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

[TRANSLATION]

Citation: CG v Canada Employment Insurance Commission, 2017 SSTGDEI 204

Tribunal File Number: GE-16-4794

BETWEEN:

C. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: June 22, 2017

DATE OF DECISION: October 12, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. G., Appellant

INTRODUCTION

[1] The Appellant made an initial claim for Employment Insurance sickness benefits on September 27, 2016. The Canada Employment Insurance Commission (Commission) disqualified the Claimant from benefits as of September 25, 2016, because she allegedly lost her job at X due to her own misconduct in a decision made on November 3, 2016. On November 7, 2016, the Commission received the Appellant's reconsideration request. It upheld its initial decision on November 25, 2016, and the Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on December 20, 2016.

[2] This appeal was heard by videoconference for the following reasons:

a) The complexity of the issue(s).

b) The fact that credibility is not anticipated being a prevailing issue.

c) The availability of videoconference in the area where the Appellant lives.

d) This method of proceeding meets the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

ISSUES

[3] The Tribunal must determine whether the Claimant lost her job because of her own misconduct and whether it is appropriate to impose a disqualification under sections 29 and 30 of the *Employment Insurance Act* (Act).

EVIDENCE

[4] The Tribunal reviewed all the documents in the appeal file. This is a summary of the evidence that the Tribunal considered the most relevant to its decision.

[5] In her initial claim for Employment Insurance benefits, dated September 27, 2016, the Appellant indicated that she worked for X between June 20, 2016, and July 28, 2016, and that she had stopped working due to dismissal. She noted that the employer had accused her of absenteeism. The Appellant said that she had asked for and obtained permission from her employer to be absent. She also said that she was sick, but that she was unable to provide a medical note within the timeframe requested. The Appellant noted that she had also asked to work part-time. She said that the employer had provided her with a written statement regarding the absence policy, but that she had not read or understood it. She said, however, that she had respected the employer's absence policy. The Appellant stated that her employer asked her for a medical note other than the one she had provided to it and told her not to return to work before obtaining it. The next week, the employer sent her a dismissal letter citing the three-day absence policy.

[6] A Record of Employment from X, dated September 14, 2016, states that the Appellant worked in customer service from July 17, 2016, to July 22, 2016, and the reason for the work stoppage was a dismissal during her probation period.

[7] The Commission contacted the Appellant on October 17, 2016, about her dismissal. She said she was dismissed for being absent for more than three days. She said that she had health problems and that she had planned medical procedures. She sometimes arrived late for work, and on July 28, 2016, she was three hours late. The Appellant said she had a discussion with her manager about these incidents and had told him about her medical condition and her upcoming medical procedure. She said that her manager told her not to come back to work until she had a medical note indicating that she was able to work. The Appellant said she had responded to her manager that she would not see her doctor again until the end of August. She said that, on August 1, 2016, she sent an email to her employer to tell it that she still did not have her medical

note. On Wednesday, August 3, the employer sent her dismissal letter indicating that the reason for dismissal was her three-day absence.

[8] On July 25, 2016, the Appellant sent an email to her employer informing it that she would be absent on July 25 and possibly on July 26, 2016. She said that she was sick, that she would be undergoing a medical procedure in the coming weeks, and that she recently had an anxiety attack. The Appellant also wrote that she needed a few days to do some planning, including financial planning. She ended her email by asking to work part-time (between 7:00 and 8:00 p.m. and 11:30 p.m.).

[9] On July 27, 2016, the Appellant forwarded her July 25, 2016, email to the employer, in which she had asked to work part-time for the rest of July and August 2016, directly to the staffing agency. That same day, M. M. from human resources responded that she was not involved in staff scheduling and that she would have to contact operations to see whether her request could be accommodated. M. M. added that the Appellant would have to provide medical notes for her past and future absences and that, if she required a modified schedule due to her medical condition, she would have to fill out the disability forms and return them with a doctor's note.

[10] The Appellant responded to M. M.'s email by saying that she had a medical condition and that she had missed work Monday because she was not feeling well. She said that she had completed half of her shift the day before. She also said that her desire to work part-time was not because of her medical condition, but rather to allow her to determine her career plans with the employer.

