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

Citation: *TG v Canada Employment Insurance Commission*, 2019 SST 1705

Tribunal File Number: GE-18-3276

BETWEEN:

T. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: January 30, 2019

DATE OF DECISION: February 2, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant (Claimant) lost her employment due to misconduct.

OVERVIEW

[2] On June 14, 2017, the Claimant submitted an appeal to the General Division in dispute of the Respondent's (Commission's) reconsideration decision. The Commission maintained their decision that the Claimant was not entitled to regular Employment Insurance benefits because she lost her employment due to misconduct.

[3] The hearing was scheduled to be heard on January 16, 2018, and was adjourned to February 22, 2018, because the interpreter cancelled. Prior to the February 22, 2018, hearing the Claimant requested a change to the hearing date because the hearing conflicted with her medical appointment. The Claimant's request was granted and the hearing date was changed to April 3, 2018. When the Claimant failed to appear on April 3, 2018, she was granted an adjournment to July 3, 2018. When the Claimant failed to appear at the July 3, 2018, hearing, the General Division proceeded on the record, in accordance with subsection 12(1) of the *Social Security Tribunal Regulations,* and dismissed the appeal.

[4] The Claimant appealed to the Appeal Division on the grounds that she was denied an opportunity to be heard. The Appeal Division allowed the appeal and directed that the matter be referred back to the General Division for reconsideration. The Claimant attended the in-person hearing on January 30, 2019, and provided affirmed testimony through the assistance of an interpreter.

ISSUES

[5] Why did the Claimant lose her employment?

[6] Did the Claimant commit the conduct that lead to her loss of employment?

[7] If so, does the Claimant's conduct constitute misconduct?

ANALYSIS

[8] The Commission bears the burden of proving that the loss of employment was by reason of the Claimant's misconduct. This burden of proof is a balance of probabilities, which means that the facts or events are more likely than not to have occurred as described.

[9] There must be sufficiently detailed evidence to know whether the Claimant acted in the manner that she is accused of, and then, a determination whether this behaviour is considered misconduct (*Joseph v. Canada (Attorney General),* A-636-85).

[10] If misconduct is proven, the Claimant is disqualified from receiving regular Employment Insurance benefits under subsection 30(1) of the *Employment Insurance Act* (*Act*).

a) Why did the Claimant lose her employment?

[11] The Claimant does not dispute that she lost her employment due to her breach of the employer's workplace violence and harassment policy. The Claimant readily admitted that she acted in a violent way towards her coworker, on June 7, 2016; that these actions were in breach of the employer's policy; and this was the reason why she lost her employment. The Claimant testified that she was aware that her employer had a policy where they did not allow "bad behaviours", such as fighting or bad attitude towards coworkers, while at work. The Claimant clarified that she understood such behaviours were referred to as "violence".

[12] The Commission submitted evidence of the employer's June 20, 2016, letter to the Claimant. This letter states, in part, that effective June 7, 2016, the Claimant's employment is being terminated for "breach of the workplace violence and harassment policy". Accordingly, I find the Claimant lost her employment due to her breach of the employer's workplace violence and harassment policy.

b) Did the Claimant commit the conduct that lead to her loss of employment?

[13] Yes. There is no dispute that on June 7, 2016, the Claimant committed an act of violence towards her coworker, as captured on the employer's surveillance video. The Claimant testified that during their break on June 7, 2016, the Claimant placed her bag down on a table in the lunchroom and left to go put her coffee in the microwave. When the Claimant returned to the

table, a coworker was sitting in the chair by her bag and that coworker had her arm placed on the Claimant's bag.

[14] The Claimant testified that she asked the coworker to move and the coworker stated something in another language (Ethiopian) which caused people, who were sitting around them, to laugh. The Claimant stated that she does not know what was said but that she felt "insulted" because the others were laughing. The Claimant went on to explain that when the coworker failed to move, she pushed her coworker. Then her coworker stood up and told the Claimant not to touch her. The Claimant stated that she slapped her coworker and her coworker responded by stating she was going to report the Claimant to the employer. The Claimant said she then pushed her coworker a second time when the coworker attempted to move past her.

