant had known since August 2014 that the part-time arrangements would no longer be available; and

f) The Commission concluded the Appellant's refusal to return to her full-time position constituted misconduct within the meaning of the Act because the Appellant knew or ought to have known that it would lead to her dismissal.

ANALYSIS

[45] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as willful misconduct, where the claimant knew or ought to have known that his misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemier*, 2012 FCA 314).

[46] The Tribunal must first identify if the alleged act constituted misconduct and if the Appellants' conduct complained of was the cause of the dismissal.

[47] The Appellant presents the argument that the Commission submitted this could also be looked as a voluntary leave however the Appellant submits she did not voluntary leave but rather she was terminated. However if the Tribunal determines it to be voluntary leave they submit the Appellant has just cause to so under 29(c)(iii)(v)(vii).

[48] The Supreme Court of Canada has stated that the cardinal principal of section 28 (now section 29) is that the loss of employment which is insured against must be involuntary. Thus claimants are disqualified if they lose employment by reason of their own misconduct, or if they voluntarily leave their employment without just cause. The consequences under (i.e., disqualification under section 30(1) whether it is found that he claimant lost his employment because of misconduct or because he voluntarily left under the Act are the same. Parliament linked voluntary leaving and misconduct due to the fact that contradictory evidence may make it unclear to the cause of the claimant's unemployment (*Canada A.G. v Easson* A-1598-92).

[49] In this case, the Tribunal finds the alleged act of refusing to abide by the employee/employer contract constitutes misconduct within the meaning of the Act and finds from the employers evidence on the file and from the Appellant's oral evidence that she refused to return to full time employment or accept the employer offer to accommodate a schedule to assist her with personal needs led to her dismissal.

[50] The Tribunal finds it was the employer who severed the employee/employer relationship and therefore would constitute misconduct.

[51] The Tribunal must determine whether or not it has been clearly established, on a balance of probabilities that the Appellant violated a rule or law, or a standard which was established by the employer or otherwise amounted to an express of implied condition of his employment (*Tucker* A-381-85).

[52] The Respondent presents the argument that the Appellant was hired by her employer as a full time employee and the employer accommodated her for a number of years to work part-time. However the contract clearly states that the agreement is to be reviewed each year and has to be satisfactory to both parties. Obviously, the employer needed for the Appellant to return to full- time employment and gave her plenty of notice to make arrangements so that she can work full- time. However the Appellant failed to meet her obligations to her employer.

[53] The Appellant argues that she is only able to work part time because she has a child with special needs. She never believed her employer would terminate her and that they would be able to work something out. She stated she spoke to Human Resources who told her that they would look at employment opportunities with her and she believed this up until the final moment. She would still be working with the employer had she been provided the opportunity to work part time.

[54] The Tribunal sympathies with the Appellant's situation and understands wanting to work part time to allow her time to spend on family affairs, however the Appellant has failed to provide evidence to substantiate that her son's medical condition changes the fact that she refused to comply with the employers request to return to full time employment. Despite the fact that she knew or ought to have known could result in her termination.

[55] The Appellant's representative refers to the Digest 7.1.0 "In that in order to constitute misconduct, the actions or omissions complained of must have been voluntary or willful or of such a careless or negligent nature that it appears to have been committed deliberately".

[56] The Tribunal finds from the evidence on file and from the Appellant's oral evidence that she was well aware of the agreement, to which she had signed, that she may be required to

return to full time work. The fact that she no longer wanted to work full time was a personal choice and one that conflicted the employer contract. Therefore the Tribunal finds that the Appellant's actions were clearly voluntary and willful.

[57] The Appellant argues that the record of employment indicates "K" which means other and in this case it is due to restructuring. She stated that restructuring should not be considered misconduct.

[58] The Tribunal finds from the evidence on the file that the employer was making changes they deemed necessary and the fact that "K" was used does not dispute the fact that the evidence clearly indicates that the Appellant would still be employed had she complied with the employers request to return to full time.

[59] The Appellant presents the argument that there was a written agreement (GD3-21) based on the employee meeting expectations and the employer may end the contract with two weeks written notice if this condition was not satisfied. The Appellant believed her work performance was satisfactory. The agreement also said it will be reviewed annually to ensure this agreement continues to be satisfactory to both parties. The representative stated that the Appellant had the ability to negotiate.

[60] The Tribunal finds from the employer's evidence on file and from the Appellant's testimony that she was provided with a great deal of notice that the employment arrangement was going to be changing as early as August 2015. Subsequently the Appellant had meetings with management and HR, who appears to have been forthcoming throughout the process. The evidence supports that the Appellant was warned there would be consequences and that her employer opportunities would be in question if she refused to comply. The Tribunal find the Appellant's belief that she would be accommodated because she was a valued employer still does dispute the fact that her continued employment was based on the facts the employer wanted her to return to her full time position.

