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

[TRANSLATION]

Citation: *L. T. v Canada Employment Insurance Commission*, 2018 SST 1072

Tribunal File Number: GE-18-1761

BETWEEN:

L. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: September 24, 2018

DATE OF DECISION: October 5, 2018

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] Starting in 1996, the Appellant worked in housekeeping at X (X). On January 12, 2018, she was dismissed.

[3] The Appellant filed a claim with the Employment Insurance Commission (Commission) for Employment Insurance benefits.

[4] After receiving information from the employer, the Commission denied the Appellant benefits because she had lost her employment due to her misconduct.

[5] According to employer (X), the Appellant had several complaints from residents and their family members for not cleaning adequately. She received verbal and written warnings. She was suspended twice, and the last notice of suspension stated that she could be dismissed after the next complaint.

[6] On January 9, 2018, the employer received a complaint because the Appellant failed to clean a resident's toilet bowl. The employer investigated and decided to dismiss the Appellant.

[7] The Appellant in turn admits that she did not perform all of her duties. However, she could not carry out all the duties the employer asked of her.

[8] Before November 2016, the Appellant had to clean 25 residential rooms and administrative offices. After an employee retired and was not replaced, the Appellant had to clean 42 rooms. Despite the Appellant's request for help, the employer did not really reduce her workload.

ISSUES

[9] What is the Appellant alleged to have done?

[10] Did the Appellant commit the alleged acts?

[11] Do the alleged acts constitute misconduct?

ANALYSIS

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

[13] The Tribunal must determine whether the Appellant lost her employment because of her misconduct and whether she should therefore be disqualified from receiving benefits under sections 29 and 30 of the *Employment Insurance Act* (Act).

[14] The Tribunal's role is not to determine whether a dismissal by the employer was justified or was the appropriate action (*Canada (Attorney General) v Caul*, 2006 FCA 251).

[15] Instead, the Tribunal must determine what the Appellant is alleged to have done, whether the Appellant committed these acts, and whether these acts constitute misconduct within the meaning of the Act.

[16] The Commission has the onus of proving on a balance of probabilities that there was misconduct (*Bartone*, A-369-88).

What is the Appellant alleged to have done?

[17] The Tribunal notes the Appellant's admission that she is alleged to have failed to perform her duties properly.

[18] The Tribunal is of the view that the Appellant is alleged to have failed to perform her housekeeping duties according to the employer's policy.

Did the Appellant commit the alleged acts?

[19] The Tribunal notes from the Appellant's testimony that she admits to having committed the alleged acts.

Do the alleged acts constitute misconduct?

[20] The Tribunal must now determine whether this amounts to misconduct under the Act.

[21] The concept of misconduct is not defined by the Act and must be considered based on principles drawn from case law. The Act requires "for disqualification [from receiving benefits] a mental element of willfulness, or conduct so reckless as to approach willfulness" (*Canada (Attorney General) v Tucker*, A-381-85).

[22] The Federal Court of Appeal has defined the legal concept of misconduct for the purposes 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 (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36).

[23] The Tribunal reminds the Appellant that it is not its role to determine whether the dismissal was justified. It must consider whether the Appellant's alleged acts constitute misconduct under the Act (*Canada (Attorney General) v Marion*, 2002 FCA 185).

[24] The Tribunal notes from the Appellant's testimony that she worked in housekeeping at a X for more than 20 years.

[25] Before the fall of 2016, the Appellant had to clean 25 rooms on the fourth floor of the X and staff offices. On August 4, 2016, an employee retired. She cleaned rooms on the third floor. The Appellant was asked to clean 42 rooms, and cleaning staff offices was removed from her duties.

[26] According to the Appellant, it is difficult to clean 42 rooms on the third and fourth floor. This is a heavy workload of clients. The residents have chronic conditions.

[27] The Appellant states that she asked the general maintenance supervisor for help. All he did was remove cleaning the offices from her duties. The workload was still too much for her to perform all of her duties. It was from that moment that she started to receive disciplinary notices.

[28] The Tribunal notes that the Appellant received several warnings because she had failed to perform her duties properly.

[29] On February 6, 2017, the Appellant received a written notice because she had not performed her duties adequately. Sinks, toilets, and other things had not been cleaned. The

employer reminded the Appellant that maintaining cleanliness was an issue raised in her 2016 evaluation.

[30] On May 5, 2017, the Appellant received a one-day suspension for failing to perform her duties properly. She was informed that more severe sanctions could be imposed on her.

[31] On October 20, 2017, the Appellant was suspended again for failing to perform her duties properly. The employer imposed a three-day suspension on her. She was informed that next time she could be dismissed.

[32] On January 19, 2018, the Appellant was dismissed for not [*sic*] having failed to clean a bathroom that was left in a substandard condition.

[33] The Tribunal notes that the Appellant acknowledged that she had not performed her duties and that she knew she would be dismissed. However, according to the Appellant, the alleged acts do not constitute misconduct under the Act.

[34] The Appellant maintains that she started receiving disciplinary notices after an employee left, when the employer increased the number of rooms to clean. Even though the employer removed cleaning offices from her duties, she had to clean more rooms in the area with high-need residents.

[35] According to the Appellant, the employer accused her of being nonchalant, which is unfounded information. The employer stated that the Appellant could have had help, yet she asked for this help, and the employer did not follow up on it. The employer knew that there was an increase in duties and that the Appellant asked for help (GD3-35).

[36] According to the Appellant, the facts do not support there being misconduct. A distinction must be made between misconduct and difficulty performing one's duties. This is an issue of competency and an inability to perform the duties that the employer increased after an employee retired.

[37] This is not misconduct; this was not wilful or intentional on the part of the Appellant. She was just no longer able to perform her duties, despite her willingness to do so.

[38] In the Commission's view, the Appellant was informed several times that she was not performing her duties properly. She knew the employer's policy on cleanliness. The Appellant did not comply with the employer's requirements. She lost her employment because she acted so carelessly as to approach wilfulness.

[39] The Tribunal finds that the Appellant did not act deliberately or so carelessly as to approach wilfulness. In coming to this conclusion, the Tribunal relied on the Appellant's testimony during the hearing. The Appellant did not contradict her earlier statements, and, despite her difficulties grasping the questions, she provided a credible testimony.

[40] Therefore, the Appellant's workload increased after an employee retired and was not replaced. She asked for help twice, but the employer did not make any special arrangements. The Appellant stayed on the job while recognizing that she was not able to meet the employer's demands. She did not act deliberately or carelessly; she was unable perform all of the new duties the employer asked of her.

[41] The Tribunal is of the view that the Commission cannot rely solely on the Appellant's knowledge of her possible loss of employment to find that there was misconduct. The Commission had to consider all the facts to prove that she had lost her employment because of her misconduct.

[42] After considering the evidence on file, the Appellant's testimony, and the parties' submissions, the Tribunal is of the view that the Commission has not proven on a balance of probabilities that the Appellant lost her employment because of her misconduct.

CONCLUSION

[43] The Tribunal finds that the Appellant must not be disqualified from receiving benefits because she did not lose her employment due to her misconduct under sections 29 and 30 of the Act.

[44] The appeal is allowed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	September 24, 2018
TYPE OF HEARING:	Videoconference
APPEARANCES:	L. T., Appellant Guylaine Guenette (counsel), 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.