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

Citation: *J. B. v Canada Employment Insurance Commission*, 2018 SST 1176

Tribunal File Number: GE-18-1985

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: October 1, 2018

DATE OF DECISION: October 11, 2018

Canada

DECISION

[1] The appeal is allowed. The Appellant has proven that it was not wilful misconduct because she did not know that editing an employee's timesheets could result in her dismissal.

OVERVIEW

[2] The Appellant was employed as X for a X. The employer dismissed the Appellant from her employment due to wilful misconduct and neglect of duty as a supervisor (GD3-25). The Appellant applied for employment insurance regular benefits (benefits) and stated that she was forced to edit a time card due to incorrect time card entry (GD3-3 to GD3-18). The Respondent initially ruled in favour of the Appellant finding that there was no misconduct under the Employment Insurance Act (Act) and allowed the claim for benefits (GD3-22). The employer requested a reconsideration of that initial decision and stated that the Appellant admitted to altering the time cards which violated company policy and provincial law (GD3-23).

[3] The employer advised the Respondent that an employee of the company initiated a complaint that she was not being paid based on the hours she worked (GD3-26). The employer conducted an investigation and determined that the Appellant had adjusted the employee's timesheets 30 times out of 54 based on her work schedule and not based on hours worked, which resulted in the employee not being paid for approximately 4 hours and 19 minutes that she worked (GD3-24). The employer had a policy that any changes to timesheets had to be completed on an "edit request" form (GD3-28 to GD3-29). The Appellant does not dispute that she adjusted the timesheets and that she was aware of the specific policy to use the time edit sheets, but stated that it was only a few minutes before and after the employee's shift while the employee was talking to colleagues (GD3-104). The Appellant told the Respondent that she spoke to the employee about signing in early and working late, but admitted that she did not apply corrective action (GD3-104). The Respondent rescinded their initial decision and determined that the Appellant lost her employment due to her own misconduct (GD3-123). The Respondent imposed a disqualification effective on January 29, 2018. The Appellant appealed the decision to the Social Security Tribunal (Tribunal) and included a written statement to explain that it was not wilful misconduct and she did not know that she could have terminated for her actions (GD2-2 to GD2-17).

PRELIMINARY MATTER

[4] The Appellant's daughter attended the hearing for support.

ISSUES

Issue 1: Why was the Appellant dismissed from her employment?

Issue 2: Did the Appellant commit the conduct, specifically did she edit an employee's timesheets and fail to use a time edit request form?

Issue 3: Does editing an employee's timesheets and failing to use a time edit request form breach time edit policy and the falsification of company records policy constitute misconduct under the *Employment Insurance Act* (Act)?

ANALYSIS

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

[6] Claimants are disqualified from receiving benefits where they lose their employment because of misconduct (s.30 of the Act). Misconduct is not defined in the Act, however misconduct must "be conscious, deliberate or intentional" (*Canada* (*Attorney General*) v. *Lemire*, 2010 FCA 314). The burden of proof rests with the Respondent to demonstrate that the employee lost her employment due to her misconduct.

Issue 1: Why was the Appellant dismissed from her employment?

[7] The Appellant was dismissed from her employment on January 29, 2018 due to misconduct. The employer dismissed the Appellant because they allege that she violated company policies around time edits and the falsification of company records.

[8] I note that the parties do not dispute the reason for dismissal or the date of dismissal. At the hearing, the Appellant agreed that she was dismissed for allegedly breaching the time card edit policy and the falsification of company records. She further noted that she did not have any

evidence to show that she was being dismissed because she was 66 years old and due to company downsizing.

[9] I note that this was consistent with the evidence contained in her application for benefits identify that she was dismissed (GD3-7), the ROE identifies that she was dismissed and the termination letter from her employer (GD3-25).

[10] Accordingly, I accept that the Appellant was dismissed from her employment on January 29, 2018 due to misconduct for allegedly breaching the employer's time card edits and falsification of company records policies.

Issue 2: Did the Appellant commit the conduct, specifically did she edit an employee's timesheets and fail to use a time edit request form?

