



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *J. M. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 96

Tribunal File Number: GE-16-4284

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division—Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: May 30, 2017

DATE OF DECISION: June 23, 2017

REASONS AND DECISION

OVERVIEW

[1] J. M. (the appellant) lost her employment in the X area and applied for employment insurance benefits. In the application, the appellant stated that the employer denied her request for leave to attend her grandmother's funeral in Nova Scotia.

[2] The Employment Insurance Commission (the Commission) determined that the appellant lost her employment because of her misconduct. Under the *Employment Insurance Act* (the Act), individuals who lose their jobs because of their conduct are not eligible for benefits. The appellant was therefore disqualified from receiving benefits. This decision was upheld on reconsideration, hence the appeal before the Tribunal.

[3] The Tribunal must determine whether the appellant lost her employment because of her misconduct under section 30 of the Act.

[4] The Tribunal informed the employer that, if it wanted to join the appeal as an "added party," it would have to file the appropriate request with the Tribunal. The employer did not respond. Pursuant to subsection 10(1) of the *Social Security Tribunal Regulations*, the Tribunal determined that the case was not of direct concern to the employer, so the employer was not added as an "added party."

[5] The appellant attended the hearing with her father, J. A., who was the appellant's witness. The appellant was represented by Kim Bouchard.

[6] This appeal was heard by teleconference because this form of hearing is consistent with the requirement of the *Social Security Tribunal Regulations* to proceed as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[7] The Tribunal finds that the appellant did not lose her employment because of her misconduct. The reasons for the decision are set out below.

EVIDENCE

[8] The Tribunal considered all of the evidence available to it and identified the following evidence as relevant to the issue of whether the appellant lost her employment because of her misconduct.

[9] First, a record of employment issued by the employer shows that the appellant was dismissed on July 20, 2016. According to the record of employment, the appellant had accumulated 539 hours of insurable employment (GD3-16). As well, the Commission confirmed that the appellant had accumulated 1158 during her qualifying period. (GD7-1 to GD7-3)

[10] During a number of conversations with the Commission, the employer explained that, in July 2016, the appellant had requested leave from August 13 to 23, 2016, because she had to attend her grandmother's funeral in Nova Scotia. The employer granted the request for leave but required the appellant to return to work on August 22, 2016, instead of August 23, 2016. The appellant said that she could not return on August 22, 2016. The employer stated that it therefore proposed that the appellant fly back to X to return to work on August 22, 2016, and the appellant seemed open to that proposal. As a result, the employer assisted the appellant in her search for an airline ticket, and they found a plane ticket for \$200. However, while the employer and the appellant were still looking for ways for the appellant to return earlier from her trip, the appellant's father went to the employer to negotiate the length of the appellant's leave. The employer stated that, in its interactions with the appellant's father, the father yelled at him, the conversation was harsh and the appellant's father intimidated him. The employer decided to dismiss the appellant because it did not appreciate the fact that the appellant's father was involved in the appellant's leave request. (GD3-24 to GD3-26)

[11] The appellant told the Commission that she had requested leave from August 13, 2016, to August 21, 2016, and that she would return to work on August 22, 2016. The employer wanted to grant her leave from August 13 to 18, 2016, but she was not scheduled to work on August 19, 20 or 21, 2016. After being dismissed, she attended her grandmother's funeral and returned to X on August 21, 2016. She was not with her father when he went to the store, so she does not know what happened during the discussion between her father and her employer when her father went

to the store. On July 20, 2016, the employer told her that her father had been “stupid,” that it was not possible to grant her leave from August 13 to 21, 2016, and that she was fired. (GD3-27 and GD3-28)

[12] In an explanatory letter attached to her request for reconsideration, the appellant stated that her work schedule was Tuesday and Wednesday, but she was on call to replace other employees as required. Her grandmother died in March 2016, and the funeral was scheduled for August 17, 2016, in Nova Scotia. In March, the appellant requested leave from her employer during the week of August 17, 2016, and her leave request was granted by the employer. However, in July 2016, the appellant noticed that she was scheduled to work during her week of leave (the week of August 17, 2016). After checking with the employer, the employer agreed that the appellant would be away from work on August 16 and 17, 2016; however, the employer required her to be back in X on August 18, 2016, so that she would be available if needed. The appellant told the employer that she could not be back in X on August 18, 2016, because she was travelling by car and the duration of the drive was two days. Not knowing what to do, the appellant asked her father to go and speak to the employer. Her father allegedly tried to make it clear to the employer that the appellant would be absent for only two days and she would return no later than August 20, 2016. The employer told her that she was fired because her father had meddled in discussions on her behalf with management. (GD3-22)