[11] M. M. from human resources for the agency X wrote in an email to the Appellant on July 27, 2016, that she was sorry to learn that the Appellant was considering quitting. She said that, if X could not accommodate her request to work part-time, she could not intervene or do anything because it is the client and the one responsible for determining how its call centre operates. M. M. told the Appellant that she did not have other jobs available for her and that she should know that other bilingual jobs do not pay as much as X.

[12] The evening of July 27, 2016, the Appellant wrote to M. M. to tell her that, if switching to part-time work was not possible, it would no longer be possible for her to work for X. She also asked for clarification on the resignation procedure and the possibility of remaining an employee of X if she left her contract with X.

[13] On July 28, 2016, the Appellant once again sent an email to M. M. from the agency X and an exchange of several emails followed. The Appellant first informed M. M. that, at work, she was questioned by M. O. even though she told him that she was sick and that she would provide a medical note. She said that she had become uncomfortable dealing with M. O.'s insistence on discussing personal information. M. M later clarified with the Appellant that she was entitled to hand in her resignation by email if she was unwell. She told her that operations had advised that it could not agree to her request to work part-time at the moment and that she would continue to be scheduled on a full-time basis with the expectation that the Appellant report to her full shifts. She also informed her that, if she could not work all of her shifts, she had to submit her resignation until another suitable job was available in the future. The Appellant responded to M. M. that she was sick that week, that she was not resigning right away, and that she would confirm the next week whether she could work full time at X. M. M. then repeated that the Appellant had to provide a medical note to justify her past absences as well as a medical note confirming that she was able to work, otherwise she could not return to work.

[14] A copy of an appointment confirmation indicates that the Appellant was scheduled for a magnetic resonance on September 4, 2016.

[15] On August 1, 2016, the Appellant sent an email to M. M. telling her she had decided to provide the requested medical notes. She noted, however, that she would not see her doctor until the end of the month and that, until then, she could not show up for work as requested by M. M. M. M. responded that such a request had to be dealt with by her supervisor M. O. and the program manager, N. I. She asked her to contact them.

[16] A copy of an appointment card indicated that the Appellant had a meeting with Dr. Ernst on August 17, 2016.

[17] On November 24, 2016, the Commission contacted M. M. She confirmed that the Appellant worked the 3:00 p.m. to midnight shift in a call centre. She noted that the Appellant completed her four-week training with a number of absences and that she then started showing up to work around 10:00 a.m. or 9:00 p.m. The Appellant had been warned to arrive on time—that is, at 3:00 p.m. M. M. said that the Appellant had then told her about her health problems, saying that she was not feeling well. The employer allegedly asked her to present a medical note and to take sick leave if necessary. M. M. said that, on July 28, 2016, she met with the Appellant and her supervisor, M. O., at her request. During the meeting, the Appellant shared her questions regarding her career path. The employer told her that all she needed was a medical note and that she would be placed on sick leave. The employer added that it even agreed to pay for the medical note. M. M. said that the Appellant responded that she would not resign immediately, but that she was going to take the next day off to think about it and decide whether she was going to get a doctor's note. She also said that, on August 1, 2016, she received an email from the Appellant telling her that she had decided to obtain a doctor's note, but that she would not see her doctor until the end of the month, and in the meantime, she was not going to work at X as requested. M. M. said she then told the Appellant that such a request would have to be forwarded to her supervisor and told her to contact him. M. M. said that the Appellant never contacted anyone, but that the employer tried to reach her and left messages for the Appellant twice a day on August 2, 3, and 4, 2016, with no response. M. M. said that they then applied the policy that an employee is considered to have abandoned their job if they do not show up for work or do not contact their employer for three consecutive days. On August 5, 2016, the employer sent a dismissal letter to the Appellant. M. M. tried to contact the Appellant asking her to return her building access card, but has had no news of the Appellant since.

