



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Z. S. v Canada Employment Insurance Commission*, 2018 SST 1164

Tribunal File Number: GE-18-1101

BETWEEN:

**Z. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Rodney Antonichuk

HEARD ON: June 27, 2018

DATE OF DECISION: July 31, 2018

## **DECISION**

[1] The appeal is allowed. The Commission failed to meet its burden; it did not prove on a balance of probabilities that the Appellant lost her job due to her own misconduct.

## **OVERVIEW**

[2] The Appellant worked in the retail sector. She was dismissed for violating employee shopping policy when she had another person purchase items on her behalf that she was not eligible to purchase according to the team member policy. The Appellant stated that she was not warned that her actions were in violation of team member policy. Further the Appellant stated that her mother bought the items and did not use the staff discount. She felt that she had not done anything wrong because she was not stopped by the retail sales manager. The Appellant applied for employment insurance (EI) benefits, but was disqualified from being paid benefits by the Canada Employment Insurance Commission (the Respondent) because it determined the Appellant lost her employment due to her own misconduct. The Appellant appeals to the Social Security Tribunal (the Tribunal) to overturn the Respondent's decision.

## **ISSUE**

[3] Was the Appellant's employment terminated for misconduct because she breached the employer's team member policy on purchasing items from the store?

## **ANALYSIS**

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

[5] A claimant is disqualified from receiving any benefits if the claimant lost his employment because of his own misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act). Misconduct for the purposes of subsection 30(1) of the Act has been defined as "wilful misconduct," where the claimant knew or ought to have known that her conduct 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 (*Canada (Attorney General) v. Lemire*, 2010 FCA 314).

[6] The burden of proof lay with the Respondent to prove that misconduct occurred (*Lepretre v. Canada (Attorney General)*, 2011 FCA 30). The term “burden” is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means is it “more likely than not” that the events occurred as described.

**What is the alleged conduct that led to the dismissal and did the Appellant commit the conduct?**

[7] The Appellant stated when speaking to the Respondent that she had been dismissed for violation of the employee shopping policy. She had mentioned a recent arrival of toy dolls at the store and had mentioned it to her children. Her children had mentioned the dolls to the Appellant’s mother who had planned to go down to the store and purchase some dolls. The Appellant had told her mother not to worry about it she would purchase them. When she arrived at work she selected three dolls she wished to purchase but was told that the dolls had not been out for two days so according to policy the Appellant could not purchase them. The Appellant texted her mother to tell her this. The Appellant’s mother came to the store later that day and purchased three dolls, paid for them and left. On the Appellant’s next shift she was called into the office to explain what had happened. She explained and was dismissed one hour later for violating the store policy regarding purchases.

[8] The Tribunal was told by the Appellant that she had attempted to buy three dolls before her shift but upon selecting them was told that they had not been on the floor for two days and as such she could not purchase them. The Appellant then stated she returned the three dolls to the display area. The Appellant then texted her mother to tell her that she could not purchase the dolls for her as they had a policy that employees could not purchase items that had not been on the floor for two days. The Appellant then stated that her mother came down to the store, selected three dolls from the display, went to the cashier and paid for them and left. The Appellant stated that her mother did not purchase the three dolls that the Appellant selected but rather three different dolls. The Appellant stated that there were approximately 800 dolls in the store and in the receiving area. She also stated that her mother did not get a staff discount when purchasing the dolls. The retail supervisor at the time did not indicate that anything was being

done that violated store policy as the Appellant introduced her mother to the retail supervisor at the time her mother was shopping.

[9] The Tribunal finds that the Appellant did not breach the employee shopping policy. The Tribunal finds that while the Appellant attempted to purchase the doll before her shift, and was told that she could not, she did not do anything that was in violation of the shopping policy. The Appellant's mother purchases three different dolls than the ones that the Appellant had originally selected. She paid for them and did not receive a discount as she was not eligible. During this transaction neither the Appellant's mother nor the Appellant were spoken to about the purchase by the retail supervisor as the Appellant introduced her mother to the retail supervisor at the time and she had seen the Appellant and her mother looking at dolls.