[61] The Tribunal finds the Appellant's argument that the contact was contingent on the agreement continuing to be satisfactory to both parties, which gave the Appellant the ability to negotiate is not reasonable, as the agreement would need to be satisfactory to the employer as

well, in this case, it was the employer who originally allowed the Appellant to work part-time which was her request, and thus this agreement no longer was satisfactory to the employer. The Tribunal finds the employer was more than reasonable in giving the Appellant several months' notice that the agreement would be changing. The Tribunal also finds the employer's evidence on the file clearly support they were willing to offer the Appellant several options that would accommodate her and her family commitments.

[62] The Respondent argues that the employer was more than willing to work out a schedule that worked for her family situation, but the Appellant made no efforts to try working full time or even discuss a schedule that would work for her family needs.

[63] The Appellant argues that all the proposed accommodations offered by the employer were based on her working full time. She does dispute the statement that she did not discuss her needs with her employer.

[64] The Appellant presented evidence of a Memorandum of Settlement, the representative referenced (GD7-2) where statements say "whereas" are agreed upon statements and that she did inform her employer of her situation. They are not disputing the employer offered accommodations but they were all in the context of working full time. The representative further referenced (GD7- forth statement) which stated "whereas Ms. H. T. through her counsel has alleged that the Employer's requirement that Ms. H. T. change her work schedule and termination constituted a failure to accommodate Ms. H. T.'s childcare responsibilities and that such was discrimination on the bases of family status a prohibited ground under The Human Rights Code" Further Appellant received $50,000.00 with $7500.00 being for general damages. The representative agreed that the settlement was based on allegations and that there were no findings. But they did pay.

[65] The Tribunal notes that the settlement was based on allegations and that there were no findings.

[66] The Appellant's representative relied, specifically on the Umpires statement cited in A-352-94 Secours "It is not necessary for a behavior to amount to misconduct under the Act that

there be a wrongful intent. It is sufficient that the reprehensible act or omission complained of be made "willfully", i.e. consciously deliberate or intentionally".

[67] The Tribunal finds that in A-352-94 the Federal Court found the Umpire to have erred in his finding as is with the finding in the appeal before the Tribunal. In this case as in *Secours*, the Appellant knew that returning to full time was a real possibility. The evidence is clear; she signed a contract that clearly states the change to part time could be evaluated. The evidence supports that the Appellant was provided with a notice in August 2015 that she would be required to resume her full time position in January. The evidence supports that the employer provided the Appellant with further options to try and accommodate her schedule that would allow her meet her family obligations.

[68] The Tribunal finds from the evidence on the file and the Appellant's oral evidence that they do not dispute the fact the employer offered accommodations. The Tribunal finds from the Appellant's oral testimony that she was not willing to accept any of the accommodations because they were based on her working full time and she only wanted to work part time. There is no evidence to support that this schedule could not have remained for the additional two days a week. In fact, the Appellant agreed that she would likely have been able to keep the same arrangement. Furthermore the employer's evidence on the file support that the Appellant was offered several options and one which included an early or late shift starts (GD3-17).

[69] The Tribunal finds the evidence supports that the employer was aware of the Appellant's family situation as they had in the past made accommodations for her by allowing her to work part time and from 6 AM to 2:30 PM. As well the Appellant had provided evidence that her employer allowed her when necessary to leave work if he son had issues, and then make up the time later. The Tribunal finds that although the Respondent's statements on this are disputed it does not change the facts the employer was willing to accommodate the Appellant and that the Appellant was not interested in accommodations that did not include part time employment.

[70] The Tribunal finds from the Appellant did not provide any evidence to support that her reasons for not returning to her full time job was other than personal reason. The Tribunal finds from the Appellant's oral evidence that she only wanted to work three days a week to allow her

to engage in other activities such as volunteering at her son's school. The Appellant was not able to provide any evidence to support that her sons condition was of urgency that she had to refuse her employers request. Or that there were any other reasons for the dismissal.

[71] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[72] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the claimant's dismissal from employment (*Macdonald* A-152-96).

[73] The Tribunal sympathies with the Appellant's situation however the evidence supports it was the Appellant's own action not to comply with her contract and resume to her full time agreement, nor to consider her employers offer to provide her with reasonable accommodations, caused her to be terminated from her employment. In acting as she did, the Appellant knew or ought to have known that the conduct was such as to impair the performance of her duties owed to the employer and that, as a result, dismissal was a real possibility.

[74] The notion of willful 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.

[75] In (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII)), the Federal Court of Appeal wrote: "there will be misconduct 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."

[76] The Tribunal finds that the legal issue at stake is a disqualification under subsection 30(1) of the Act which states a claimant will be disqualified from benefits if she lost her employment by her own misconduct or voluntarily left her employment without just cause (*Canada (Attorney General) v. Desson*, 2004 FCA 303 (CanLII)).

[77] The Tribunal finds an indefinite disqualification should be imposed pursuant to section 30(1) of the Act because the Appellant lost her employment by reason of her own misconduct, within the meaning of the Act.

CONCLUSION

[78] The appeal is dismissed.

Teresa Jaenen
Member, General Division - Employment Insurance Section