



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. M. v. Canada Employment Insurance Commission*, 2018 SST 314

Tribunal File Number: GE-17-2533

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

FASD Lifes Journey Inc

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: February 23, 2018

DATE OF DECISION: March 25, 2018

REASONS AND DECISION

DECISION

[1] The appeal is dismissed. The Appellant's actions of violating the employers Respectful Workplace Policy and Workplace Harassment Policy caused her to lose her job for misconduct.

OVERVIEW

[2] The Appellant was fired after being involved in an argument with a co-worker and making racist remarks. The employer performed an investigation into the matter that included the Appellant, the co-worker and a witness. The employer alleges the Appellant had a history of similar behavioural incidents and she was fully aware of the respectful workplace policy and expectations as she had received them at orientation. The Appellant conceded she knew the rules but she denied making the comments and tried to provide an explanation to her employer but they did not believe her and it was three against one. The Appellant applied for employment insurance benefits; however the Canada Employment Insurance Commission (Respondent) denied the Appellant's claim as they determined her disrespectful conduct constituted misconduct.

PRELIMINARY ISSUES

[3] The employer attended the hearing; however the Appellant did not. The Appellant's notice of hearing sent by Priority Post was returned to the Tribunal on February 13, 2018, and on the same date the Tribunal sent the Appellant a notice of hearing via regular mail. The Tribunal was satisfied the Appellant received notice under the authority of paragraph 19(1)(a) of the *Social Security Tribunal Regulations* where if sent by ordinary mail, 10 days after the day on which it is mailed to the party is deemed the notice to have been communicated to the party.

ISSUE

[4] Whether the Appellant is disqualified from benefits pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act) for misconduct.

- a) Did the Appellant lose her employment because of the alleged offence?

b) Did the Appellant commit the alleged offence?

c) Does the alleged offence constitute misconduct?

ANALYSIS

[5] The relevant legislative provisions are reproduced in the Annex to this decision.

[6] 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 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 (*Canada (AG) v. Lemier*, 2010 FCA 314; *Hastings* 2007 FCA 372).

[7] The onus of proof lies with the Respondent to establish that the loss of employment by the claimant resulted from the claimant's own misconduct (*Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485).

Did the Appellant lose her employment because of the alleged offence?

[8] Yes. The Tribunal finds the Respondent has proved on the balance of probabilities that the Appellant lost her employment because she violated the employers Respectful Workplace Policy and Workplace Harassment Policy. The employer terminated the Appellant because she displayed disrespectful conduct and verbally attacked a co-worker that included profanity and racial comments.

Did the Appellant commit the alleged offence?

[9] Yes, the Tribunal finds the Appellant breached the employer's policy when she made disrespectful and racial comments to a co-worker that was witnessed by another employee.

[10] The Appellant denies the allegations that she made the comments and argued that she believed she was not given an opportunity to tell her side of the story and that it was three against one. However the Appellant's statements on the file are contradictory as she stated in her

that her employer called her and she gave them her side of the story but they didn't believe her. She also stated in her statements later to the Respondent that she did get into an argument with a co-worker and she was aware of the policy. Unfortunately she did not attend the hearing that would have provided her an opportunity to further explain the incident to support her appeal.

Does the alleged offence constitute misconduct?

[11] The employer did attend the hearing and confirmed their position remained unchanged on the reason for the termination. They had performed a thorough investigation and spoke with all parties involved and provided witness statements of the final incidents as well as considered the previous written warnings the Appellant had received during her employment. He stated there was no evidence found by their investigation or the investigation by the union that there was any conspiracy against the Appellant as she argued. The employer stated they were indifferent on whether the Appellant receives employment insurance benefits or not; however the Appellant's behaviour in this incident was very serious as it jeopardized the safety of staff and clients; and could no longer be tolerated. The employer also submitted a copy of the policy which was signed by the Appellant supporting she was aware of the policy.

[12] The relationship between employment and misconduct is not one of timing, but one of causation (*McNamara* 2007 FCA 107).

[13] Rude or aggressive behaviour has been held to be misconduct and in particular if it is detrimental to the employer's interest. An employer cannot tolerate physical or verbal aggressive behaviour in the workplace as it threatens everyone's safety, the effectiveness of the work performed and the atmosphere. It also creates conflict between co-workers and the employee-employer relationship and thus the employer can no longer trust an employee who behaves in such a manner.

[14] In addition to the causal relationship, the misconduct must be committed by the employee while employed by the employer, and must constitute a breach of a duty that is expressed or implied in the contract of employment (*Canada (Attorney General) v. Nolet*, F.C.A., A-517-91).

[15] The Tribunal finds the serious actions of the Appellant's behaviour constitute misconduct and that it was her own actions that caused her dismissal.

[16] The Appellant admitted to having an argument with a co-worker and that there had been previous arguments. The employer submitted witness statements and evidence that the Appellant had been previously warned; therefore the Tribunal finds on the balance of probabilities the Respondent has proven that the Appellant's engaged in an argument with the co-worker and made derogatory remarks that were wilful and deliberate and voluntary (*Tucker*, A-381-85).

[17] The Tribunal finds the Appellant ought to have known she could have been fired as she had received written warnings and she was aware of the policy as she had acknowledged and signed it (*Mishibinijima*, 2007 FCA 36).

CONCLUSION

[18] The appeal is dismissed. The Tribunal finds the Appellant is disqualified from receiving employment insurance benefits because she lost her employment by reason of her own misconduct when she violated the employer's Respect in the Workplace and Harassment in the Workplace policy and her actions were detrimental to the employer's interest or welfare as the employer clearly felt the Appellant's actions were one of intent that impaired the employee/employer relationship.

Teresa Jaenen

Member, General Division - Employment Insurance Section

METHOD OF
PROCEEDING: In person

APPEARANCES: G. W., representing the employer FASD Life Journey Inc.

ANNEX

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

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.