[18] The Commission contacted the Appellant on November 24, 2016, to get her version of the facts and confront her with the employer's statements. The Appellant said that she was sick, that she had been late two or three times because of her illness, and that she could not provide the medical note required by the employer for about two weeks. The Appellant said that she was doing her best to go to work and that she wanted to work except that her boss did not want to allow her to return to work until she provided a medical note. It is written in the conversation log that the Appellant contradicted the employer's version by saying that she had indeed called her

supervisor to discuss the delay in obtaining her medical note. The Appellant stated that M. O., her supervisor, was not supportive of her absences and that it was clear that the employer did not want her anymore. The Appellant insisted that she tried to contact M. O. after M. M.'s email on August 1, 2016, but that he never called her back. She admitted that she did not leave a message, but that he could have tried to contact her himself. She added that the July 28 meeting was really a dismissal meeting and that their mind was already made up to get rid of her.

[19] A medical note in the Appellant's name and dated December 30, 2012, indicates that she has sickle cell anemia.

[20] A copy of an email indicates that, on August 8, 2016, the Appellant wrote to M. O. confirming that she had received his voicemail and that she would mail her access card when she had the chance.

Testimonial Evidence

[21] The Appellant does not believe that she lost her job because of her misconduct and says that she believes that the decision destroyed her reputation. She says she tried to communicate with her employer as best she could and that she made every effort to inform it of her absences. She believes she was not fired because of her misconduct, but rather because the employer knew she had a disability.

[22] The Appellant says she has sickle cell anemia, a disease that causes seizures and that has progressed with age. She says it is a changing condition. She can be without symptoms for two or three months and then have a seizure. The Appellant says that her health problems have been more difficult in the last six years. She sees her doctor approximately every six months on a regular basis. She says that she was in a panic in December 2015 when her seizures intensified and she had several symptoms. She says she had discussions with her doctor during a hematology appointment in December and at a second appointment in February–March. She says that her doctor wanted to check and do some brain tests. The Appellant says that, when she has seizures, she takes pain medication such as Dilaudid, morphine, etc. If the symptoms persist for several days, she has to go to the hospital for treatment.

[23] The Appellant explained that she worked for X, but via a third party, the company X, of whom she was formally the employee. It is X that pays her, and she always dealt with the people at X. She says that she saw an ad online and had an interview for X at the end of May 2016, after which she was told that they needed staff at X. She was hired, participated in training, and started working at X in X. She notes that she was a high-performing employee.

[24] The Appellant said that, in July 2016, she told the supervisor that she had had a seizure and that her next appointment was on August 4, 2016. She said that she had had an appointment before her seizure. She said that her first absence was Monday, July 25, 2016, because she was not feeling well. She said that, on July 26, she went to work at 7:30 p.m., when she was scheduled to work at 3:30 p.m. She said that her delay did not cause any trouble. However, on Wednesday, July 27, even though it was a delay equivalent to the day before, her employer (M. O., her supervisor at X) told her that he needed her to arrive on time.

[25] She admits that, given the requirements of the job, the Appellant doubted that she could keep it up with her medical condition. She said she had received another job offer in the meantime for a less stressful job. She explained that she had then asked M. O. whether she could work part-time without telling him about her other job offer. M. O. said that he would see what he could do, but that he did not believe he needed part-time staff at that time.

[26] The Appellant noted that M. O. was a bit frustrated and that communication between them had become more difficult, in part because there was a lot of work. She explained that she did not like talking about her medical condition and that she had a hard time talking about it. She said that M. O. asked her a lot of questions. So she kept a distance and communicated with him by writing instead of in person. Their conversations had become more systematic. Because she arrived late the next day too and because she no longer wanted to talk to him, she saw the disappointment in his face. He insisted on obtaining more information about her disease, and she shut down. She gave him a doctor’s note, but it was not recent. It was a summary and explanation of her condition. Because she did not feel comfortable with M. O., the Appellant said she contacted the woman in human resources (M. A.) to discuss her situation. She asked M. A. to meet with her and, the following Thursday (July 28, 2016), there was a meeting with M. O. and M. A. They asked her whether she would continue to arrive late and discussed the fact

