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

Citation: *E. E. c Canada Employment Insurance Commission*, 2019 SST 869

Tribunal File Number: GE-18-3849

BETWEEN:

E. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: January 30, 2019

DATE OF DECISION: January 31, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant lost her employment due to her own misconduct and is disqualified from receipt of employment insurance benefits (EI benefits).

OVERVIEW

[2] The Appellant applied for regular EI benefits and established a claim effective August 19, 2018. The Commission investigated the Appellant's reason for separation from employment and determined she was dismissed from her job at X for insubordination and breach of confidentiality. The Commission imposed a disqualification on her claim because she lost her job due to her own misconduct. The Appellant disputed the Commission's decision because X had amended her Record of Employment (ROE) from "dismissal" to "without cause termination". The employer advised that the Appellant's actions were still a breach of her employment contract and a violation of trust. The Commission maintained its decision, and the Appellant appealed to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The conduct of the employer is not the issue on this appeal. Although the Appellant repeatedly stated in her testified at the hearing that X's decision to terminate her employment was "unfair" and "heavy-handed", the Federal Court of Appeal has definitively held that the Tribunal's role is **not** to determine whether a dismissal was justified or the appropriate sanction, nor whether dismissal is too severe of a penalty in the circumstances: *Caul 2006 FCA 251, Secours A-352-94, Namaro A-834-82*.

[4] If the Appellant believes she was treated unreasonably and/or wrongfully dismissed by XX, she is free to pursue whatever remedies might be available to her for such acts.

[5] The Tribunal must focus on ***the conduct of the Appellant*** as it relates to the separation from employment, and determine whether it constitutes misconduct for purposes of section 30 of the *Employment Insurance Act* (EI Act): *McNamara 2007 FCA 107, Fleming 2006 FCA 16*.

ISSUE

[6] Is the Appellant disqualified from receipt of EI benefits because she was separated from her employment at X because of conduct that constitutes misconduct for purposes of section 30 of the EI Act?

ANALYSIS

[7] The Appellant will be disqualified from receiving EI benefits if she lost her employment due to her own misconduct: section 30 EI Act.

[8] The onus is on the Commission, with evidence obtained from the employer, to prove that the Appellant, on a balance of probabilities, lost her employment due to her own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[9] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act has been established by jurisprudence from courts and administrative bodies that have considered section 30 of the EI Act and enunciated guiding principles to be considered in the circumstances of each case.

[10] In order to prove misconduct, it must be shown that the Appellant behaved in a way other than she should have and that she did so willfully, deliberately, or so recklessly as to approach willfulness*: Eden A-402-96*. For an act to be characterized as misconduct, it must be demonstrated that the Appellant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the Appellant's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

[11] The Tribunal acknowledges that the most recently amended ROE issued by X states that the Appellant was terminated without cause (GD3-20). However, the ROE is not a complete answer to the question of why the Appellant was separated from her employment. As set out by the Federal Court of Appeal in *Macdonald A-152-96*, the Tribunal must determine the ***real*** cause

of the claimant's separation from employment, and whether it amounts to misconduct for purposes of section 30 of the EI Act.

Issue 1: What is the conduct that led to the Appellant's separation from employment?

[12] The first step in the process is for the Tribunal to determine why the Appellant was separated from her employment at X.

[13] The evidence from the employer is:

a) The original ROE and an amended ROE, issued August 28, 2018 and September 26, 2018 respectively, both for "Dismissal" (GD3-16 and GD3-18);
b) Initial statements to the Commission on October 9, 2018 that Appellant was let go for insubordination and breach of confidentiality (GD3-22 and GD3-25);
c) Further statements to the Commission on October 15, 2018 that the Appellant intended to send an email to a former employee and was creating an antagonistic relationship in the workplace (GD3-27);
d) A further amended ROE issued November 15, 2018 for "Without Cause Termination" (GD3-20);
e) Statements to the Commission during the reconsideration process that the Appellant intended to send an email with confidential information to a former employee, which although the email was contained, was a violation of the employer's trust (GD3-36);
f) A copy of the August 14, 2018 Termination letter (GD3-38), stating that the Appellant sent an "unacceptable email" externally to former X employees which also contained "confidential internal information" – in breach of her employment contract; and
g) A copy of the email in issue (GD3-41 to GD33-44).

