



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *X v Canada Employment Insurance Commission and A. S.*, 2019 SST 1019

Tribunal File Number: GE-19-2442

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

A. S.

Claimant

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: August 12, 2019

DATE OF DECISION: August 15, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant was dismissed from her employment and subsequently applied for Employment Insurance (EI) benefits. After reviewing her initial claim for benefits the Canada Employment Insurance Commission (Commission) disqualified her from benefits as they determined that she had lost her employment as a result of her own misconduct.

[3] The Claimant requested a reconsideration of the Commission's decision to disqualify her. After reviewing their decision, the Commission overturned their initial decision and removed the disqualification, finding the reasons why the Claimant lost her employment did not amount to misconduct under the *Employment Insurance Act* (Act).

[4] The Appellant (the Employer) appeals the decision of the Commission to remove the Claimant's disqualification to the Social Security Tribunal.

PRELIMINARY MATTERS

[5] The Employer stated that provincial legislation bound the employment agreement between himself and the Claimant and those laws should apply. The Employer argued that he had the right to hire and fire any employee as he saw fit and he was concerned about reputation damage from the comments the Claimant had made in the course of the proceedings with the Commission and was not concerned with whether the Claimant received EI benefits or not.

[6] I clarified to the Employer that my role was solely to determine why the Claimant lost her employment and whether that conduct constituted misconduct under the Act. The decision of the Employer on how to hire and fire employees, or whether there is any damage to the Employer's reputation, is not what I am considering; my role is not to determine whether the dismissal of the Claimant was justified, it is to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act, (*Canada (Attorney General) v Marion*, 2002 FCA 185).

ISSUES

1. Why did the Claimant lose her employment?
2. Did the Claimant commit the conduct that resulted in her loss of employment and, if so, does that conduct constitute misconduct?

ANALYSIS

[7] The Claimant is disqualified from receiving any benefits if she lost any employment because of her misconduct according to subsection 30(1) of the *Employment Insurance Act* (Act). The onus of proof, on the balance of probabilities, lies on the Employer to establish that the loss of employment by the Claimant was "by reason of their own misconduct" (*Minister of Employment and Immigration v. Bartone*, A-369-88).

1. Why did the Claimant lose her employment?

[8] I find the Claimant lost her employment due to questioning her Employer at the final meeting regarding her future with the company, asking him for certainty regarding her employment.

[9] The Commission submits that the Claimant was dismissed when she asked about her future with the Employer, as the Employer was looking to hire another employee.

[10] I note the Employer and the Employer's Witness raised issues regarding things they found about the Claimant's behaviour at work after she had been terminated and also spoke about the performance of her replacement. I find these things are not relevant to the issue at hand as they all relate to a time when the Claimant had already been dismissed, thus they cannot form the basis for the Claimant's dismissal.

[11] The Employer testified the Claimant was hired to be an administrative assistant and had the typical job responsibilities for that position, which were laid out in detail in her employment contract, but quickly became resistant to performing certain elements of the job.

[12] The Employer testified the Claimant did not want to perform tasks such as filing and emptying the garbage as she stated she did not go to college to perform such tasks. He tried to

speaking with her about the filing issues and other performance issues approximately five times but never made any real headway in getting her to perform the tasks as she preferred to work on Human Resources (HR) projects.

[13] The Employer testified that in the final meeting where the Claimant was dismissed he did not go into that meeting with the intent to dismiss her; the goal was to speak to her about improving her performance one more time. The Employer testified he spoke to the Claimant in that meeting about hiring another employee to supplement her role, as work was piling up and he needed the help, although he had not determined in what capacity the new hire would work.

[14] The Employer testified the scenario of hiring another employee was not agreeable to the Claimant and she wanted certainty on what was going on so he responded that if she wanted certainty that he would give it to her by giving her three weeks notice as her employment was at an end. The Employer testified he would have not likely have dismissed her had she not raised the certainty of her employment, but he cannot say how the conversation would have progressed if she had not raised the certainty of employment issue.

[15] The Employer testified the reason the Claimant's employment was ended was due to performance issues and he worked with her extensively to try and get work completed. The Employer testified he had the right to terminate and hire whom he wished and the Claimant was trying to interfere with his ability to do that.

[16] The Claimant testified she was never given warnings about performance issues and any delay in the work she did was due to the Employer. The Claimant testified she was spoken to by her employer regarding tasks like filing, but she did not consider those warnings. The Claimant testified she did do the tasks she was required to do, such as filing, and the delays in those tasks were due to her employer not getting back to her on things she spoke to him about such as whether the system she had used for filing was acceptable.

[17] The Claimant agreed she enjoyed doing HR work and was asked to do such tasks by the Employer. The Employer agreed he assigned HR work to the Claimant as it was something that needed to be done in the office and since the Claimant did not want to work on other projects he wanted to have something to keep her busy during the day.

[18] The Claimant argued she had been given a raise and that is not something that would be given to a poorly performing employee. The Employer agreed he offered a raise to the Claimant during her employment as he wanted to keep her around and not have her quit so he could find someone else before she left.

[19] The Claimant testified when she was called into the meeting in which she was terminated she was told by the Employer he would be hiring someone else and if that person performed better than her she would be let go. The Claimant agreed she did ask the Employer to provide certainty and guarantee her employment.