that she had asked to work part-time, but it was not possible. The meeting ended with M. A. telling her that she had to either stop being absent or bring in a doctor's note. The Appellant said she had explained that she needed some time to get a doctor's note. She explained that she would have the notes later in August. The Appellant said that she had tests scheduled on August 4 and that the results would be available on August 17, 2016. She showed her referral for August 4, 2016, to inform them of her future absence. She said she explained her disease and that she needed to have a digitization of the brain. The Appellant said that she already had medical notes about her condition that she could show them, but that M. A. told her that she wanted a medical note specifically for the recent absences. The Appellant said she explained that it was impossible for her to see her doctor before August 17, 2016. M. A. also asked for a medical note saying that the Appellant was able to work, to avoid any accident. According to the Appellant, it was clear that she did not want her back at work without a doctor's note. She added that she tried to explain that she would not miss any days, but that she would be late on occasion after taking medication.

[27] When asked about the procedure at work in the case of late arrivals and absences, the Appellant said that, if she had to arrive late, she had to call a number and speak to a supervisor. She said that, when it happened in the past, her supervisor was not happy, but he was at least informed.

[28] When asked about the fact that she wrote in an email that the reason why she wanted to work part-time was not because of her medical condition (GD3-24), the Appellant explained that she meant that it was not only because of her disease, but for several other reasons, like stress, medical appointments, and her other job.

[29] The Appellant said that, when the employer required a medical note, it was not possible for her to get one, but that she intended to provide a note after her consultations with her specialist. She said that M. A. was quick to use the three-day absence clause allowing her to dismiss her because she did not want to have to deal with her medical condition.

[30] To the question [translation] “Why did you not go to a doctor to explain your absences and late arrivals while waiting to see your specialist?,” the Appellant answered that the only doctor she sees is a specialist. She added that she did not think about it either.

[31] The Appellant said she had accepted her new job offer to see whether that option would be more suitable to her conditions. Her new job was during the day and ended around 2:00 or 3:00 p.m., while she generally worked evenings for X. This could sometimes have conflicted with the other job, but she was flexible and said she could always work it out. The Appellant said that the new job involved answering the telephone and that she had time to rest a bit. She started working there on Tuesday, July 25, 2016, because even though she was in pain or was taking medication, she could answer the telephone and do her work, unlike at X. The Appellant argues that she was forced to find something else because of her illness.

[32] She said that she did not want to leave X, but that she needed more flexibility. She also said that she wanted to stay at X more than the other one. She said that she wanted to have some time to adjust. She said that she was not ready to quit, but that she had already been late twice and that she was still trying to coordinate two schedules. Her main objective was to have part-time work at X for the month of August, but it was refused. The Appellant said that managing her two jobs was becoming more complicated, but that she was gradually getting better physically.

PARTIES’ ARGUMENTS

[33] The Appellant argues that:

a) She was honest and respectful with her employer. The employer dismissed her because she was sick and because it did not want her at work without advice from a doctor while she was waiting to receive her doctor’s advice.

b) She made every effort to keep an open conversation with her employer, but the woman from human resources took all the information that she had given her and used it against her by using the three-day policy, knowing full well that she would not

get a medical note within three days. The employer did not want to cooperate with her medical condition.

c) She gave an old doctor's note in an attempt to show her good faith to show that she really was sick while waiting to get another one.

d) She went to work even though she was in pain.

e) The employer dismissed her knowing that she could not get a medical note before August 17. They clearly told her not to come to work before she had the doctor's note. She had no choice but not to go.

f) The real reason why she wanted part-time work was not her other job, but her medical condition. She had asked for part-time work before she even had her new job.

g) The real reason for her dismissal is that the employer knew that she was sick and that she would be a burden for them.

h) Her conduct as a person was not bad. She said that she had not believed that she would be dismissed in that way. She believed that she would have the opportunity to bring a doctor's note to her employer.

