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

Citation: *C. K. v Canada Employment Insurance Commission*, 2018 SST 1367

Tribunal File Number: GE-17-2747

BETWEEN:

C. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: December 5, 2018

DATE OF DECISION: December 14, 2018

Canada

DECISION

[1] The appeal is dismissed. The Appellant is disqualified from receiving employment insurance benefits because she lost her employment due to her own misconduct.

OVERVIEW

[2] The Appellant worked at X where employees were covered by a health benefit plan administered by X. The latter performed an investigation which revealed that the Appellant was one of several employees who participated in a scheme consisting of submitting false claims for medical items and services that were never received. The Appellant was dismissed as the employer considered that the Appellant breached her code of conduct. The Canada Employment Insurance Commission (Commission) concluded that the Appellant should be disqualified from receiving benefits as the loss of her employment was due to her own misconduct.

ISSUES

[3] The Tribunal must determine whether the Appellant lost her employment because of her own misconduct. To do so, the Tribunal must first decide:

a) What is the alleged conduct that led to the Appellant's dismissal?

b) Did the Appellant commit the alleged conduct? If so does that conduct constitute misconduct?

PRELIMINARY MATTERS

[4] At the beginning of the hearing, the participants spoke in French. Upon realizing that the Appellant specifically asked in the Notice of hearing that communication takes place in English, the Tribunal asked the Appellant in which official language she wished to proceed. The Appellant and her representative responded that they can proceed in French but the Appellant specified that she is not fluent in French. In light of that fact, the Tribunal decided to proceed in English as originally requested by the Appellant.

ANALYSIS

[5] Subject to exceptions not relevant to this appeal, s. 30 (1) of the *Employment Insurance Act* (Act) stipulates that a claimant is disqualified from receiving benefits if he or she "lost any employment because of their misconduct".

What is the alleged conduct that led to the Appellant's dismissal?

[6] The employer's decision to dismiss the Appellant was following an investigation conducted by X which concluded that the Appellant and several other employees' submitted false claims for products or services received through a provider named X. During its investigation, X contacted the medical professionals indicated on the receipts submitted in support of the claims who confirmed that the services indicated on the receipts were never rendered. As such, the employer determined that the Appellant participated in this scheme of submitting false claims for reimbursement and in doing so the Appellant breached her code of conduct.

Did the Appellant commit the alleged conduct? If so does that conduct constitute misconduct?

[7] The Commission bears the burden 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. After reviewing the evidence carefully, it leads to the conclusion that, the Commission has met its burden of proving that the Appellant submitted false claims to X. In reaching this conclusion, the Tribunal found the following evidence significant.

[8] First, the employer confirmed that the Appellant along with 46 other employees could not describe the nature of the treatments received at X or whether the treatments received were provided by a man or a woman. And during the hearing, the Tribunal observed that the Appellant could not describe the different treatments received, nor could she provide a credible answer as to why she required those treatments. For example, the Appellant testified that she legitimately received seven acupuncture treatments during the period of September 2 to September 23, 2016;

but she first testified that she could not remember why she needed those treatments; then she mentioned that the acupuncture treatments were recommended by her family doctor to alleviate her back pain; yet she could not provide a medical certificate prescribing such treatments. Moreover, the Appellant also filed eight claims for osteopathy treatments during the period of October 3, to October 21, 2016 (GD3-26). Yet, when asked by the Tribunal to explain how the treatments were performed, the Appellant failed to answer; in fact she simply responded that it was for the bones. The Tribunal finds that the Appellant's explanation as to the treatments was vague and much like her other colleagues involved in the scheme, the Appellant did not sound like someone who had undergone the treatments for which she claimed and received reimbursement.

[9] Second, the Appellant's acupuncture receipts indicate that the treatments were all performed by Doctor S. B., yet when the latter was contacted by X with respect to the seven claims submitted under the Appellant's Group Benefits plan, he told X that he never treated the Appellant. This is corroborated by the Appellant's testimony affirming that she never received treatments from Doctor B. The Appellant also explained that her acupuncture treatments were performed by I. E. and that she did not pay any attention to the name of the doctor indicated on her receipts.

