



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. M. v Canada Employment Insurance Commission*, 2019 SST 464

Tribunal File Number: GE-18-2593

BETWEEN:

K. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: March 21, 2019

DATE OF DECISION: April 11, 2019

DECISION

[1] The appeal is allowed. I find the Commission has failed to prove the claimant lost her employment due to her own misconduct.

OVERVIEW

[2] The Appellant, K. M. (whom I will refer to as the claimant) established a claim for employment insurance benefits (EI) indicating she left her employment due to a shortage of work. However, a record of employment (ROE) indicated the claimant had been dismissed from her employment. The employer submitted the claimant was dismissed because she was sleeping while at work. The claimant argues that the employer was lying. The Respondent, the Canada Employment Insurance Commission (whom I will refer to as the Commission) following their conversations with the employer and claimant determined the claimant was not entitled to receive EI benefits because she lost her employment due to her own misconduct. The claimant appealed the decision to the *Social Security Tribunal* (Tribunal).

[3] Following a decision rendered by the General Division the claimant appealed the decision to the Appeal Division of the Tribunal. The Appeal Division allowed the appeal and returned the case to the General Division for reconsideration before a different member.

PRELIMINARY MATTERS

[4] On March 1, 2019, a Notice of Hearing was sent to the claimant and the employer whom was an added party, advising a teleconference hearing was scheduled on March 21, 2019.

[5] The employer failed to attend the scheduled hearing. The Canada Post-delivery receipt confirms the employer's Notice Hearing was successfully delivered on March 5, 2019. I was satisfied the party received their notice of hearing and proceeded with the authority allowed under subsection 12(1) of the *Social Security Tribunal Regulations*.

ISSUES

[6] Did the claimant lose her employment because of the alleged offence?

[7] Did the claimant commit the alleged offence?

[8] Has the Commission proven misconduct occurred?

ANALYSIS

[9] There will be misconduct where the conduct of a claimant was wilful, i.e. 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 that 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.¹

Issue 1: Did the claimant lose her employment because of the alleged offence?

[10] Yes, I find the claimant lost her employment because it was alleged that she was sleeping while at work. The employer alleges the claimant's actions breached the company's trust and damaged the employer/employee relationship.

Issue 2: Did the claimant commit the alleged offence?

[11] No, I find that the claimant did not commit the alleged offence. I am satisfied the claimant was not sleeping on the job as her testimony was consistent with her statements on the file and she provided a reasonable explanation regarding the employer's evidence of the picture presented by the employer. I find that the evidence provided by the employer is not credible because it was contradictory and inconclusive. I will explain my reasons in the following paragraphs.

¹*Canada (AG) v. Lemier*, 2010 FCA 314; *Hastings* 2007 FCA 372

[12] For me to conclude that there was misconduct there must be sufficiently detailed evidence to know whether the claimant acted in a manner that she is accused of, and then whether this behaviour is considered misconduct.²

Issue 3: Has the Commission proven misconduct occurred?

[13] No, I find that that the Commission has failed to meet the burden of proof, that on the balance of probabilities, the claimant was sleeping while at work. I find the evidence provided by the employer is inconclusive, conflicting and clearly lacks credibility.

[14] The onus of proof, on the balance of probabilities, lies on the Commission and the employer to establish that the loss of employment by a claimant was because of their own misconduct.³

[15] It is unfortunate that the employer did not attend the hearing and have the opportunity to provide explanations for the conflicting evidence. I give more weight to the claimant's oral testimony than that of the hearsay information provided by the employer because the claimant was consistent with the chain of events throughout the initial investigation and appeal process.

[16] I prefer the claimant's statements and that someone with direct knowledge of events will prevail to the statements from another who was not a participant. The claimant provided detailed oral evidence to support that her first-hand statements should have been given more weight.

[17] I am not convinced that the evidence presented by both sides is equally balanced. A finding of misconduct, with the grave consequences that it carries, can only be made based on clear evidence and not merely speculations. It is up to the Commission to convince me of the presence of such evidence irrespective of the opinion of the employer.⁴

[18] I find the Commission based their decision solely on the hearsay information provided by the employer. The Commission never made any contact with the co-worker who made the complaint or with the person who allegedly took the picture.

² *Joseph v. Canada (Attorney General)*, A-636-95

³ *Lepretre v. Canada (Attorney General)*, 2011 FCA 30

⁴ *Chrichlow v. Canada (Attorney General)*, A562-97).

[19] In addition, I find the documentary evidence provided by the employer lacks credibility because the information provided is inconclusive and lacks clarity to support their allegations.

[20] The employer stated to the Commission that the claimant was dismissed because she was sleeping on the job. She stated the claimant had received verbal and a written warning about this issue before the termination. She stated that other employees had reported that the claimant would often sleep on the job; they also have pictures of the claimant sleeping on the job. In addition, they also have a complaint from a resident of her sleeping on the job.

[21] The employer provided the Commission with an undated warning letter⁵ addressed to the claimant indicating two different staff members had reported her that she was sleeping on the job. In addition, she had already received a verbal warning on this issue. The letter also indicated that any further infractions could result in termination.

