



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *L. L. v Canada Employment Insurance Commission*, 2019 SST 1057

Tribunal File Number: GE-19-1986

BETWEEN:

**L. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Lucie Leduc

HEARD ON: July 23, 2019

DATE OF DECISION: August 30, 2019

## **DECISION**

[1] The appeal is dismissed.

## **OVERVIEW**

[2] The Appellant has worked for X since 2007. She worked in a series of in-store positions for X, first as a direct employee and then through an agency. The last position the Appellant held was that of member services agent (in a closed office and not at the client services counter). On April 20, 2018, investigators met with and questioned the Appellant as part of an investigation by X regarding some doubts about the Appellant. The Appellant left the meeting very upset after being questioned extensively for four hours. She never returned to work after that meeting and took a sick leave.

[3] The agency that was employing the Appellant dismissed her on October 2, 2018, following the results of the investigation by X, which found that she had breached the employer's code of conduct and committed a breach of trust.

[4] The Employment Insurance Commission (Commission) determined that the Appellant had lost her employment because of her own misconduct. Therefore, it imposed a disqualification from Employment Insurance benefits on the Appellant starting September 30, 2018.

## **ISSUES**

[5] The Tribunal must decide the following issues:

- a) Did the Appellant commit the alleged acts?
- b) Do the acts that led to the Appellant's dismissal constitute misconduct?

## ANALYSIS

[6] I must determine whether the Appellant should be disqualified from Employment Insurance benefits for an indefinite duration, under sections 29 and 30 of the *Employment Insurance Act* (Act), on the basis that she lost her employment because of her own misconduct.

### **Issue 1: Did the Appellant commit the alleged acts?**

[7] In order to find misconduct, I must have relevant facts and sufficiently detailed evidence, first, to know how the employee behaved and, second, to decide whether such behaviour was reprehensible.<sup>1</sup> In the same way, I must establish whether the Appellant committed the alleged acts. The burden of proof is on the Commission, which must show, on a balance of probabilities, that the evidence supports the alleged misconduct.<sup>2</sup>

[8] Based on the evidence and for the following reasons, I find that the Appellant committed, in part, the acts of which the employer accuses her.

[9] The file contains various accusations. I first consulted the employer's dismissal letter, which indicates that the Appellant committed [translation] "a series of actions that undermine compliance with the safety standards and policies established by our client X, [...] serious breaches [...] and failed to conduct [her] continuous training in a timely manner." The letter does not detail the nature of the alleged breaches. I therefore had to rely on the residual evidence in the file, consisting of summaries of discussions between the Commission and the employer, the Commission and X, and the Commission and the Appellant, as well as the Appellant's testimony and written statements.

[10] Based on the evidence, I find that the following accusations led to the dismissal:

- a) Signing a power of attorney in her name, authorizing her to make transactions for a client of X;

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<sup>1</sup> *Meunier*, A-130-96; *Joseph*, A-636-85.

<sup>2</sup> *Crichlow*, A-562-97.

b) Breaching the employer's code of ethics and conduct; and

c) Failing to complete required online training.

[11] Other accusations were raised, such as making transactions in the client's account and asking for an increase of the client's line of credit. I am of the opinion that these accusations are directly related to the power of attorney and therefore do not constitute separate accusations.

[12] The Appellant admitted that she did not complete all the online training required by X due to time constraints. She also admitted to breaching the employer's code of ethics and conduct by making herself attorney for one of her clients who was, in fact, a friend. She claims that she did not realize she could not do that and that she did not discuss it with anyone at X. She also admitted that she realized she could not make a power of attorney in her name when she did her online training. The Appellant does not deny committing the alleged acts, but she submits that the Commission submitted erroneous facts and that she acted in good faith.

[13] Considering the evidence on file as well as the Appellant's admissions, I find that it has been established that the Appellant failed to complete the required online training and that she breached the employer's code of ethics by granting herself the power of attorney for a client friend without discussing it with the institution, X. I also find that the Appellant was dismissed because of those acts and omissions.