[34] The Respondent argues that:

a) The Commission found that the three consecutive days' absence from work without contacting the employer or asking for permission to be absent constituted misconduct under the Act because employers have the right to expect an employee to show up for work regularly. Any employee who wishes to be absent or plans to be absent has to inform the employer ahead of time and ask for permission.

b) In this case, the Appellant was dismissed because she was absent for more than three days (GD3-18). She was experiencing physical difficulties, and she had to undergo certain procedures. The Appellant was late for work from time-to-time. On July 28, 2016, she was three hours late, and she did not remember whether she had notified

the employer. Her manager talked to her about it that day. The Claimant explained her physical difficulties to the employer and that she had to undergo certain procedures. The employer told her not to return to work until she had medical clearance. The Claimant had an appointment with the doctor at the end of August (GD3-18).

c) Based on the information obtained from the employer, the Appellant "dropped off the face of the earth" (GD3-44). She was working the 3:00 p.m. to midnight shift in a call centre. The Claimant completed four weeks of training with various absences, and then she started showing up to work at 8:00 or 9:15 p.m. The employer told the Appellant that these late arrivals were not acceptable and that she had to show up to work for her shift at 3:00 p.m. After it was informed that the Appellant was sick and did not feel well, the employer told her that, if she was sick, she had to provide a medical certificate and take a medical leave if necessary. The Appellant never brought a medical certificate. Only once, the employer received, by fax, an emergency leave form with no information to justify her absences.

d) The Appellant had an obligation to protect her job by making the necessary arrangements to make sure she was at work at the right time and also to provide the documents the employer requested to justify her absences.

e) During a meeting on July 28, 2016, with the supervisor M. O. and M. A from human resources, the Claimant said that she was thinking about her career, and she had to decide what to do. This led the employer to ask the Claimant about her illness. The employer told her that all she had to do was bring them a medical certificate, and the employer would consider her on sick leave. The employer offered to pay for a medical certificate because the Appellant said that medical certificates were expensive. The Appellant decided to take July 29 to rest and think about her career and decide whether she was going to obtain a medical note (GD3-50).

f) At that time, the employer could not give the Appellant part-time work as she had asked. The employer told her that, if her doctor recommended that she stay home and

rest, she should do that, but that if she chose to come back to work, she would need a doctor's note excusing her absences from work for the days she had missed. An employee is required to comply with the reasonable work rules of their employer. The employer even offered to pay for a medical note for the Appellant. Justifying the absence with a medical note or being on medical leave is a reasonable rule that the Appellant did not respect.

g) The employer left messages for the Appellant twice a day at the beginning and end of her shifts on August 2, 3, and 4, 2016, and she never called the employer back. On August 5, the employer sent a letter of termination of employment to the Appellant by Purolator.

h) The Appellant had an obligation to contact the employer and let it know about her late arrival or absence and also to provide a reason for the absence or late arrival and ask for permission. She should have done what was necessary to protect her job, especially after the July 28 meeting where her employer explained to her what it needed if she was sick and could not work. The employer said that the Appellant was going to think about getting a medical note. The absence from work from August 2, 2016, is the result of wilful or deliberate behaviour on the part of the Appellant because she should have known that by acting that way she would be dismissed. Also, she was aware of the employer's absence policy and the fact that the employer did not accept that type of absence (GD3-8).

i) In this case, the Appellant's failure to contact the employer or arrange to take leave, as the Appellant's and the employer's statements show, constitutes misconduct. Employers have the right to expect an employee to show up for work regularly and remain at work until the end of their work shift. Work attendance is unquestionably a determining factor in a company's productivity. However, it is necessary for any employee who wishes or plans to be absent to notify the employer ahead of time and asks for its permission.

j) The Commission submits that the Appellant did not comply with the provisions of section 20(1)(a) of the *Social Security Tribunal Regulations* (Regulations) when she raised the argument based on the *Canada Charter of Rights and Freedoms* (Charter) as part of this appeal because she did not serve a notice of constitutional question. To present the Tribunal with a constitutional question, the Appellant must, as stated in section 20(1)(a) of the Regulations, file a notice with the Tribunal that sets out the provision that is at issue and contains any submissions in support of the issue(s) raised. In the event that the Appellant files the required notice, the Commission reserves the right to file documents and submissions as stated in section 20(3) of the Regulations.

k) The Commission submits that its decision is supported by case law. The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a claimant was wilful, in the sense that the acts that led to the dismissal were conscious, deliberate, or intentional (*Mishibinijima*, 2007 FCA 36).

l) The Federal Court of Appeal defined the legal notion of misconduct within the meaning of section 30(1) of the Act as wilful misconduct, where the claimant knew or should have known that their misconduct was such that it would result in dismissal. 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 (*Lemire*, 2010 FCA 314).

