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

[TRANSLATION]

Citation: A. C. v Canada Employment Insurance Commission, 2019 SST 569

Tribunal File Number: GE-19-1159

BETWEEN:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: April 29, 2019

DATE OF DECISION: May 3, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant has worked as a retirement home orderly since October 2004. During the past 15 years, she worked for the same employer. In September 2018, the employer suspended the Appellant for three months for mistreating a resident at the retirement home where she worked.

[3] The Appellant applied for Employment Insurance benefits for her suspension period. The Employment Insurance Commission (Commission) disqualified her from receiving benefits because it found that the Appellant was suspended because of her own misconduct.

ISSUE

[4] The Tribunal must determine whether the Appellant was suspended from her employment because of her own misconduct within the meaning of the Act.

ANALYSIS

[5] Generally speaking, section 31 of the *Employment Insurance Act* (Act) states that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits. The Commission has the burden of proving on a balance of probabilities that there is evidence of the alleged misconduct (*Crichlow*, A-562-97).

Issue: Was the Appellant suspended because of her own misconduct?

[6] The word "misconduct" is not defined as such in the Act, but, through case law, the courts have established guiding principles for decision-makers. It is largely a question of circumstances (*Bedell*, A-1716-83). In cases involving misconduct, the Tribunal must analyze the facts and reach a finding that the alleged breach is of such scope that its author could normally foresee that it would be likely to result in disciplinary action up to and including dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98).

[7] I find that, in this case, the Appellant was suspended because of her own misconduct for the following reasons.

[8] In this case, on August 21, 2018, the resident's family members filed a complaint with the employer concerning events that took place on August 10, 2018, in the patient's room. The employer conducted its investigation and found that the Appellant had severely and intentionally mistreated X, a resident.

[9] Before I could determine whether certain acts or behaviours amount to misconduct, I had to first consider whether the Appellant did commit the alleged acts. The Tribunal is not bound in any way by the employer's opinion or interpretation of events. I must reach my own findings based on the *Employment Insurance Act*. For the Tribunal to find that there was misconduct, it must have before it relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible (*Meunier,* A-130-96).

[10] The employer says that it has video evidence from a hidden camera the resident's family set up. The video evidence was not submitted as evidence. However, the employer provided the Appellant with a written transcript describing the events of August 10, 2018, and submitted it as evidence in the appeal file.

[11] At the hearing, the Appellant described the events of August 10, 2018, as she remembered them. She even did a short re-enactment of the events for the Tribunal in an attempt to demonstrate her conduct. When she was asked about the written transcript, the Appellant acknowledged that she agreed with what it reported. Based on this evidence, I find that the Appellant's behaviour was as it was described in the written transcript, having weighed some subtle distinctions the Appellant made. In particular, I accept the Appellant's argument that it can be difficult to gauge the level of force from a videotape, such as the level of force used when she held the patient's hands. Consequently, the written transcript cannot describe the conduct and the intensity of certain actions perfectly. But overall, the Appellant has admitted that her conduct was as it was described in the written transcript. As a result, I note from the evidence that the Appellant yelled at and/or spoke loudly to the resident, that she grabbed her by the arm to lift her

against her will, that she squeezed the resident's fingers so she would let go of hers, and that she held her hands to protect herself and to let her colleague wash the resident. I also note that the Appellant and her colleague continued to perform their care tasks even though the resident was agitated and aggressive and was screaming to be let go.

[12] Does such conduct constitute misconduct? I find that it does. First, I note that the Appellant has admitted that her conduct was not the best. She admitted that she had since changed her approach and improved her behaviour by being more communicative with residents. It is reasonable to believe that it is accepted that the Appellant's acts were reprehensible because she dealt with the situation forcefully rather than gently.

[13] However, reprehensible conduct does not automatically lead to a finding of misconduct (*Locke*, 2003 FCA 262). In *Tucker*, A-381-35, the Court established that "to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance." Reprehensible conduct must constitute a breach of such scope that its author could normally expect that it would be likely to result in disciplinary action (*Meunier*, A-130-96).

[14] In *Hastings*, 2007 FCA 372, the Court reaffirmed the *Tucker* principles on the concept of misconduct and the requirement that there be a mental element. The Court established that 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 his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility." Even though this is not a case of dismissal, the same reasoning applies to a suspension.

[15] I am of the view that, considering the nature of the Appellant's work, she should have known that her conduct toward X the evening of August 10, 2018, was not in line with her employer's expectations and, by that very fact, could jeopardize her employment.

[16] I find that it is understood that the role of orderlies involves caring for vulnerable people and that, because of this, an orderly is expected to provide the care needed in a compassionate way, without yelling or using force. Having worked in that field and for the same employer for the past 15 years, the Appellant should have known that her kind of reprehensible conduct is not tolerated.

[17] In addition to the role being understood, I note from the evidence that the employer has a clear policy about the Appellant's type of conduct. The Montréal east island integrated university health and social services centre, CIUSSS de l'Est-de-l'Île-de-Montréal, has a policy to prevent mistreatment of vulnerable seniors and sets out principles to govern anyone interacting with an elderly person or any vulnerable resident. This policy applies to orderlies, among others. The Appellant recognizes that X was a vulnerable elderly resident. The policy clearly indicates zero tolerance for any kind of mistreatment. It also states that mistreatment may be intentional or unintentional. I find that, in this case, the mistreatment was not intentional in that the Appellant did not necessarily intend to harm the resident. She simply wanted to clean the resident, which was necessary because of the resident's bowel movement.