**Issue 2: Do the acts that led to the Appellant's dismissal constitute misconduct?**

[14] Generally, section 30 of the Act provides that a claimant who loses their employment because of their misconduct is not entitled to benefits. Each case is unique and must be analyzed based on its particular facts. Regarding misconduct, the burden of proof is on the Commission, which must prove, on a balance of probabilities, that the evidence supports the alleged misconduct.<sup>3</sup>

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<sup>3</sup> *Crichlow, A-562-97.*

[15] The word “misconduct” is not defined as such in the Act, but tribunals have established, in line with case law, guiding principles for decision-makers. It is largely a question of circumstances.<sup>4</sup>

[16] I am of the opinion that failing to complete mandatory online training despite reminders to do so constitutes a reprehensible omission. Indeed, an employer should be able to expect an employee to respect the requirements and instructions to follow. An employer should also be able to expect an employee to keep their skills up to date. This implies completing required training, which the Appellant failed to do.

[17] Regarding the power of attorney, it was established that the power of attorney the Appellant made was not permitted and was contrary to the employer’s code of ethics and conduct. I am of the opinion that fundamentally, breaching a code of ethics constitutes reprehensible conduct. The rules of conduct and ethics related to an employment must be strictly followed, and an employer has the right to expect that its employees respect those rules. Not respecting them is reprehensible.

[18] However, reprehensible conduct does not automatically lead to a finding of misconduct.<sup>5</sup> To reach a finding of misconduct, the Tribunal must analyze the facts and reach the conclusion that the alleged breach is of such scope that its author could normally expect that it would be likely to result in dismissal.<sup>6</sup>

[19] I therefore asked myself whether the Appellant knew or should have known that, by failing to complete her required online training and by granting herself the power of attorney for the account of a friend, she knew she could lose her job. My conclusion is yes.

[20] During her testimony, the Appellant explained in detail the circumstances surrounding the power of attorney she made for a client. She explained the nature of her relationship with X, an elderly man who was a friend outside of work. She mentioned the relationship of trust they had developed, in part because the Appellant was able to communicate in XX’s native language

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<sup>4</sup> *Bedell*, A-1716-83.

<sup>5</sup> *Locke*, 2003 FCA 262.

<sup>6</sup> *Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96.

and because he could not express himself very well in either English or French. Over time, they had developed a father-daughter relationship. Because X lived outside the country for most of the year, he asked the Appellant to help him with the management of his bank accounts. He also wanted her to do transactions for him. The Appellant gave the example of a debt X owed to another person and with which he asked for her help. When his pension payment was deposited into X's bank account, he wanted the Appellant to withdraw an amount and give it to another person for X in repayment of his debt.

[21] The Appellant said she was ready to help X, but indicated that she had wanted to do it properly. It was in this context that she suggested making a power of attorney in her name, signed by X and allowing her to make transactions for him. She indicated that it was a type of transaction that she made on a daily basis as part of her duties as member services agent. The Appellant indicates that she made the power of attorney in her name from her office without supervision or authorization by another employee. She had, in fact, acted the same way that she would have for someone else in relation to this type of power of attorney. In my opinion, that is what shows that she knew or should have known that her act was such as to impair the performance of her duties.

[22] Based on the Appellant's testimony, I find that that she was used to doing all her personal transactions under the supervision or in front of another employee or supervisor in order to ensure maximum transparency. She clearly testified that she never made any transaction in her name, but that she asks someone else from the institution. Why then not use the same precaution to add a power of attorney in her name in X's file? I find that the Appellant's conduct is not consistent with her normal conduct that she describes. This suggests to me that she did it in a way that was careless or negligent.

[23] The Appellant states that she was convinced there was nothing wrong with her way of doing things and that she had not felt the need to speak to anyone else within the financial institution because, in any case, her name appeared clearly on X's account. Because she is so easily identifiable on X's account, the Appellant submits that it would have been impossible to hide her power of attorney. Furthermore, the Appellant submits that she cared about her job and that she certainly would not have compromised it after 10 years to help a friend.

[24] I accept the Appellant's argument, in part. I believe her testimony is sincere when she states that she does not believe she did anything wrong and that if she had had wrongful intent, she would not have left her name visible on X's account. I do not believe that the Appellant had wrongful intent. I share her opinion that she lacked judgement by not being as diligent with the transaction in question as with the ones she normally does. She should have done the same as she does for any transaction that involves her personally and informed X or at least asked a colleague. The Appellant cannot equate the power of attorney of X to any other that she would make as part of her work. The fact that the power of attorney was in her name is a significant factor to consider and distinguishes this act from all other powers of attorney that she could make in her position. The Appellant has not convinced me that she was unaware of that significant distinction and that the uniqueness of the transaction required that she take additional precautions.