ANALYSIS

[35] The relevant statutory provisions appear in the annex of this decision.

[36] The Tribunal has to decide whether the Appellant should be indefinitely disqualified from benefits under sections 29 and 30 of the Act because she lost her job due to her own misconduct.

[37] In cases of misconduct, the Tribunal must first decide whether the alleged acts were the real cause of the dismissal (*Davlut*, A-241-82). The Appellant submits that the employer found

an excuse to dismiss her and that the real reason for the dismissal is that it wanted to get rid of her because of her medical condition. Unfortunately, the Tribunal does not have the dismissal letter. The evidence therefore comes from conversations the Commission had with the employer as well as the Appellant's testimony. The employer submits that, after an email exchange in which the Appellant said she would note get a medical note in two weeks' time, the employer asked the Appellant to contact her supervisor and the program manager to talk about it. The employer also submits that, after that, the Appellant gave no news to anyone at the employer and that, on August 5, 2016, it therefore applied its policy to consider an employee to have abandoned their job after three consecutive days without showing up for work or contacting their employer. The employer reported that it had tried to reach the Appellant twice a day on August 2, 3, and 4, 2016. The Appellant denies having received the employer's calls and says that she called her supervisor after M. M.'s email on August 1, 2016, but did not leave a message. Although the Tribunal accepts that the relationship between the Appellant and the employer was strained after her late arrivals, absences, and request to change her work schedule, the Appellant has not convinced the Tribunal that her termination of employment was for other reasons or that the alleged conduct was an excuse to dismiss her. The Tribunal gives more weight to the employer's version, which is supported by the copies of email exchanges between M. M. and the Appellant. On reading these emails, the Tribunal finds that, after the Appellant indicated on August 1 that she would not provide a medical note until later in August, M. M. asked her to communicate directly with her supervisor and program manager, which she did not do. The Appellant does not dispute the existence of a policy that after three consecutive absences without any notification an employee is considered to have abandoned their job. If she had tried to call the employer after August 1, 2016, as she should have done, the Appellant admits that she did not leave a voicemail. The Tribunal is of the view that calling without leaving a message is the same as not calling. It would be unreasonable to expect the employer to guess the Appellant's actions. In this case, based on the evidence presented, the Tribunal finds, on a balance of probabilities, that the Appellant was dismissed for being absent for more than three days without justification, based on the employer's policy. Although the Appellant felt persecuted after her July 28, 2016, meeting with her employer, the evidence does not demonstrate to the Tribunal that there would be another reason behind her job loss.

[38] Next, the Tribunal has to decide whether the Appellant's alleged acts constitute misconduct under the Act. The word "misconduct" is not defined as such in the Act, but the courts have established principles to guide decision-makers throughout case law. It is largely a question of circumstances (*Gauthier*, A-6-98; *Bedell*, A-1716-83). In *Tucker*, the Court sets out what constitutes misconduct. The Court established that "to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."

[39] The Commission has the burden of proving on a balance of probabilities that the Appellant's dismissal was the result of misconduct according to the Act. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as she did. It is not enough to show that the employer found their employee's conduct to be reprehensible. The Tribunal must analyze the facts itself and arrive at the finding that the alleged breach is of such scope that the employee would normally foresee that it would be likely to result in their dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98). Where applicable, the Tribunal is of the view that the Commission and the employer have met this burden.

[40] The Tribunal also notes that the issue is not whether the penalty was justified (*Fakhari*, A-732-95). It may be that the employer has an entirely valid reason to end an individual's employment without there being misconduct in terms of Employment Insurance.

[41] In *Larivée*, 2007 FCA 132, it was established that the determination of whether the Appellant's acts constitute misconduct under the Act basically involves a review and determination of the facts.