[14] The Appellant's evidence to the Commission was:

a) The Dismissal Questionnaire (GD3-23 to GD3-24), in which she gave the following details about her dismissal:

> "There was a reorganization at work and my Boss left, I was then put under a new boss who sent me an email which I considered in essence, harassment. I then sent an email to my former Boss expressing my concerns about being micro managed

> and asking if I was being overly sensitive. I sent the email to my Boss's former work email by mistake and what I didn't realize is that my new Boss had access to that email and they used it as a reason to fire me. I have been in contact with a Lawyer and he indicates I may have a case for wrongful dismissal. Originally I received a letter stating I was dismissed without cause but they have since contacted my Lawyer saying they want to change it to with cause. The Lawyers are still negotiating" (GD3-23)

b) Initial statements to the Commission on October 12, 2018 (GD3-26) that she did intend to send the email to her former boss but it did not contain financial information. It was a call volume report which has no impact on anything. She didn't even realize the report was attached. She was seeking guidance from her former boss to see whether she was being overly sensitive to an email from her new boss.

c) Further statements to the Commission on October 15, 2018 (GD3-28) that she made an error and could have done things differently, but she just wanted an opinion from her former boss about her new boss's email. Her former boss had been fired by X two weeks prior to the incident.

d) Statements to the Commission during the reconsideration process (GD3-34 to GD3-35) that:

- she sent an email to her former boss (X) to ask her opinion about what was said in an upsetting email from her new boss – which was part of an email chain she also forwarded to X.
- X was constructively dismissed and had quit two weeks earlier in August, and X's boss (XX) was also let go in August.
- By accident, the Appellant sent the email to X's old internal X email address. The email didn't go externally and no confidential information was sent out, but because it stayed internally the employer found out about it.
- The email included an attachment that the Appellant missed, but X already had the information anyway from when she worked at X and it wasn't anything confidential.
- The Appellant planned to go into work on the Monday and go on sick leave because she was that upset by her new boss's email.

e) Further statements to the Commission during the reconsideration process (GD3-45 to GD3-46) that:

- She felt the email from her new boss was harassment and that what he was asking for in that email was ridiculous.
- She forwarded the email from her new boss to 2 people: (a) X, her former boss who was terminated a few weeks beforehand and (b) her former boss's boss, X, who had been terminated as well.
- She did this because X had just gone through what the Appellant was going through, and she copied X's boss, X, because she had also just gone through this. She was looking for advice from then.
- She admitted to making the error right away.
- She didn't realize the report was attached, but it didn't have anything confidential in it and both X and X were aware of the information in the attachment.
- There is a line in her employment contract about not sharing information with third parties.
- Her lawyer said the intent was there, but the contract was poorly worded and would not stand up in court.
- The employer's action did not fit the error. She was a good employee and the employer completely overreacted. She was going to retire in 16 months and didn't deserve this.
- She was not being insubordinate. She never would have said what she said in her email to anyone else that still worked at X.

[15] The Appellant testified at the hearing as follows:

- She relies on the letter of explanation at GD2-6 to GD2-7 in her appeal materials.
- X has said the termination is without cause, and she doesn't understand why that's not the end of this matter.
- She was not insubordinate because she did not openly or publicly say to her staff or to any of her boss's staff that she did not respect him or did not want to report to him.
- She sent what she thought was a confidential email to her former boss.

- In an emotional state, she made an error in choosing the wrong email address. This resulted in her employer becoming aware of what she had done and "that's what caused all of this".
- The employer intercepted the email. Nothing got to her former boss, so there was no sharing of anything.
- She has paid "a very heavy price" for her error, but there was no harm done to X because X and X had already seen the stats in the attached report. The Appellant stated: "Yes, there may have been intent", but there was nothing X hadn't seen before, other than the fact that the Appellant "now had to report to X" (her new boss).
- A reporting structure is not confidential information.
- Her conduct does not meet the "EI definition" for wilful misconduct.
- She did not know that her conduct would or could result in her dismissal because she thought she was sending a private email to her former boss and the employer would never find out about it. There was nothing willful about "hitting the wrong email address on a cell phone".
- She did not intend to harm anybody. She was looking for advice and accidentally sent her email to the wrong address.
- She was in a very emotional state when she sent the email and hadn't slept for 2 days.
- Having to report to her new boss, X, was "ridiculous". She was looking for advice from somebody familiar with "the politics and everything else that goes on" at X.
- She was a very good employee and this was the "first mistake" she made in the 3.5 years she worked at X. The Appellant stated: "And all I did was hit a wrong email address."
- The Appellant stated: "If I would have hit the right email address, we wouldn't be having this discussion. I wouldn't be in this situation."
- Her lawyer told her this was "very heavy-handed" given that she was "not a problem employee at all".
- The Appellant stated: "I get it that I couldn't go back and work there after saying that."
- But now she is being doubly penalized for a "slight error" in "hitting the wrong email address" by not even getting EI benefits after paying into the program for 40 years.