[15] The Commission's evidence consists of statements by the employer, three written witness statements; grievance filed by the union, and a copy of the Claimant's apology letter. The statements provided by the employer and the witnesses of the events which occurred on June 7, 2016, and are consistent with the Claimant's testimony, as set out above.

[16] The Claimant confirmed that she knew that her actions towards her coworker were "violence" and that she acted that way because her "anger took over." Although the Claimant's actions were committed during a period of anger, there is no dispute that her actions amounted to workplace violence, in breach of the employer's policy. Nor is there any dispute that it was the Claimant's acts of violence that caused her loss of employment.

c) Does the Claimant's conduct constitute misconduct?

[17] Yes. There will be misconduct where the conduct of a claimant was wilful, in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility (*Canada (Attorney General) v. Lemire*, 2010 FCA 314).

[18] The Claimant testified that during the events that occurred on June 7, 2016, she felt insulted and her "anger took over", when everyone began to laugh after her coworker said something in her Ethiopian language. The Claimant admitted that it was during that anger that

she intentionally shoved, slapped, and then pushed her coworker; which I find supports the Commission's submission that the Claimant's actions were conscious and deliberate. As such, I must now determine whether the Claimant knew, or ought to have known, there was a real possibility that her actions would lead to her dismissal.

[19] The Claimant stated that during the nine years she worked in this multicultural workplace, many of her coworkers spoke different languages. She explained that employees assisted each other in translating English into their native languages. She stated that she had heard about this employment from a member of her community who assisted in translating for her during her orientation and training. The Claimant also stated that her coworkers translated for her during monthly staff meetings, when needed.

[20] The Claimant testified before me that her ability to speak and understand spoken English was at "level 1". When asked to clarify what "level 1" was, the Claimant explained that she can understand what is "generally" said in English. The Claimant clarified that she understands enough of spoken English that if she is confused about what is being said, she knows to request someone to explain translate into either her own language of Dinka or into Arabic.

[21] The Claimant stated that she cannot read anything that is written in English so she has someone translate documents for her. The Claimant confirmed that she had received the appeal documents from the Tribunal and that she had a person from her community translate them for her prior to the hearing.

[22] The Claimant stated that she prefers to respond orally in Dinka, because she feels she is better able to express herself when speaking in her own language. During the hearing it became evident that the Claimant did have a general understanding of what I was saying in English because at times she answered my questions or commented on what I was saying, prior to the Interpreter translating them into Dinka for her.

[23] Specific examples of when the Claimant understood English during the hearing include when I asked if the employer sent her home, pending their investigation. The Claimant immediately answered "yes", prior to translation. Also, when I was paraphrasing her testimony

of who contacted her from the union and who was in attendance at the settlement meeting, the Claimant responded prior to translation.

[24] Despite the Claimant's quick responses, prior to translation of my questions and statements, I ensured that the Interpreter translated what I stated into Dinka, and then requested that the Claimant provide her answers again. I note that in these situations the Claimant never changed her responses after the translation, which supports a finding that the Claimant was responsive to English, when spoken, and that she did have what she referred to as a "level 1" or a general understanding of oral English.

[25] The Claimant testified that she had verbally been told "the employer's rules" against violence during her orientation and during every monthly staff meeting. The Claimant also confirmed that she was provided union documents, which included the workplace violence and harassment policy, written in English. She stated that members from her community assisted her with translation of these documents.

[26] The Commission submitted evidence that the employer stated their workplace violence and harassment policy was printed on posters located throughout the workplace, and was discussed during their monthly meetings. The employer also stated that this policy clearly states that violence could result in dismissal. The Claimant agreed that there were "so many" papers attached to the walls but that they were written in English.

[27] When asked if she ever requested that the posters or papers be translated for her, she stated "no", she only asked her coworkers to translate the vacation schedule for her. The Claimant stated that she did not ask for the other papers to be translated because she was only interested in the vacation schedule. The Claimant then clarified that the employer discussed their workplace violence policy during their monthly meetings and confirmed that that they were told that violent actions could result in their loss of employment.