[42] In this case, it is acknowledged that the Appellant did not show up for work for more than three days and that an employer policy allows it to consider an employee to have abandoned their job if they do not contact their employer or show up for work for more than three consecutive days. There are, however, different views on the reason why the Appellant did not show up for work. The Appellant says that the employer clearly prohibited her from showing up for work

without a medical note and that she was going to obtain that note later in August. The employer, however, says that the Appellant had to provide a medical note as soon as possible to explain her absences. And, if she wanted to return to work, she also had to provide a medical note to show that she was able to work. The employer also said that, when the Appellant told it that her medical note would come several weeks later, it asked the Appellant to contact her supervisor because a situation like this had to be managed by him directly, which she did not do in addition to not being reachable.

[43] The Tribunal gives significant weight to the employer's version because of the emails on file showing the exchanges between the Appellant and M. M. on July 28 and August 1, 2016. The Tribunal finds that these emails corroborate the employer's version and objectively show that the employer's instructions were clear. The Appellant had to provide a medical note if she wanted to return to work, and because she said she would not obtain that note until several weeks later, she had to contact her supervisor to discuss it. Although the Appellant said she called her supervisor once, she admits that she did not leave a message. The fact that she called her supervisor indicates that she knew she had to do this. The Tribunal finds from the evidence that the Appellant consciously chose not to follow the instructions to contact her supervisor for permission to provide her medical note after visiting her specialist. Despite the Tribunal's sincere sympathy for the Appellant's medical condition, the Tribunal finds that the Appellant was nonchalant and lacked diligence in her conduct with her employer. All she had to do was go see a doctor, at any clinic, and get a medical note to justify her absences and confirm whether she was able to work. She did not do this.

[44] The Tribunal therefore finds that the Appellant's conduct was reprehensible. However, reprehensible conduct does not automatically lead to a finding of misconduct (*Locke*, 2003 FCA 262). Reprehensible conduct must constitute a breach of such scope that its author could normally expect that it would be likely to result in dismissal (*Meunier*, A-130-96). In *Hastings*, 2007 FCA 372, the Court reaffirmed the *Tucker* principles on the concept of misconduct and the requirement that there be a mental element. The Court has established that "there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were 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." The Tribunal is of the view that, in the Appellant's circumstances, she should have known that her inaction would be likely to result in the loss of her job. The Tribunal based its finding on the fact that the Appellant was in her first weeks at work, that she had already been up to three hours late for her shifts, that she had unexplained absences, that she had received warnings, and that she had already told her employer that she was uncertain whether she wanted to or was able to continue working for it and that she was reconsidering her career plans. In such delicate circumstances, it seems clear that the Appellant knew or should have known that not contacting her employer for more than three days when it asked her to do so would have serious consequences.

[45] The Tribunal finds that the Appellant instead deliberately chose to wait for her appointment with the specialist without an agreement having been reached with the employer even though the employer asked her to contact her supervisor and even though M. M. offered to pay for a medical note that she could obtain earlier. The Appellant repeated numerous times that she needed time and that she had to consider her career options. The Tribunal finds that the Appellant could easily have been granted sick leave to accommodate her needs while still meeting the requirements of her employer by going immediately to get a medical note. Instead, she chose to give herself time on her own initiative without working with her employer.

[46] The Appellant's testimony also shows that she was rather busy trying out her new job. This indicates to the Tribunal that she was trying [translation] "to buy time." The Tribunal therefore finds that the Appellant wilfully disregarded the repercussions her actions would have on her job performance. That type of behaviour constitutes misconduct under the Act. Although the Tribunal sympathizes with the Appellant's serious medical condition, the Appellant acted carelessly and recklessly to the point of approaching wilfulness. However, the Tribunal explained poorly why the Appellant put her job on the line by resisting the employer's request for a medical note. The Tribunal finds that the Appellant caused her unemployment situation herself.

[47] Based on all the evidence, the Tribunal finds that the Appellant lost her job because of her own misconduct within the meaning of the Act. Therefore, a disqualification applies under sections 29 and 30 of the *Employment Insurance Act*.

CONCLUSION

[48] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

ANNEX

APPLICABLE 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