[16] The Tribunal finds that the Appellant's separation from her employment at X was caused by her conduct of sending an email with the employer's information (at GD3-41 to GD3-44) to third parties – namely her former boss and her former boss's boss – ***and*** by the statement she made in the email that she had no respect for her current boss and would not be "micromanaged" by him.

[17] The employer clearly and consistently identified these actions as the reasons why X severed its employment relationship with the Appellant. The Appellant does not dispute that she sent an email with internal communications between herself and her boss and an X report attached to it to these two individuals, and admits they were not X employees at the time. She admits to sending the email, but states that it did not reach the intended recipients because she inadvertently used the wrong email address and it was intercepted by the employer. Nor does the Appellant deny stating in the email that she had no respect for her boss and would not be "micromanaged" by him. She admits to making these comments, but states they were supposed to be private and were not intended to be communicated to the employer.

Issue 2: Does this conduct constitute "misconduct" for purposes of the EI Act?

[18] The Tribunal must consider whether the conduct it has found to be the cause of the Appellant's separation from employment constitutes misconduct within the meaning of section 30 of the EI Act (*Marion 2002 FCA 185, Macdonald, supra*).

[19] The Tribunal finds that it does constitute misconduct.

Breach of Confidentiality

[20] As an employee, the Appellant owed a duty of confidentiality to her employer. She was also aware that her employment contract prohibited her from sharing the employer's information with third parties (GD3-46). Yet the Appellant deliberately forwarded an email chain with internal communications between herself and her boss, along with an internal X report, to two individuals outside of the organization (see GD3-41 to GD3-44). This was a breach of the Appellant's duty of confidentiality and her employment agreement.

[21] The fact that the Appellant thought she was directing the email to a personal email address and never intended the employer to become aware of it does not change the nature of her actions. While the two intended recipients may have been former employees of X, they were not employees of X at the time of the Appellant emailed them. Moreover, these two individuals had ***both*** been recently dismissed from their employment by X, which amplifies the breach of confidentiality. This is especially the case in light of the Appellant's knowledge that there were severance issues in connection with their terminations (GD3-34 to GD3-35 and GD3-45 to GD3-46). It also does not matter that the email was intercepted by the employer and never reached the third parties. The act of sending the email in the first place, albeit to the "wrong address", demonstrates that the Appellant intended to share internal communications between herself and her boss with individuals outside of X. This intention in turn proves the deliberate and willful nature of the conduct.

[22] It also does not matter that, in the Appellant's view, there was no financial information and nothing significant or confidential in the email chain or the report attached thereto. The duty of confidentiality is not dependant on the Appellant's personal assessment as to whether the information she is sharing with third parties is financial in nature or confidential. Nor does the Tribunal accept the Appellant's testimony that a reporting structure is not confidential. The confidential nature of any particular piece of X information is for the employer to determine, and X asserted that the email sent by the Appellant contained confidential information not intended to be outside of the company (GD3-36). The Appellant knew she was prohibited from sharing the employer's information with third parties, and this would certainly include internal communications such as the email chain and attached report at GD3-41 to GD3-44. The Appellant described the information in the attachment as "call/email volume numbers and service level reporting, no financial info or anything that would be of value" (GD2-7). However, she also stated that X's fiscal year end was August and that X tended to lay off employees when they don't make the required numbers, which they did not do as of August 2018 (GD3-34). The report attached to the Appellant's email (at GD3-43) shows the year-over-year changes in various service categories between 2017 and 2018. Common sense dictates that such information would obviously be subject to both the duty of confidentiality and the prohibition in the Appellant's employment contract. The fact that the intended recipients may have previously

seen the report prior to their own terminations (although not the email exchange between the Appellant and her new boss) does not change the nature of the Appellant's actions.