[18] However, I find that there was mistreatment according to the employer's policy because physical actions were involved in restraining the resident in a rough manner. While it is difficult to gauge the force of movements from a videotape as I mentioned above, the employer was able to see that the Appellant's actions were rough. This is reflected in the written transcript, with which the Appellant has no objection. The employer's policy states that care provided in a rough manner amounts to violence and, by the same token, mistreatment. The same applies to physical mistreatment, including bullying. I find that taking the resident by the arm to lift her, even though she refused and screamed [translation] "Ow, ow," demonstrates bullying, which the policy prohibits. The policy describes violence as making someone do something they do not want to do by using force and/or intimidation. I note from the evidence that the resident did not want to get up and cooperate with washing, which led the Appellant to use force to make the resident do something she did not want to do. That is mistreatment within the meaning of the employer's policy.

[19] Finally, I find that the Appellant breached the policy against psychological mistreatment by yelling at and/or speaking loudly to the resident. In her defence, the Appellant explained that it was a method of getting the resident's attention so that her colleague could undress her and give her the care she needed. That is possible. However, the Appellant should have known that that method was no longer in use because it goes against the employer's policy. I also note from the written transcript that the Appellant sometimes spoke to the resident in a childish, humiliating, and degrading manner. For example, twice she told the resident that she needed help because, if she were capable, she would be at home. I find those comments childish and degrading.

[20] I also note from the evidence the relational approach to care tool that accompanies the provincial policy to prevent mistreatment of vulnerable people and which reflects the expectations for good treatment in residential and long-term care centres (CHSLDs). The document shows how workers are expected to behave toward vulnerable people, including elderly people in need of care, such as X in this case. Kindness, speaking softly and acting in a gentle manner, empathy, active listening, patience, and openness are some expected behaviours. Based on the evidence, including the Appellant's testimony, I am, unfortunately, able only to find that the Appellant did not apply this type of approach.

[21] When answering the question [translation] "What do you have to do when a resident is too agitated or aggressive?" at the hearing, the Appellant said that, in those instances, orderlies must ask for help from a nurse who can administer medication to calm residents if necessary. The Appellant said that she had spoken to the nurse, when she was asked [translation] "Why did you not do that in this case?" The nurse had supposedly told her that X had already had her medication, that they know her well, and to leave her and come back later if she was too agitated. It appears that the Appellant and her colleague did not follow these instructions and insisted on cleaning the resident despite her cries and refusal to cooperate. I find that there was an element of carelessness to the point of being wilful.

[22] I understand the frustration that can sometimes overwhelm orderly staff when difficult residents may be aggressive or violent. In this case, I accept that the resident was having a bad day and that she was not cooperating at all with staff. However, the instructions were clear, and

orderlies have to meet high expectations and act with kindness, understanding, and patience. I find that the Appellant knew these requirements of her job and the expectations regarding mistreatment. Although I am of the view that the Appellant did not inflict the mistreatment to intentionally harm, I find that engaging in behaviour that goes against the employer's implicit and explicit policies demonstrates carelessness characteristic of misconduct under the Act.

[23] The Appellant knowingly and deliberately acted contrary to the behaviour expected of her. I find that, even if she did not intentionally want to mistreat the Appellant, she still wilfully disregarded the repercussions her actions would have on her job performance and continued employment. The Appellant argues that she offered explanations to justify the alleged acts. However, I am not satisfied that the explanations justify behaviour that goes against the employer's policy. The zero-tolerance policy leads me to believe that yelling or using force is never justified and that the Appellant knew this very well.

[24] I find that the conduct that led to the suspension was conscious and wilful because the Appellant knew or should have known that her conduct was likely to lead to disciplinary action but she still engaged in it. That type of behaviour constitutes misconduct under the Act (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36). Therefore, I find that the Appellant herself brought about the risk of finding herself in an unemployment situation, which goes against the spirit of the Employment Insurance program.

[25] I also note that the issue is not whether the penalty was justified (*Fakhari*, A-732-95). It may be that the employer has an entirely valid reason to suspend an individual's employment for three months just as it may be that the suspension is excessive. Either way, it does not necessarily mean that there is misconduct in terms of Employment Insurance. Therefore, I will not decide on the rationality of the penalty. If the Appellant finds that she was reprimanded too severely, she can pursue the remedies she has through other tribunals that have jurisdiction on that matter. This is in fact what she did by filing a grievance against the employer, for which the process is still pending.

[26] The Appellant argued that, if the evidence is equally balanced, the benefit of the doubt should be given to the Appellant under section 49.1 of the Act. The Tribunal would like to point

out that section 49(2) of the Act requires that **the Commission** give the benefit of the doubt to the claimant when the evidence on each side is equally balanced. That section has to do with rules of evidence the Commission follows but that do not apply at all to the Tribunal. It would be an error for the Tribunal to appropriate that section.

[27] Based on all the evidence, I find that the Appellant was suspended from her employment because of her own misconduct within the meaning of the Act. Therefore, a disqualification applies under section 31 of the *Employment Insurance Act*.

CONCLUSION

[28] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	April 29, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	A. C., Appellant Vanessa Collin-Lavoie, Representative for the Appellant X, Observer X, Observer