[22] The employer provided the Commission with a letter of termination⁶ dated May 1, 2016, stating they have a detailed text message from one staff and a picture of the claimant sleeping on shift again from a different staff member, along with a concerning email from X detailing a disclosure regarding her sleeping from a former resident of the home.

[23] The Commission contacted the director who confirmed the claimant was dismissed for sleeping on her shift on March 24, 2016. The director stated that there had been a report of the claimant sleeping on her shift a few days earlier and a final warning letter was issued. She stated that the warning letter was never given to the claimant because the second incident happened and they moved straight to dismissal.

[24] The claimant submitted that documents submitted by the employer are questionable. She indicated that she was dismissed and her last day of work was March 24, 2016, and she never received any letters at that time or before. She stated the warning letter, the director alleges was given to her, is dated May 1, 2016; as well as the other letter has no date on it at all. In addition, she questions the picture provided by the employer is her.

⁵ GD3-17

⁶ GD3-18

[25] The claimant testified that she never had any prior issues or disciplines. She argued that the employer's evidence is not credible. She stated that she never received the warning letter that is not dated, nor the termination letter dated May 1, 2016. She argues that she was terminated after her last shift on March 24, 2016, but the letter is dated May 1, 2016.

[26] I find that the employer's initial statements to be contradictory and inconsistent with that of the director. The employer stated that the claimant had received a verbal and written warning about sleeping on the job. However, at the reconsideration stage when the director is interviewed she then advised the Commission that the claimant was never provided with the undated letter because the final incident occurred shortly after.

[27] I am of the view, that the written warning letter is filled with conflicting information as it states the employer has more than one complaint and one photo of the claimant sleeping. However, in the employer's initial statements, they only speak and provide one email and photo to the Commission allegedly taken on the final night the claimant worked that led to her termination.

[28] In addition, the letter is not dated, the claimant does not sign it nor does it indicate what dates the claimant was allegedly sleeping, and the tone of the letter suggests there were multiple occurrences and complaints.

[29] I accept the claimant's testimony that she never received any warning letter or the letter of termination because the termination letter is clearly dated May 1, 2016, and as her record of employment indicates her last day was March 24, 2016, and is marked "M" for dismissal.

[30] The employer provided a copy of a message to support the alleged complaint made by J.⁷ who stated she was working with the claimant and reported the claimant was sleeping almost her whole shift.

[31] The claimant questioned an email the employer provided regarding a complaint made by J.. She stated she does not even know J. and she never worked with her that night. She stated the email is also questionable on who made the email because it is dated May 27, 2016, and the from

⁷ GD8-2

and to addresses on the email are that of the director. She stated that the complaint is unfounded and in particular, the director was at the home that night and knew she was not sleeping.

[32] I find the email message lacks credibility as it dated May 27, 2016, which is two months after the claimant was dismissed. I find it is questionable that it came from J. because it was sent from and to the director herself. In addition, the complaint does not provide any dates or times to support it would have been sent on the day after the claimant's last shift.

[33] The director stated to the Commission that she had gotten a report and photo of the claimant asleep on a couch under the blankets. She stated that there had been concerns raised about people sleeping so they had a staff meeting about two weeks prior, where it was highlighted and a memo was put out to all staff. She stated it was explained there was a zero-tolerance policy on this issue.

[34] The director submitted a digital copy of the photo⁸ taken, as well as memo on sleeping on the job.

[35] I am of the view that the Commission failed to investigate with the director, who was directly involved in the final incident, the claimant's version of events, in which the director herself had gone to the house and saw the claimant with the boy and the conversation that took place with the claimant regarding the sick baby. I am of the view, that knowing if the director had gone to the home and spoke to the claimant, what time and how long she stayed in the house would be relevant.

[36] I am of the view that the Commission failed to confirm with the director who provided her with a report and photo of the claimant asleep on a couch under the blankets. Especially when the employer's evidence supports two separate people made them.

[37] The employer provided a signed statement⁹ from A. R. who confirms she was the one who took the picture of the claimant and sent it to the director. However, I give little weight to

⁸ GD3-23

⁹ GD8-3

the document because it is not dated, nor does it confirm the date the picture was taken and where it was taken.

[38] The claimant testified that the person (A. R.) the employer stated took the picture of her and who signed a confirmation is not true because she was not working with that person that night nor had she worked with her since February.

[39] The claimant explained that the picture is very blurred and hard to see who it is. She stated that if there is a picture of her, it was taken a few weeks earlier and just before, she started her shift. She explained that there was a staff meeting in February from 7:30 PM to 9:30 PM and because her shift started at 11:00 PM, she did not go home but went downstairs to lie down before the start of her shift.

[40] In considering the evidence of the photo, I accept that the claimant provided a reasonable explanation that it was taken a few weeks earlier and that she had been to staff meeting and was lying down prior to her shift. I also find the photo lacks credibility because is not dated and if is not verified that it was taken on the last night the claimant worked.

