



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. P. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 31

Tribunal File Number: GE-16-3282

BETWEEN:

R. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: March 1, 2017

DATE OF DECISION: March 10, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant did not attend the hearing.

The Canada Employment Insurance Commission (Commission) did not attend.

INTRODUCTION

[1] The Appellant submitted an initial claim for sickness benefits on February 17, 2016. In that claim, the Appellant reported to have been dismissed due to misconduct. A period of sickness benefits was nonetheless established for him. However, in the notice of decision dated March 11, 2016, the following is specified: [translation] “If you are submitting a claim for regular benefits, we will conduct a finding of facts and will make a decision on the ground for the termination of employment for the above-mentioned employer(s). The decision on that issue could determine whether you will be entitled to regular benefits for this claim.”

[2] At the end of her sickness benefits, the Appellant submitted a claim to convert her sickness benefits into Employment Insurance regular benefits. Claim was refused on June 13, 2016. The Commission determined that it could not pay out benefits to the Appellant, since she had lost her job due to her misconduct.

[3] The Appellant filed a request for reconsideration. In a reconsideration decision rendered on July 28, 2016, the Commission upheld the decision rendered on June 13, 2016.

[4] The Appellant filed an appeal with the Tribunal on August 24, 2016.

[5] On September 1, 2016, the Tribunal informed the employer that if it wanted to be included in the case as an “added party,” it would have to file the appropriate request with the Tribunal no later than September 16, 2016. The employer did not follow up on that request, and the Tribunal decided not to include it as an “added party.”

[6] On February 17, 2017, the Appellant notified the Tribunal that, because she did not think she could win her case, she would not be attending the hearing.

[7] Being convinced that the Appellant had indeed received the notice of hearing, the Tribunal held the hearing in her absence, pursuant to subsection 12(2) of the *Social Security Tribunal Regulations*.

[8] Notwithstanding the foregoing, on the day of the hearing, the Tribunal waited on the telephone line for 30 minutes to allow the parties enough time to join the hearing, but to no avail.

[9] This appeal proceeded via teleconference for the reasons set out in the notice of hearing.

ISSUE

[10] The issue is whether the Appellant lost her employment by reason of her own misconduct pursuant to subsection 30(1) of the *Employment Insurance Act* (Act).

EVIDENCE

[11] A Record of Employment, dated March 2, 2016, specifies that the Appellant held a nursing position in a general hospital from August 5, 2012, to February 6, 2016, and that she stopped working for that employer due to a dismissal (GD3-15).

[12] On June 9, 2016, during the administrative review, the Appellant stated that she was dismissed because she had given her personal medication to a friend, who was a palliative care patient in the general hospital where she worked. Although this event occurred while she was on vacation, she was still dismissed for serious professional misconduct. The Appellant acknowledged the fact that she could have said “no” to her friend or could have asked the attending physicians to adjust her medication (GD3-21).

[13] On June 13, 2016, the employer stated that the Appellant had been dismissed following a breach of the *Code de déontologie des infirmières et infirmiers du Québec* ([translation] Quebec Nurses’ Code of Ethics). The Appellant administered about twenty pills to her friend, who was a patient in another unit of the general hospital. It turned out that the patient in question was addicted to this type of medication and that, if the patient had taken all the pills, she could have died. The employer confirmed that the Appellant admitted that she had done it,

but she downplayed the severity of her action, not thinking that she was a nurse during her vacation (GD-322). The employer sent to the Commission the dismissal letter addressed to the Appellant dated February 16, 2016 (Exhibits GD-324 to GD-327). According to that letter, the employer also reported the Appellant's conduct to her professional body.

[14] In her request for reconsideration submitted on June 27, 2016, the Appellant explained that she had filed a grievance following her dismissal, and that the time frame for getting a ruling is between 1 and 3 years. According to the Appellant, the Commission had found her guilty before the ruling was even given. With respect to the event that led to her dismissal, the Appellant added that her friend had cancer and that she had asked her for help, because she was suffering from too much anguish. The Appellant claimed to have hesitated before saying "yes" to her friend. However, given that in the exercise of her duties as a nurse when she agreed to help her friend, the Appellant told her friend that she would come by and see her during her vacation. The Appellant admitted to acting on emotion, and that the medication she had given her friend was hers, so she had not stolen any medication. She added that she did not want to find herself on social assistance and that she believes Employment Insurance can help her while she awaits the ruling on her grievance (GD3-32 to GD3-34).

[15] On July 28, 2016, the Appellant claimed to have filed a grievance following the dismissal. She recognized that the action that had led to her dismissal was contrary to the ethics code. She claimed to have acted without considering the consequences of her actions; however, when she visited her friend in the hospital to give her the medication, she was not carrying out her functions as a nurse (GD3-35).

[16] In her notice of appeal submitted to the Tribunal, the Appellant reiterated the same facts that she had explained in her request for reconsideration (GD2-1 to GD2-15).

[17] Both parties in the docket were absent during the hearing. Therefore, no evidence was submitted during the hearing.

PARTIES' ARGUMENTS

[18] The Appellant has argued that she had not been exercising her functions as a nurse when the circumstances that led to her dismissal arose, and that she filed a grievance in that

regard. The Appellant has argued that the Commission had found her guilty before the ruling was even rendered.