**Was there a relationship between the conduct and the termination?**

[10] There must be a causal relationship between the conduct and the loss of employment; the conduct must have been committed by the Appellant while employed by the employer, it must constitute a breach of a duty that is express or implied in the employment contract, and it must have caused the loss of employment (*Canada (Attorney General) v. Cartier*, 2001 FCA 274, *Lemire, Supra*).

[11] The statement from the retail supervisor indicates that the Appellant attempted to purchase three dolls but was told that they had only been put out the day before so she could not buy them. The Appellant then stated that she would put them on hold and that her mother would come and purchase them. The supervisor then told the Appellant that it was against policy to put items on hold and to call someone to come and purchase the merchandise. She wrote that she then returned the dolls to the shelf. The Appellant stated that she understood the policy. Later in the afternoon the Appellant introduced the retail supervisor to her mother. The supervisor stated that the Appellant was giving dolls to the customer who went to the till and purchased the three selected dolls. Two days later the supervisor informed the store manager of the transaction and the video tapes were reviewed and the Appellant was dismissed.

[12] The store manager wrote that the Appellant was dismissed because she had been directly informed that it was against policy to call someone to come and purchase merchandise for the

employee. The statement indicated that when the Appellant's mother came to the store she has her paged and then they went to the back to look at the dolls where three dolls were selected and then the Appellant's mother went to the till to purchase them.

[13] The Tribunal finds that there was a relationship between the conduct and the termination. The written evidence provided by the retail supervisor and the store manager indicate that the Appellant was told by the retail supervisor that she could not purchase the dolls. The Appellant indicated that she understood and then proceeded to communicate with her mother. Her mother arrived at the store and together they selected three dolls which the mother purchased. Even though the Appellant had been warned that she could not purchase the dolls nor could she put the dolls on hold she directed her mother to purchase dolls which were not allowed to be purchased by store employees as per company policy. While the Appellant stated that her mother purchased the dolls at full price, the statements from the supervisor and the store manager indicate that the Appellant did go out of her way to communicate with her mother regarding the purchase of the dolls and even spend time with her mother directing her which dolls to purchase. The Appellant's actions give support that the Appellant's mother did not come to the store to shop but rather to purchase the dolls that the Appellant earlier had been told she could not purchase.

**Was the conduct wilful, or so careless or negligent as to approach wilful?**

[14] Misconduct requires a mental element of wilfulness on the part of the Appellant, or conduct so negligent or reckless as to approach wilfulness (*Canada (Attorney General) v. Tucker*, A-381-85). Wilfulness has been defined in a number of ways, but generally requires the Appellant to have acted consciously, deliberately, or intentionally.

[15] The Appellant stated that she was stopped by the retail supervisor when she attempted to buy three dolls on a Sunday when she thought they had been available to customers for the required 48 hour period. Once she was corrected her retail supervisor took them and placed the dolls on a back table. The Appellant stated that she took those dolls and returned them to the sales floor as she did not want it to look like she had been stashing them. She went on to indicate that the dolls that she had picked out were then purchased one hour later.

[16] The Appellant stated that once she was informed that she could not purchase the dolls she texted her mother to tell her that she was unable to make the purchase. Her mother then came down to purchase dolls for the Appellant's children, the Appellant's mother's grandchildren. The Appellant stated that she introduced her mother to the retail supervisor when her mother came into the store. The retail supervisor confirms this. The Appellant's mother then proceeded to purchase three dolls at full price. Again the retail supervisor was aware of this purchase. It was not until the following Tuesday that the retail supervisor informed the store manager of a potential breach of the store purchase policy and the video tapes were reviewed.

[17] The Appellant stated in her testimony that she was upfront about her mother coming in to purchase the dolls because she could not. She stated that she introduced her mother to the retail supervisor and she was at the till when her mother made the purchase. The Appellant stated that at no time did the retail supervisor indicate that her mother could not make the purchase of the dolls and the matter was not brought up until the following Tuesday. The Appellant also stated that the policy was a "grey area" as her mother had been planning on coming down to purchase the dolls for her grandkids but the Appellant thought she would save her the trip and do it herself. The Appellant also pointed out that her mother paid full price for the dolls. If the dolls had been purchased by the Appellant then she could have used a staff discount but obviously she could not purchase the dolls. The Appellant stated that there were over 800 dolls that were available to be sold. The three dolls that she had selected and were not allowed to buy were purchased by another customer 45 minutes after the Appellant had returned them to the sales floor. The Appellant stated that her mother does not live with her so she is not considered a family member as per store policy so she was just a regular customer purchasing dolls for the her grandchildren. The Appellant stated that she felt that she did not do anything wrong when her mother purchased the dolls since the retail supervisor did not object to her mother's purchase when she was at the cash register.