[25] The Tribunal relies on the teachings of Judge Létourneau of the Federal Court of Appeal who noted that analyzing the alleged conduct in isolation is of little relevance.<sup>7</sup> Rather, it is a matter of assessing the acts in the context of the Appellant's employment and determining whether she could have known that making a power of attorney in her name breached an express or implied duty resulting from her contract of employment. Indeed, the context being that the employment within a financial institution means that the nature of the Appellant's position includes higher ethical standards, that must be taken into consideration. Reading the code of ethics and conduct of X makes this clear. Indeed, the Appellant signed that document. It requires integrity, rigour, and transparency in employees' work. As a member services agent, she must show integrity, professionalism, and transparency in dealing with assets of members of X.

[26] Furthermore, I find that the nature of the employment, the work environment, and the person involved are all part of the relevant context in this case. If questions about money are delicate questions in everyone's life, I am of the opinion that they are even more so when a person in a position of authority within a financial institution is involved. I am also of the opinion that the fact that X is an elderly person representing a potentially vulnerable population group required even greater transparency. In that context, I find that as a member services agent

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<sup>7</sup> *Brissette*, A-1342-92.

with access to the management of a person's assets, the Appellant knew or should have known that granting herself the power of attorney for X without letting the institution know was potentially problematic and could compromise the relationship of trust she must maintain with the institution.

[27] The Appellant states that she was unaware that she could not hold power of attorney herself until she had completed her online training, including one that deals specifically with power of attorney. She states that she acted immediately and cancelled the power of attorney immediately in accordance with the requirements. She did not talk about it to anyone until she was questioned by X's investigators.

[28] I do not accept the Appellant's argument that the lack of training meant that her breach does not constitute misconduct. On the one hand, I have already determined that she should have known the seriousness of her breach even before reading specifically about that subject in her training. On the other hand, the fact that she did not complete her training only reinforces the Appellant's situation of misconduct because that in itself constitutes misconduct. Failing to complete online training despite her employer's numerous reminders demonstrates careless and negligent behaviour. Any reasonable person working in a financial institution knows or should know the rigour required of them, and that includes keeping their knowledge up to date. In my opinion, this accusation alone constitutes misconduct. The Appellant was aware that she had to do her online training because it was mandatory, which she did not deny. The Appellant attempted to minimize her failure to do her mandatory training by explaining that she did not have the time. I find that she deliberately chose not to do it, which constitutes a refusal to comply with her employer's direction or insubordination. Any employee who refuses to comply with their employer's direction should expect it would put their job at risk.

[29] I would even go so far as to say that the first misconduct in a way created the second. Based on the evidence, I find that the failure to complete her training, in part, caused the Appellant to make a mistake by granting herself power of attorney for a client's account. There is therefore double misconduct. It is the whole of the Appellant's misconduct that was careless to the point of wilful behaviour. This constitutes misconduct under the Act and resulted in breaking the relationship of trust between the employer and the Appellant.



[30] I note that X's consent is irrelevant in the present analysis. I accept that X consented to all transactions the Appellant made in his name. There is no evidence on file showing otherwise. However, the Appellant still had to act with transparency and diligence, which she did not do. I will not comment on the allegations of fraudulent transactions and the unauthorized acts the Appellant is vaguely accused of in the file because there is no evidence to support those allegations. Furthermore, I find that the transactions in question are incidental to the power of attorney that was on X's file.

[31] The Federal Court of Appeal has ruled numerous times on the notion of misconduct and the need for there to be a mental element.<sup>8</sup> Therefore, there will be misconduct where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.

[32] On this fundamental aspect of the notion of misconduct, I find that in her circumstances, having nearly 10 years of experience with the financial institution, the Appellant could normally expect that failing to complete her online training and granting herself power of attorney without transparency would be likely to result in her dismissal.

[33] Based on all of the evidence before me and the arguments raised by the parties, I am satisfied that the Commission fulfilled its burden of proof on the balance of probabilities and find that the Appellant lost her employment because of her own misconduct within the meaning of the Act. Therefore, a disqualification applies under sections 29 and 30 of the *Employment Insurance Act*.

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<sup>8</sup> *Tucker*, A-381-85 and its principles reaffirmed in *Canada (Attorney General) v Hastings*, 2007 FCA 372.

**CONCLUSION**

[34] The appeal is dismissed.

Lucie Leduc  
Member, General Division – Employment Insurance Section

HEARD ON:	July 23, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	L. L., Appellant Nadia Samy, Representative for the Appellant