[20] The Employer's Witness testified the Claimant was not performing her duties as per her employment agreement, but the Employer said to give her a chance to develop. The Witness testified the Claimant's favourite activities were HR related and she would pick and choose what she wanted to do for tasks.

[21] The Witness testified the Employer spoke to the Claimant many times about helping with filing but the Claimant complained she did not go to college to do tasks such as taking out the garbage and filing.

[22] The Witness testified that at the meeting where the Claimant was terminated the intention was to explain to the Claimant they were considering hiring extra help as she was not doing the jobs that were in her job description, nor was she capable of doing as such.

[23] The Employer told the Commission he informed the Claimant he was looking to hire another employee and the Claimant asked about her future. The Employer stated he told the Claimant that if she was going to make him decide right then she could have her three week notice.

[24] The Employer told the Commission he was in a performance review with the Claimant and told her he would be seeking another employee. The Employer stated the Claimant became upset and asked if she should start looking for another job. The Employer stated he did not say the Claimant was no longer going to be employed but she would not let the issue go and forced his hand to make a decision if she would be dismissed.

[25] The Employer stated that due to her behaviour he chose to tell the Claimant she was getting her three week notice and was dismissed.

[26] The Claimant told the Commission she was called into a meeting with her Employer regarding her performance and was told the Employer was looking for another worker. The Claimant stated she questioned the Employer in regard to her status with the company and was told if someone works out better she would be replaced. The Claimant stated her employer offered her three weeks pay in lieu of notice and she was terminated.

[27] I find the Claimant lost her employment for questioning her Employer at the final meeting regarding her future with the company, asking him for certainty regarding her employment.

[28] I note that no party disputes the Claimant did question her employer at the final meeting regarding her future at the company and requesting certainty regarding her employment.

[29] I rely on the testimony of the Employer that he did not have a preconceived notion to fire the Claimant at the final meeting and it he was not likely he would have dismissed her if she had not raised the issue of employment certainty.

[30] If the Claimant was dismissed for performance issues then her raising the issue of certainty would have had no impact on the likelihood of her being fired or not at the meeting since it would have already been decided she was not performing up to expectations and would be dismissed. Also, the Employer testified he did not plan to fire her when he called the meeting, further supporting he was not firing her for performance issues and decided to fire her when she raised the certainty issue.

[31] I further rely on the testimony of the Employer, that when the Claimant asked for clarity he told her that if she wanted clarity then he would give it to her and told her this was her three week notice of end of employment, to support the Claimant's firing was triggered by her pressing for clarity of her employment.

[32] I also rely on the Employer's statement that he did give her a raise. I find the Employer's explanation that he gave a raise to the Claimant, an employee whom he testified was not

performing her duties up to standard and was not performing the duties of her employment contract, in order to retain her to find a replacement, not credible. I find that on a balance of probabilities, the giving of a raise to an employee expresses satisfaction with their work, rather than supporting they were doing a poor job.

2. Did the Claimant commit the conduct that resulted in her loss of employment and, if so, does that conduct constitute misconduct?

[33] Yes, the Claimant did commit the conduct that resulted in her loss of employment but that conduct does not rise to the level of misconduct as she did not know, nor should she ought to have known, that her conduct was such it would result in dismissal.

[34] The Act does not define misconduct. The Federal Court of Appeal (FCA) has explained the legal notion of misconduct for the purposes of the Act as acts that are wilful or deliberate, where the Claimant knew or ought to have known that her conduct was such that it would result in dismissal (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Tucker v. Canada (Attorney General)*, A-381-85)

[35] The FCA has further explained that wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Secours v. Canada (Attorney General)*, A-1342-92).

[36] I find the Claimant did commit the conduct that led to her dismissal and note there is no dispute from any party that the Claimant committed the conduct of questioning her employer regarding her future with the company and requesting certainty. I further find the Claimant's conduct was intentional, as she could have chosen not to ask about her future with the company and request certainty, but decided to do so.

[37] I further find that while the Claimant committed the conduct, and it was intentional, her conduct does not rise to the level of misconduct as the Claimant could not have known, nor should she ought to have known, that her conduct would lead to dismissal.

[38] I do not see how the Claimant could have known, or ought to have known, that questioning her employer regarding her future with the company and asking for certainty of employment would lead to dismissal. I find there is insufficient evidence to support as such. I can find no policy, or letter, or other documentation that would support the Claimant ought to have known as such, nor is there anything to support the Claimant would have been told as such verbally.

[39] As I have found the Claimant did not know, nor should she ought to have known, that her conduct could have resulted in dismissal I find her conduct does not meet the test for misconduct set forth in *Lemire v. Canada (Attorney General)*, 2010 FCA 314.

CONCLUSION

[40] The appeal is dismissed. I find the Claimant was dismissed from her employment for questioning her Employer at the final meeting regarding her future with the company, asking him for certainty regarding her employment. I further find that while the Claimant committed the conduct in question, and it was deliberate, it does not rise to the level of misconduct. I find the Claimant did not know, nor should she out to have known, that her conduct would result in dismissal.

[41] I find the Employer has failed to meet the burden of proving the Claimant lost her employment by reason of her own misconduct; the Commission's decision is upheld and the Claimant is not disqualified from benefits.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	August 12, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	K. S., Employer A. S., Claimant