[13] At the hearing, the appellant submitted the following:

- a) The owners of the company for which she was working are Ms. G. and Mr. B.. The appellant usually worked Tuesday and Wednesday evenings, but sometimes she was called in to work when she was not scheduled to work.
- b) In March 2016, Ms. G. granted her leave for August 13 to 21, 2016. Despite this, the appellant noticed in July 2016 that she was scheduled to work on August 16 and 17, 2016. In light of this, the appellant reiterated to Ms. G. her request for leave. After discussing with Mr. B., Ms. G. explained to the appellant that Mr. B. did not agree with the appellant taking leave. However, Ms. G. suggested that the appellant take the plane so that she could be back from her trip on August 18, 2016.

- c) Not knowing what to do, the appellant explained the situation to her father, who offered to help her by talking to the employer. On Wednesday, July 20, 2016, when the appellant was scheduled to work in the evening, her father went to the store to talk with the employer. On the same day, the appellant received a call from Mr. B.. He was angry because the appellant's father had gone to the store, and he told her that her employment was terminated.

[14] The appellant's father, J. A., testified as follows:

- a) J. A. is the appellant's father, and he helps the appellant in difficult situations because the appellant has difficulty expressing herself. However, this was the first time that J. A. had to intervene in the appellant's work life.
- b) J. A. testified that, contrary to the employer's allegations, he did not intimidate the employer in any way by going to the store on July 20, 2016. Rather, he had a polite discussion with Ms. G.. During the conversation, J. A. pointed out that the appellant worked only on Tuesdays and Wednesdays and that she had been granted the two days off. Regarding the employer's requirement that the appellant be back on August 18, 2016, J. A. told Ms. G. that the costs associated with the requirement were excessive. In fact, for the appellant to return by plane on August 18, 2016, J. A. would have to drive three hours to get the appellant to the Halifax airport, not to mention the cost of the plane ticket. Moreover, according to the work schedule, the appellant was not working on August 18, 2016, so she would be returning early only so she could be available if needed. The employer then told J. A. that the appellant and the employer were about to agree that the appellant would fly back on August 18, 2016. J. A. told Ms. G. that they could return from their trip on August 19 or 20, 2016. The appellant would then be back in time for her next shift, which was scheduled for August 22, 2016. Since she could not make a decision, Ms. G. said that she would discuss the matter with Mr. B. and that he would inform them of the decision.

- c) Later on July 20, 2016, the appellant received a call from Mr. B. and passed the telephone to her father. J. A. testified that, during the conversation, Mr. B. told him that he had no business going to the store to assault his wife (Ms. G.) as he had done.

PARTIES' ARGUMENTS

[15] Counsel for the Appellant argues that the Commission's position is not supported by the evidence in the file for the following reasons:

- a) First, according to the Commission, the appellant took leave without authorization; however, according to the facts in the file, the appellant was dismissed on July 20, 2016, and her request for leave was for a period after her dismissal. Specifically, the appellant requested leave from August 13 to 21, 2016.
- b) Second, contrary to the Commission's claims, the appellant did not uphold a leave request that had been denied because, as indicated in Exhibit GD3-25, the employer stated that the leave request was still under negotiation.
- c) Third, according to *Brissette*, misconduct must be the operative cause of the loss of employment; however, the facts in the file show that the appellant was dismissed because her father intervened in the negotiation of her period of leave. This cannot constitute misconduct because the appellant could not have known that, by asking her father to intervene, she was running the risk of losing her job.
- d) Finally, this case should not be analyzed in terms of a voluntary leaving, since it is clear that the appellant was dismissed.

[16] For all these reasons, counsel for the appellant argues that the Commission did not discharge its burden of proving that the appellant lost her job because of her misconduct.

[17] For its part, the Commission argued that subsection 30(2) of the Act provides for indefinite disqualification if it is established that the claimant lost her employment because of her own misconduct. For the action complained of to constitute misconduct within the meaning of

section 30 of the Act, it must be wilful or deliberate or be so reckless or negligent as to approach wilfulness. There must also be a causal link between the misconduct and the dismissal.