[28] The Claimant explained how her employer conducted their monthly meetings during which they discussed health and safety requirements, such as having to wear hearing protection. The Claimant confirmed that, during every monthly meeting, her employer would also discuss

the “rules” regarding “no fighting”; “no bad behaviours or violence with coworkers”; and how employees needed to be polite with each other.

[29] The Claimant testified that during every monthly meeting, the employer would also explain that workers would be suspended or fired if they broke the “rules” and were involved in such “bad” behaviours at the workplace. Although the Commission did not submit a printed copy of the employer’s workplace violence and harassment policy, I find that based on the Claimant’s testimony, she clearly understood that complying with the employer’s policy against workplace violence was a condition of her employment.

[30] After hearing the Claimant’s explanation of what occurred on June 7, 2016, I am not convinced that her coworker intentionally refused to move her arm or to move from that seat so that the Claimant would lose her job, because the Claimant could have walked away and sought assistance from a supervisor. When asked why she did not ask for assistance, instead of responding in a violent manner, the Claimant stated that her anger took over her.

[31] I further find that, despite having a language barrier, the Claimant knew, or ought to have known, or was wilfully blind to the fact that dismissal was a real possibility if she acted in a “bad” or in a violent way towards a coworker. The Claimant admitted that she understood that she was required to comply with the employer’s policy against violent behaviour and by failing to comply she willfully breached an expressed duty of her employment contract. Accordingly, I find the Claimant knew, or ought to have known, that such behaviour could lead to her dismissal as her actions were in direct violation of company policy. Accordingly, I find the Claimant’s actions of violence towards her coworker on June 7, 2016, constitute misconduct.

[32] Further, as set out above, I find that there is a causal relationship between the Claimant’s breach of the employer’s workplace violence and harassment policy and the loss of her employment. Meaning that the Claimant’s misconduct caused her loss of employment (*Canada (Attorney General) v. Cartier,* 2001 FCA 274; *Smith v. Canada (Attorney General),* A-875-96; *Canada (Attorney General) v. Nolet,* A-517-91).

[33] The Claimant argued that she now feels that she should not have signed the settlement agreement with her union because someone from her community has since told her that the

employer should have issued her a warning because this was her first offence. The Claimant was not aware of any law or reason why the employer was required to give her a warning, other than she was a good employee who made no mistakes prior to the events of June 7, 2016. There is no dispute that this may have been the Claimant's first offence; however, the issue to be decided is not whether she was a good employee in years past; rather, the issue is whether the Claimant's actions on June 7, 2016, constitute misconduct.

[34] The Claimant also argued that she feels the employer refused to let her come back to work because she suffered from various workplace injuries, which included asthma and hearing loss. Although the Claimant provided medical documentation which confirms she suffers from medical conditions, there is insufficient evidence to prove these conditions resulted from her employment or that the employer maintained their decision to dismiss her because of her conditions or illnesses. Rather, as submitted by the Claimant, the employer stated that they refused her request to return to work because they were concerned she may retaliate or "go after" her coworker if she was allowed back on the employer's property.

[35] As explained during the hearing, I am not required to determine whether her dismissal was justified. Rather, my role is to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Act* (*Attorney General of Canada v. Marion*, 2002 FCA 185).

[36] In response to the Claimant's argument that she is entitled to her benefits because she has worked for the employer for almost nine years, Employment Insurance is an insurance scheme and not a pension fund or a needs based program that can be withdrawn at will. The entitlement to benefits does not depend solely on having made contributions to the plan, but also on compliance with the conditions set out in the *Act.*

[37] I sympathize with the Claimant given the circumstances she presented; however, there are no exceptions and no room for discretion. I cannot interpret or rewrite the *Act* in a manner that is contrary to its plain meaning, even in the interest of compassion (*Canada (Attorney General) v. Knee*, 2011 FCA 301).

CONCLUSION

[38] The appeal is dismissed.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	January 30, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	T. G., Appellant (Claimant) Riak Lok, Interpreter