[11] Yes, the parties agree that the Appellant committed the conduct. At the hearing, the Appellant agreed that she did alter the employee's timesheets on multiple occasions to reflect the employee's actual hours worked and that she did not use a time edit request form. Accordingly, I accept that Appellant committed the conduct.

Issue 3: Does editing an employee's timesheets and failing to use a time edit request form breach time edit policy and the falsification of company records policy constitute misconduct under the Act?

[12] No, I find that editing an employee's timesheets does not constitute misconduct under the Act because the Appellant, as a long-tenured employee was following standard practice at work and was not aware that her conduct could lead to her dismissal.

[13] The parties dispute whether the Appellant's actions amount to Misconduct under the Act.

[14] The Respondent submits that the Appellant repeatedly violated the time edit and falsification of documents policy because she failed to complete a time edit form for each time adjustment. The Respondent further submits that the Appellant was aware of the time edit and

falsification of documents policy because she signed an employee handbook acknowledgment on June 21, 2016 (GD3-30).

[15] The Appellant testified that she worked as the Centre Director for approximately 23 years which included responsibilities to monitor the time, to review timesheets, to make changes and receive time edit forms from employees. The Appellant was dismissed because she says that she made several smaller adjustments to an employee's timesheets which allegedly totalled four hours over a period of a few months. The Appellant stated that the employee was logging into work minutes earlier and minutes later than her scheduled shifts and that she was using that time to socialize with colleagues and use the restroom. The Appellant noted that since it was usually only a few minutes before or after her shift, she adjusted the employee's timesheet which she states was within her authority to do. She also took steps to speak with the employee about the issue and to her reporting supervisor. She recalls having a discussion with her new reporting supervisor about this employee. Her reporting supervisor noted that this particular employee was not a good fit for the organization for various other reasons. Her reporting supervisor instructed the Appellant to disregard any formal discipline with the employee because she would likely be dismissed during her probationary period. As a result, the Appellant states that she did not apply any corrective action or discipline the employee for her conduct.

[16] The Appellant testified that she signed an acknowledgement confirming that she read the employee handbook which included the time edit policy and falsification of documents policy (GD3-30). However, she states that she was not provided with any workplace training about the policies from the employer. The Appellant stated that she usually only looked at the employee handbook when necessary. A copy of the employee handbook was also submitted (GD3-31 to GD3-103).

[17] The Appellant states that the time edits sheets were meant for employees to complete for sick, vacation or missed shifts, etc. The Appellant submits that the language used in the time edit policy does not require management to complete a time edit form, but rather the onus is placed on employees to submit the form. For example, the Appellant referenced the following sections of the time edit policy to support her argument that the language does not reflect that it is

management's responsibility to submit a time edit request for small changes to timesheets (GD3-64 to GD3-65):

- Once the "Time Card Edit Request" is completed it must be signed by the employee and presented to the employee's manager.
- "Time Card Edit Request" forms must be submitted to the employee's manager as soon as possible after the event requiring an adjustment. Or by the last day of the pay period the 15th or the last day of the month.
- Upon receiving a signed "Time Card Edit Request" from an employee, it is the responsibility of the manager to make the requested adjustment and keep the "Time Card Edit Request" in the Manager's file with other employee documents.

[18] I agree with the Appellant because the time edit policy does not indicate that management or in this case, a X must submit a time edit form for changes made to timesheets. I was persuaded by the Appellant's testimony because as a long-tenured employee she had the authority to do so and had previously made adjustments to timesheets. A plain reading of the time edit policy clearly demonstrates that this process must be initiated by the employee which then flows to the manager. Further, I found no supporting documentary evidence that shows a time edit form must be completed by a manager or X for making small or more significant timesheet adjustments.

[19] The Appellant testified that she has a history of following workplace policies and relied on her performance reviews because they would show that she was rewarded by her former reporting supervisor for professional conduct and good performance. In particular, she notes a performance review in 2016: "(Appellant name removed) leads by example in following all (employer name removed) Policies and Procedures" (GD2-16). Another statement says: "(Appellant name removed) is always on top of her X schedule. She monitors X on a daily basis for any needed time edits, etc. It will be a top priority in 2017 to keep our payroll hours in check" (GD2-16 to GD2-17).