[18] The Commission found that the appellant's action of taking leave for a period that had not been granted constituted misconduct within the meaning of the Act because, by not complying with her employer's decision, the appellant caused the loss of her employment. As a result, the appellant ceased to meet one of the employment criteria by upholding a request for leave that had been denied.

[19] The Commission also proposes that the case be assessed in terms of voluntary leaving. According to the Commission, if the appellant had accepted the vacation her employer was offering, she would still have her job. By refusing to comply with a reasonable request from her employer, the appellant became responsible for the termination of her employment and created an unemployment situation by allowing a third party to intervene. Although the dismissal was caused by the intervention of the appellant's father, the fact remains that the appellant did nothing to try to save her job after the discussion between her father and the employer. Moreover, the appellant stated that it did not bother her to lose her job. The Commission is therefore of the opinion that the appellant made a personal choice not to resolve the dispute with her employer and to let a third party resolve it in her place. In doing so, the appellant did not behave as a reasonable person would have done in this case. In the case of a voluntary leaving, the Appellant would therefore not be justified in leaving her employment for a leave request that had been denied because it is not the only reasonable alternative. A reasonable alternative would have been to find common ground with the employer rather than allowing a third party to settle the matter.

[20] The Commission maintains that the decision is consistent with the Act and supported by the case law. Accordingly, the Commission asks the Tribunal to dismiss the appeal.

ANALYSIS

[21] The relevant statutory provisions are appended to this decision.

[22] On its face, the Commission determined that the appellant lost her job because of her misconduct. However, in its arguments in support of dismissing this appeal, the Commission submits that the appellant abandoned her employment by refusing to accept the denial of her leave request. Therefore, if the case is analyzed from a voluntary leaving perspective, the appellant was not justified in voluntarily leaving her job because the appellant had not exhausted all reasonable avenues to keep her job.

[23] The Tribunal notes that the Federal Court of Appeal has ruled that, although the concepts of “misconduct” and “voluntary leaving without just cause” are two distinct concepts, both are treated together through a disqualification under the same section of the Act, which is reasonable, since both refer to situations where the loss of employment is the result of the employee’s wilful action (*Borden A-338-03, Easson A-1598-92*). However, the misconduct or voluntary leaving must still be supported by the evidence in the file.

[24] Having considered all the evidence, the Tribunal notes that it is not in dispute that the appellant was dismissed, and the evidence in the file on a whole shows that the issue in dispute should be analyzed in terms of misconduct. Accordingly, the Tribunal will analyze the issue of misconduct to determine whether the disqualification should be upheld.

[25] According to subsection 30(1) of the Act, a claimant is disqualified from receiving employment insurance benefits if the claimant lost an employment because of their misconduct.

[26] The Act does not define misconduct. However, the case law has established that, for the purposes of subsection 30(1) of the Act, misconduct occurs when the claimant’s conduct is wilful, that is, the acts that led to the dismissal are conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility (*Mishibinijima A-85-06*).

[27] The onus is on the party alleging misconduct to prove it (*Larivée, 2007 FCA 312*). In this regard, the Commission must show that, on a balance of probabilities, the appellant lost her employment because of her misconduct.

[28] What are the acts complained of?

[29] According to the Commission, the appellant demonstrated misconduct in the following ways:

(a) The appellant took leave not authorized her employer, and she allegedly maintained a leave request despite the employer's refusal; and

(b) Third-party involvement to settle the dispute.

The Tribunal will analyze each of the acts complained of to determine whether they in fact occurred and whether they constitute misconduct within the meaning of the Act.

The appellant took leave not authorized her employer, and she allegedly maintained a leave request despite the employer's refusal

[30] For the Tribunal to conclude that there was misconduct, it must have relevant facts and sufficiently detailed evidence, first, for it to be able to know how the employee behaved and, second, to decide whether such behaviour was reprehensible (*Meunier*, A-130-96; *Joseph*, A-636-85).

[31] Did the act complained of occur?

[32] The Commission submits that the appellant demonstrated misconduct by taking a leave not authorized by her employer. However, the Tribunal notes that the act complained of did not occur.

[33] According to the testimony of the appellant and her father, the appellant was dismissed on July 20, 2016. This is further corroborated by the employer's statements and the record of employment. The parties agree that the appellant's leave request was for August 2016. Thus, contrary to the Commission's position, the Tribunal finds that the appellant did not take an unauthorized leave, since her leave request was for dates after her dismissal.