[41] The employer provided a copy of an email message she sent to the Employment Standards on May 30, 2016, stating she was sending a second complaint and an email from a child that had made a complaint against the claimant. However, the employer did not provide this complaint on the file to support this allegation. There is only the employer's hearsay comment. Therefore, I give no weight to this document.¹⁰

[42] The claimant stated to the Commission that she was not supposed to work on the day of the incident but was called in. The director told her that she could have another day off and that being the Sunday and she could come in on Monday instead. She stated that she worked her shift on Friday, and then got a text on Sunday telling her to come in a bit early on Monday because they wanted to have a meeting. She stated that she then got a text on Monday telling her she was no longer needed and would be given one-week pay in lieu of notice.

¹⁰ GE8-5 to GD8-6

[43] The claimant testified that she was not sleeping on the job and never had. She stated that the director called her into work on her day off. She stated that she worked the night shift and arrived around 10:30 PM. She stated that around 2:30 AM, the director arrived at the house and saw her sitting with the boy that was on suicide watch. She stated she advised the director of the baby being sick and it should be taken to the doctor in the morning. She stated that the baby woke up about 4:00 AM and was awake until 6:00 AM. She stated that after that, she did her report and the other staff arrived and she finished at 7:00 AM.

[44] The claimant reiterated that she received a text from the director to come and see her on Monday, and then told her not to come as it was a holiday and the director was not going to come in and waste her time.

[45] The claimant testified that she is very aware of the policies and you are not allowed to sleep on the job. She stated that they are not a daycare; they provide a home environment for children who are in care of the provincial agency so you need to be awake.

[46] The Commission concluded that the claimant denied the employer's allegations on the premise; the employer was lying about her. However, she did not offer any reasonable explanation for this other than that the director disliked her possibly due to her race or perhaps her education status. She also offered varying responses when presented with the employer's evidence, particular the photo. She, at first stated the photo shows her merely resting but not asleep, and then later lagged that it was not her, and denied the incident altogether.

[47] The Commission concluded that, on the other hand, the employer offered consistent testimony as to the reason for the claimant's termination upon each contact. They have also offered a plausible explanation as to the reason the claimant did not receive her initial warning letter. In addition, they provided convincing documentary evidence to support their allegations.

[48] The Commission submits that any determination in this case must be made solely on the weight of the evidence on the file and the balance of probabilities. In the absence of any plausible explanation from the claimant as to the reason for her allegations, the Commission must rely on the documentary evidence provided by the employer and consider it the more credible in this case. The Commission therefore considers that the employer has proven that the

claimant did, in fact, commit the acts that led to her termination. The Commission concludes that the claimant's actions constituted misconduct within the meaning of the Act.

[49] The Commission submits that the claimant has acknowledged that she was aware of the employer's policy with regard to sleeping while on shift, and she had been informed of the potential consequence of any failure in this regard.¹¹ The Commission must therefore consider that the claimant could reasonably have concluded that she could be terminated as a result of her actions in the final incidents. If, as she alleges, the employer disliked her and was looking for a reason to terminate her, this would have given her even more reason to ensure that she complied explicitly with the employer's expectations.

[50] The claimant stated to the Commission that she knew sleeping on the job was not permitted but she was not sleeping.

[51] I agree that the claimant was well aware of the policies and I am satisfied that she adhered to them. The claimant does dispute the fact that there was a staff memo dated September 15, 2015, and she knew sleeping on a shift was not allowed. I also accept the claimant's testimony that she had never received any warnings or any disciplines regarding sleeping on the job. I note that the director has substantiated that the claimant never received the undated warning letter.

[52] I find the claimant did not sleep on the job and therefore could not have known she would lose her employment. I give more weight to the claimant's testimony and her account of the final incident to be more credible.

[53] The claimant stated to the Commission that the employer was lying and that she never slept on the job. She stated she K. P. (director) did not like her and she was dismissed based on her lies. The claimant stated that she spoke to M. C. (employer) but she was not able to change the decision.

[54] I acknowledge the claimant's frustrations that the employer made the choice to terminate her employment but an employer has the right to release employees. However, I must determine

¹¹ GD3-25

whether the alleged act constituted misconduct within the meaning of the Act.¹² In this case, the I find the claimant was not sleeping at work therefore she could not have known, or ought to have known she could be in jeopardy of losing her job, as it related to the final incident.

[55] I note that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.¹³

CONCLUSION

[56] The Tribunal concludes that, on a balance of probabilities, the Commission has not met its burden of proving the claimant lost her employment as a result of her own misconduct.¹⁴ Therefore, an indefinite disqualification should not be imposed.¹⁵

[57] The appeal is allowed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	March 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. M., Appellant

¹²Macdonald A-152-96

¹³Caul 2006 FCA 251

¹⁴Meunier v. Canada (A.G.) A-130-96); and Choinier v. Canada (A.G.) A-471-95

¹⁵ Sections 29 and 30 of the *Employment Insurance Act* (EI Act)