[20] The Appellant rejects the notion that she made adjustments to inflate her centre's statistics and profits because she only made small adjustments a few minutes per shift which would not have had a significant impact.

[21] I agree with the Appellant because her performance reviews with her former reporting supervisor demonstrated good performance and a history of following policy during her tenure. I also accept that she was commended positively by her former supervisor for making time adjustments to employee schedules as the employer had expressly identified controlling payroll hours as a priority.

[22] As to whether the Appellant knew she could be dismissed for making small changes to employee timesheets and for failing to complete a time edit request form, I am not satisfied that she could have known or ought to have known it could result in her dismissal. I was persuaded by the Appellant's testimony because I found her explanation for her conduct credible and reasonable. More specifically, the Appellant was employed for approximately 23 years, had received good performance reviews, was advised to keep payroll in check by the employer and the time edit policy language places the onus on employees and not managers to complete time edit forms.

[23] Further, the Appellant noted that she would have expected her employer to provide her with additional training and an opportunity to resolve the issue. I note that the Tribunal does not have jurisdiction to determine whether the dismissal was justified or whether the penalty was justified *(Canada (Attorney General)* v. *Marion*, 2002 FCA 185). While the Tribunal cannot make a determination on the progressive discipline policy of the employer and whether it was reasonable, I find that since the Appellant had not received any warnings from the employer about her conduct supports the fact that she could not have known that she would be dismissed

[24] Where the claimant knew or ought to have known that her conduct was such as to impair the performance of his duties owed to his employer and that, as a result, dismissal was a real possibility (*Canada* (*Attorney General*) v. *Lemire*, 2010 FCA 314). I also note that the new reporting supervisor had not yet conducted a 2017 performance review, so the Appellant could not have known that her actions of making changes to timesheets without a time edit form was a breach of workplace policies.

[25] The employee and Respondent submit that the Appellant breached the falsification of company records policy, which included time edit forms and noted that it may lead to termination. A copy of the policy was included in the employee handbook (GD3-48).

[26] The Appellant acknowledged that she was aware of the falsification of records policy, but she states that she did not falsify any records. She did not submit any false time edit sheets because she made small authorized adjustments to an employee's timesheets.

[27] I agree with the Appellant because there was insufficient evidence that the Appellant falsified any time edit forms because she did not use any time edit forms. I note that editing an employee's timesheets is not listed as an offence on the falsification of company records (GD3-48). I also note that the employer did not submit copies of any of the alleged false records for the Tribunal's consideration. The proof of a mental element is necessary and the claimant must have a deliberate behaviour or so reckless as to approach wilfulness *(Canada (Attorney General)* v. *Tucker*, A-381-85). I am not persuaded that the Appellant's conduct was deliberate, reckless or wilful, therefore I find that the Respondent has not proven that there was misconduct because the Appellant did not falsify any records.

[28] While the employer characterizes the Appellant's conduct as misconduct based on their policies, I note that it is an error of law to focus on the definition of the employer and on its stated policies to determine "misconduct" within the meaning of subsection 30(1) of the Act (*Canada (Attorney General)* v. *Nguyen*, 2001 FCA 348). In this case, I am satisfied on a balance of probabilities that the Appellant's conduct was not misconduct under the Act because her conduct was not wilful and she could not have known that she could be dismissed for conduct that was supported by the employer.

CONCLUSION

[29] I am allowing the appeal because the Respondent has not proven that the Appellant's conduct was wilful, reckless or deliberate. I was not convinced that she wilfully breached the employer's time edit and falsification of records policy. Further, there was insufficient evidence that the Appellant knew or ought to have known that her conduct could lead to her dismissal.

[30] The appeal is allowed.

Solange Losier

Member, General Division - Employment Insurance Section

HEARD ON:	October 1, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	J. B., Appellant Sean Jackson, 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.