[18] The Respondent contends that the Appellant stated that the retail supervisor had told her it was acceptable for the Appellant's mother to buy the dolls. The Respondent argues that it is unreasonable that the Appellant would not have defended herself and prevented termination by stating this to her employer. The Tribunal is of the belief that the Appellant would have been in

shock with the termination days after the purchase of the dolls that she would not have thought of the conversation with the supervisor.

[19] The Tribunal finds that while the Appellant was aware of the policy regarding purchases during the 48 hour period and of people buying items for the Appellant her belief that this was a legitimate purchase because of the lack of interference by the supervisor is understandable. The fact that the Appellant's mother was buying the dolls for her grandchildren and was not afforded any special price treatment nor was she stopped by the retail supervisor who was very much aware of the purchase indicates to the Tribunal that the transaction was legitimate. Given the lack of specificity regarding the policy and that it took two days for the employer to determine that they believed the policy had been breached the Tribunal finds that there is enough confusion surrounding the purchase that it cannot be considered that the Appellant acted consciously, deliberately, or intentionally against the employer policy. The fact that the Appellant acknowledged that she was unable to purchase the dolls and returned them to the sales floor after the supervisor had placed them on a back table indicates to the Tribunal that the Appellant's motives were not intentional. The Tribunal finds that the Appellant's conduct was not wilful.

**Did the Appellant know or ought to have known that his conduct could to impair the performance of his duties and that dismissal was a real possibility?**

[20] The Tribunal finds that the Appellant was not aware that her conduct could impair the performance of her duties. The Appellant was forthright when confronted by her supervisor and told that she could not purchase the three dolls that she had selected before work. She indicated to the supervisor that she was aware of the policy and was not aware that the dolls had been on the floor for less than 48 hours. Since her mother had indicated that she was planning on purchasing the dolls the Appellant informed her that she would have to come down to the store as the Appellant was not allowed to make the purchase. The Appellant also took the three dolls that she had selected and returned them to the sales floor where they were purchased 45 minutes later. While the Appellant's mother was in the store she introduced her to the supervisor and indicated that she was purchasing dolls for her grandchildren. It was at that time and when the Appellant's mother made the purchase that the supervisor had a chance to stop the purchase but did not. There is also no indication that the supervisor indicated that the purchase was against

company policy until two days later. The Tribunal finds that given the non-action by the supervisor during the purchase there was clear acknowledgement that there was no break from the policy and as such the Appellant was not breaking any policy.

[21] The Tribunal also finds that the Appellant was not aware that her actions could result in her dismissal. The employer had indicated to the Respondent that there had been other employees who had been dismissed in the past for the same policy breach. The employer stated that while they do not share details of terminations the Appellant would have been aware of what had gone on in the store. The Tribunal finds that there is no substantive proof that the Appellant would have been aware of the reasons for other employees being let go and that there is no indication that the Appellant was aware that her actions could result in her dismissal. Given the nature of the policy and its lack of specifics along with the fact that the supervisor never stopped the purchase of the dolls by the Appellant's mother the Tribunal finds that the Appellant was not aware that her conduct could impair the performance of her duties, and that dismissal was a real possibility (*Canada (Attorney General) v. Mishibinijima*, 2007 FCA 36).

## CONCLUSION

[22] The appeal is allowed. The Tribunal finds the claimant's conduct was not wilful, or so careless as to approach wilful, thus is not misconduct under the Act.

Rodney Antonichuk

Member, General Division - Employment Insurance Section

HEARD ON:	June 27, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	Z. S., Appellant  Mark Crawford, Representative for the Appellant

## 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

(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.