[23] The Appellant was in a management position (GD3-45) and ought to have known she could lose her employment for sharing the employer's information at GD3-41 to GD3-44 with third parties. While the Appellant testified that she didn't think sending a private email to her former boss would result in the loss of her job, this is only because she never thought she'd get caught. Her repeated references to her only error having been "hitting the wrong email address" demonstrate that the Appellant knew not only that she was breaching her duty of confidentiality and the provisions of her employment contract, but that she needed to keep this from the employer because of the very serious consequences for doing so. The Tribunal therefore finds that the Appellant knew or ought to have known that dismissal was a real possibility for sending the email at GD3-41 to GD3-45 to third parties. The Tribunal further finds that doing so irreparably harmed the employment relationship, especially given the fact that the two intended recipients were former X employees that had been very recently dismissed from their employment.

Insubordination

[24] On August 12, 2018, the Appellant forwarded an email exchange between herself and her new boss (that took place on August 10, 2018) to her former boss and her former boss's boss. She added the following to that email chain:

> "This is what pissed me off. Am I being over sensitive? I will not be micromanaged by someone I have no respect for. I *(sic)* thinking through a few options and would love any feedback. X" (GD3-41)

[25] The Appellant testified she was expressing her displeasure at being forced to report to someone she had no respect for.

[26] The fact that the Appellant never intended the employer to become aware of her statements about her new boss does not change the fact that X did gain knowledge of them and

cited them as one of the reasons for terminating her employment. They must, therefore, be viewed in the context of having been communicated to the employer.

[27] The Tribunal finds that the Appellant's statements are derogatory on their face and reflect a willful and intentional refusal to obey an employer's reasonable request. While the Appellant may have thought the original email from her boss on August 10, 2018 was "ridiculous" and "harassment", the Tribunal gives greater weight to the evidence from the employer that what X wrote and asked for was wholly appropriate for a new person coming into the position, which was the case with X (see GD3-27 and GD3-36). A review of the emails between the Appellant and X supports that common sense interpretation. The Tribunal finds that they constitute insubordination.

[28] The Tribunal further finds it was reckless for the Appellant to make such statements in writing. This is especially the case given that the intended recipients of the Appellant's email were both former X employees – one of whom had previously done X's job - and had themselves recently been dismissed by X. Having made the statements in writing in an email sent, albeit accidentally, to an internal X email address, the Appellant cannot alter the plain and obvious meaning of her words or their impact.

[29] The Appellant also testified that she understood she could not have returned to work for X after the employer became aware of what she had said in the email about her new boss. The Tribunal agrees, and finds that the Appellant's statements irreparably harmed the employer-employee relationship.

[30] The Tribunal further finds that, as a manager herself, the Appellant ought to have known that such comments could lead to her dismissal if communicated to the employer. While the Tribunal acknowledges that the Appellant was in an emotional state when she sent the email in question, the Federal Court of Appeal has held that the fact a claimant acted impulsively and now regrets the action is not relevant to determining whether their actions constitute misconduct (*Kaba 2013 FCA 2008, Hastings 2007 FCA 372*). The Tribunal must consider whether, in acting as she did, the Appellant ought to have known that her conduct was such that it might lead to her dismissal. For the reasons set out in paragraphs 20 to 29 above, the Tribunal finds that the Appellant ought to have known she could be fired if her employer found out she was emailing

her former boss and her former boss's boss and telling them she had no respect for her current boss and would not be "micromanaged" by him. The Appellant laments inadvertently "hitting the wrong email address" when she sent the email. However, this "error" does not change the nature of the statements or the fact that the Appellant recklessly took a risk when she put them in writing and ought to have known of the serious potential consequences, including loss of her job, if her statements were ever communicated to the employer.

Summary

[31] The Tribunal finds that the Appellant's conduct of sending the email with the employer's information at GD3-41 to GD3-44 to third parties, namely her former boss and her former boss's boss, and stating in her email that she had no respect for her current boss and would not be "micromanaged" by him was willful, deliberate and reckless. The Tribunal further finds that these actions irreparably harmed her employment relationship with X, and that the Appellant ought to have known she could lose her job for this conduct. The Tribunal therefore finds the Appellant's conduct to be misconduct within the meaning of section 30 of the EI Act.

[32] Finally, the Tribunal acknowledges the difficult circumstances the Appellant has experienced since she was dismissed by X. Unfortunately for the Appellant, she cannot avoid the disqualification prescribed by section 30 of the EI Act by virtue of being in need of financial support or having paid into the employment insurance program for many years.

CONCLUSION

[33] The Tribunal finds that the Appellant's separation from her employment at X was due to her own misconduct. The Appellant is, therefore, disqualified from receipt of EI benefits as of August 19, 2018 pursuant to section 30 of the EI Act.

[34] The appeal is dismissed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	January 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. E., Appellant