[10] Third, in December 2016, the Appellant filed two claims totaling $1600 for knee braces and she was reimbursed $1440 by X. When asked why she needed braces, the Appellant explained to the Tribunal that she did some research online regarding issues that she was having with her knees and she decided that she needed knee braces. So she went to X, where her measurements were taken and she paid $1600 cash for her braces, but she never received them. The Tribunal finds the fact the Appellant did not receive her braces which she paid a large sum of money for, should have alerted her to the fact that something suspicious was going on, but the Appellant never raised the issue with her employer or with X. Instead, the Appellant's efforts to obtain the braces over the course of two years were minimal; she testified that her only efforts made to obtain the braces was by calling the clinic several times. The Appellant's actions lead the Tribunal to conclude that she participated in the scheme of submitting false claims for products and services that were never received.

[11] Based on the foregoing, the Tribunal finds that the Appellant committed the gesture of submitting false claims to X for reimbursement of products and services that were never received.

Does this conduct constitute misconduct?

[12] The Appellant submits that following her dismissal she filed a claim for wrongful dismissal and according to a settlement agreement signed with her former employer, the latter agreed not to recover the overpayment of $3,400 generated by her alleged false claims (GD10). Therefore, the Appellant affirms that she is not guilty of misconduct. The Tribunal finds that that argument cannot stand as the mere existence of a settlement agreement is not determinative of whether an employee was dismissed for misconduct (*Canada (A.G.) v. Perusse* A-309-81 F.C.A.). The fact that the settlement agreement required the employer to forego recovery of the overpayment cannot be treated as conclusive of whether there was actually misconduct for purposes of the Act. This is particularly true since the settlement agreement did not include an admission by the employer, either express or implicit, that the dismissal for cause was not fully justified. The Tribunal's role is to assess the evidence and to arrive at its own conclusions. It is not bound by how the employer and employee characterize the grounds on which the employment was terminated. In this case, it is clear from the evidence that the Appellant lost her employment due to her own misconduct.

[13] In fact, misconduct requires a mental element of willfulness on the part of the Appellant, or conduct so negligent or reckless as to approach willfulness (*Canada (Attorney General) v. Tucker*, A-381-85). The evidence demonstrates that the Appellant filed 31 false health insurance claims (GD3-26) to X and each time that the Appellant filed a claim she certified that the services listed in the claim had been supplied (GD3-28). What is also striking here is the fact that the Appellant's conduct was repeated many times over the period from September to December 2016 and it was relatively elaborate, involving the submission of false invoices, and repeatedly going through all of the steps involved in submitting a benefit claim.

[14] A proper application of the legal test of misconduct to the facts leads to the only reasonable conclusion that the Appellant's conduct, of signing a claim form to certify that the charges therein were for products and services received, was willful, and constituted misconduct

for which her employment was terminated. Making false claims is a voluntary act of misconduct that has for effect to destroy the essential relationship of trust between employer and employee (*Lefebvre*, 2004 FCA107; *Latour*, 2004 FCA 103).

[15] The misconduct may manifest itself in a violation of the law, regulation or ethical rule and it should be shown that the impugned conduct constitutes a breach of an express or implied duty or condition included in the contract of employment of such scope that the employee would normally foresee that it would be likely to result in his or her dismissal (*Brisette*; *Nolet* A-517-91; *Langlois* A-94-95). Each time the Appellant filed a claim she agreed to the following: “I understand that any fraudulent claims submitted by myself or anyone else, purporting to do so on my behalf, including but not limited to, my spouse/partner or dependents, will subject me to discipline up to and including termination of my employment for cause” (GD3-28). Therefore, the Tribunal finds that the Appellant knew or ought to have known that her conduct would likely lead to her dismissal.

CONCLUSION

[16] For the foregoing reasons, the appeal is dismissed.

Bernadette Syverin

Member, General Division - Employment Insurance Section

HEARD ON:	December 5, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. K., Appellant Marie-France Ouimet, Representative for the Appellant