[34] In light of the above, the Tribunal finds that the act complained of did not occur. The Tribunal therefore cannot determine whether there was misconduct.

[35] Moreover, according to the Commission, the appellant lost her job by maintaining her leave request even though the employer had denied it.

[36] The Tribunal finds that this action also did not occur because the evidence in the file shows that the appellant's leave request had previously been granted.

[37] In fact, the evidence shows that the leave request had not been denied. On the contrary, according to GD3-24, the employer stated that the appellant had asked to go on leave from August 11 to 23, 2016. This request was granted on condition that the appellant return to work on August 22, 2016. To assist the appellant in her efforts to return to work on August 22, 2016, the employer stated that it had helped the appellant find plane tickets. They even found a plane ticket for \$200. Moreover, according to the employer's statement, at the time the employer terminated the employment, the employer was helping the appellant find a means of transportation that would enable her to return to work on August 22, 2016. Consequently, the Tribunal finds that the appellant did not maintain a leave request that had been denied. Therefore, the act complained of did not occur.

[38] As noted above, the onus is on the Commission to prove, on a balance of probabilities, that the appellant lost her employment because of her misconduct. For the Tribunal to determine that there was misconduct by the appellant, it must have sufficient evidence before it to be able to know how the appellant acted and then to determine whether that behaviour constitutes misconduct within the meaning of the Act.

[39] It must be noted that, in this case, there is no evidence of the acts complained of. Therefore, the Tribunal cannot determine whether the behaviour constitutes misconduct within the meaning of the Act.

Third-party involvement to settle the dispute

[40] According to the Commission, the appellant demonstrated misconduct by allowing her father to intervene to settle the dispute between her and the employer.

[41] The Tribunal finds that, based on all the evidence in the file and the testimony of the appellant and her father, this act did in fact occur. The appellant's father testified that he approached the employer to negotiate with the employer on behalf of the appellant. Does this act constitute misconduct within the meaning of the Act?

[42] Section 30 of the Act states that a claimant is disqualified from receiving benefits if the claimant loses their employment because of their own misconduct. In *Canada (Attorney General) v. Tucker*, [1986] 2 F.C. 329 (F.C.A.), the Federal Court of Appeal established that “. . . Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent . . .”

[43] In this case, the appellant was not present during the conversation between her father and Ms. G.. Moreover, according to Mr. B.'s statement, it was the appellant's father who had intimidated Ms. G.. In addition, the employer confirmed that, while it was speaking with the appellant, the appellant passed the telephone to her father. Finally, the employer clearly states that, had it not been for the intervention of the appellant's father, she would not have been dismissed. The Tribunal therefore finds that the appellant was dismissed because of her father's behaviour and that this behaviour was not attributable to her. The Tribunal finds that there is no evidence to show that the appellant breached a fundamental duty that is explicit or implied in the contract of employment (*Tucker*, A-381-85; *Lemire*, 2010 FCA 314). The Tribunal also finds that the appellant did not wilfully or wantonly disregard her employer's interests or manifest wrongful intent towards it (*Tucker*, A-381- 85).

[44] The case law holds that misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in their dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274).

[45] Did the appellant know that she would probably be dismissed by allowing her father to intervene?

[46] The Tribunal cannot conclude that, in the circumstances, the Commission has proven, on a balance of probabilities, that the appellant knew or ought to have known that her conduct would lead to her dismissal. The evidence shows that, in March 2016, the employer granted the appellant's request for leave to attend her grandmother's funeral in August 2016. It was not until the appellant realized in July 2016 that the employer had nonetheless scheduled her to work during her vacation days that the appellant told her father about the situation and that he offered to help her. Moreover, when the appellant's father intervened, the appellant and the employer were still seeking solutions to enable the appellant to return from her trip earlier than planned. Consequently, the Tribunal finds that the appellant could not have known that allowing her father to speak to her employer would impair the performance of her duties owed to the employer and that dismissal was a real possibility (*Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36).

[47] The Tribunal notes that, in a case of misconduct, the burden of proof rests with the Commission or the employer, as the case may be (*Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485). In this case, the Tribunal finds that the Commission has not met its burden in this regard.

COMING INTO FORCE

[48] The Tribunal finds that the appellant was not dismissed because of her misconduct. Consequently, the Commission's decision to disqualify her from receiving employment insurance benefits is not justified in the circumstances.

[49] The appeal is allowed.

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.