[19] The Commission has argued that the Appellant was dismissed due to a violation of the employer's policies and a breach of its ethics code when she had provided medication to a friend, who was a patient at the general hospital where she was working. Through this action, the Appellant violated the *Code de déontologie des infirmières et infirmiers du Québec*. She should have known that the nature of that action would impair her performance as a nurse and that it could lead to her dismissal. This action was deliberate, wilful and was the cause of the dismissal. This act constituted misconduct within the meaning of the Act.

[20] The Commission affirmed that the Appellant's guilt does not fall within the Commission's jurisdiction. The Commission has the duty of enforcing the Act and, from this fact, it determined that the Appellant's alleged act constituted misconduct requiring a disqualification under the Act.

ANALYSIS

[21] The relevant legislative provisions are reproduced in an appendix to this decision.

[22] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving benefits if he or she loses an employment due to his or her misconduct.

[23] Misconduct is not defined in the Act. However, the case law established that, for the purposes of subsection 30(1) of the Act, there is misconduct when a claimant's conduct was wilful, i.e. in the sense that the conduct that led to the dismissal was conscious, deliberate or intentional. There is 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—*Mishibinijima*, A-85-06.

[24] Furthermore, the misconduct must have been the cause of the dismissal (*Cartier*, A-168-00; *Namaro*, A-834-82). In fact, the misconduct must be the operative cause for the loss of employment and not merely an excuse to justify it (*McNamara* A-239-06, 2007 FCA 107).

[25] It is incumbent upon the party who alleges the misconduct to prove it (*Larivée* 2007 FCA 312). In this regard, the Commission must prove, on a balance of probabilities, that the Appellant lost her or her employment due to her own misconduct.

[26] The Tribunal finds that the Commission met its onus to prove that the act that led to the dismissal constituted misconduct within the meaning of the Act.

[27] In fact, the Tribunal is not to determine whether the dismissal or disciplinary action was justified. It must instead determine whether the claimant's action constituted misconduct under the Act (*Marion*, 2002 FCA 185).

[28] What is the alleged act?

[29] The misconduct may take the form of a violation of the law, a regulation or ethical rule, and it must be shown that the alleged conduct constitutes a breach of an express or implied duty or condition included in the contract of employment of such scope that the employee would normally foresee that it would be likely to result in her or her dismissal (*Brisette*, A-1342-92).

[30] The Tribunal has reason to believe that the Commission proved that the Appellant, a nurse by trade, provided non-prescribed medication to a patient who was not under her care. The Appellant did not assess the medical record, nor did she assess the patient's mental and physical state before providing medication to her. Furthermore, it turned out that the patient was a friend of the Appellant. By acting in such a way, the Appellant violated the basic rules of the nursing profession, especially the principles of administering medication. There are also significant breaches of the *Code de déontologie des infirmières et infirmiers du Québec*, notably, the duty to prevent any conflict-of-interest situation.

[31] In the case study, the facts in the docket are clear, and they allow the Tribunal to find that the Appellant knowingly violated her ethics code.

[32] Moreover, the Tribunal finds that this violation of the ethics code was done deliberately. The Appellant explained that she was on vacation when she provided the medication to her friend; she thereby disputes the fact that the loss of her employment was related to her

misconduct because the alleged incident had occurred outside of work. The Tribunal cannot share this view, because the case law informs us that it is unnecessary for the misconduct to have been made at work, on the work premises or within the work relationship with the employer. It is sufficient for the misconduct to arise while the employee is under the employment of the employer, and that it constitutes a breach of the express or implied duty resulting from the contract of employment (*Brissette*, A-1342-92).

[33] The Tribunal believes that, in choosing to carry out this action during her vacation, the Appellant demonstrated that she knew that providing the non-prescribed medication to a patient violated the basic rules of the nurse profession, and that this action was such that it could result in her dismissal.

[34] The Tribunal finds that the Appellant's alleged behaviour constituted misconduct because it amounted to a violation of her ethics code and a breach of the express or implied obligations in her contract of employment, namely: respecting the principles of safe administration of medication; competence; trust; and respect for the ethics code.

[35] With respect to the cause of the dismissal, the Tribunal finds that there is no doubt that the alleged action caused the dismissal. That is shown by the dismissal letter, which reads as follows: [translation] "You have acted in defiance of the safety and patience at issue, and it is inconceivable to us that you could have acted in this way [...] Due to the severity of your lack of judgement and all the major breaches of the nurses' ethics code, we have no other choice but to conclude that the required relationship of trust between us has been irreversibly broken."

[36] With respect to the Appellant's perception such that the Commission found her without merit, the Tribunal wishes to indicate that the Commission and the Tribunal are not able to assess or examine the severity of the penalty that the employer had imposed. The sole question with which the Tribunal must concern itself, is whether the alleged conduct amounts to misconduct within the meaning of section 30 of the Act (*Lemire*, 2010 FCA 314).

CONCLUSION

[37] In conclusion, the evidence clearly shows that the Appellant lost her job due to her own misconduct pursuant to sections 29 and 30 of the Act. The Tribunal finds that the Appellant violated her code of ethics and that there was a breach of the express or implied terms of her contract of employment, and that she knew or ought to have known that this conduct was such that it could result in her dismissal. There is no doubt that the alleged action constitutes misconduct within the meaning of the Act.

[38] The appeal is dismissed.

Bernadette Syverin
Member, General Division—Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30 (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

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

(2) 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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of

weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

Employment Insurance Regulations