



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *E. N. v Canada Employment Insurance Commission*, 2019 SST 1063

Tribunal File Number: GE-19-2877

BETWEEN:

E. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: September 17, 2019

DATE OF DECISION: September 18, 2019

DECISION

[1] The Commission has not proven that the Claimant lost her job because of misconduct. This means that the Claimant is not disqualified from being paid benefits from February 15, 2015.¹

OVERVIEW

[2] The Claimant was in receipt of regular employment insurance benefits and took a job as a security guard. The Claimant lost that job. The Claimant's employer said that she was dismissed because she abandoned her employment. The employer says the Claimant failed to call in for shifts as required and did not respond to a letter dated February 20, 2015 advising her that she would be terminated if she did not contact the employer within 10 days.

[3] The Claimant says it was not a requirement of her job that she call in for shifts or within a specified period of time to seek shifts and she does not recall getting the employer's letter of February 20, 2015 telling her to call in within 10 days or she would be dismissed. She says that she was hired as a casual on-call "roving" security guard with no permanent schedule. She was told at her interview that she could accept shifts depending on her availability. She says shifts were obtained by either her calling in and asking for shifts or the scheduling manager calling her when shifts were available. The Claimant agrees that she did not call in for shifts for a period of time but denies the employer ever told her of a consequence for failing to call in to seek a shift within a certain period of time. She says she did not even know she had been terminated. The Claimant also questions how she can be disqualified from benefits from an employment she lost during her benefit period.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct, and disqualified her from being paid employment insurance (EI) benefits from February 15, 2015.

[5] I find that the Claimant was dismissed for failing to contact the employer to seek shifts for a lengthy period of time and for failing to contact the employer within 10 days of the

¹ Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

February 20, 2015 letter, as requested. However, I find the Claimant's actions did not constitute misconduct. I find that because I am not satisfied that the Claimant received the February 20, 2015 letter. I also find that the Claimant did not owe an express or implied duty to her employer to call in for shifts within a specified period of time and that the consequences for failing to do were not communicated to the Claimant. I find the Claimant, therefore, did not know or ought to have known that a failure to call in for a shift within a certain period of time could possibly result in her dismissal.

ISSUES

[6] Did the Claimant lose her job because of misconduct? To determine this, I will first decide the reason why the Claimant lost her job. Then I have to decide if the Claimant committed the act for which she was fired. Finally, I have decide if that act is considered to be misconduct.

ANALYSIS

Why did the Claimant lose her job?

[7] I find the Claimant lost her job because she had not been calling in to seek shifts for a lengthy period of time and she did not respond to the employer's letter of February 20, 2015 requesting that she contact the employer within ten days or be dismissed.

[8] The Record of Employment (ROE) dated March 16, 2015 from the employer says the Claimant was employed from October 23, 2014 to November 10, 2014 and that during that period she earned 71 insurable hours.² The reason for issuance is noted as "M" (which is the code for "dismissal"). Earnings information submitted by the employer to the Commission shows that the Claimant had earnings in each of the week of October 19, 2014, October 26, 2014, November 2, 2014 and November 9, 2014.³

[9] The employer told the Commission that the Claimant was employed on a part-time, as-needed basis and her hours varied per week. The employer said the Claimant was dismissed for

² GD3-11.

³ GD3-13.

abandoning her employment, as she did not respond to a letter telling her to contact the employer within 10 days.⁴ The employer told the Commission that the Claimant was a probationary employee and that she did not have any schedule at that time. The employer said the Claimant was expected to report into work to pick up shifts and she didn't come in to pick up any shifts. A letter was then sent to her requesting her intention on whether to continue working for the employer. They never received a response from her so they terminated her employment because of the lack of response.⁵

[10] The employer's letter of February 20, 2015 is on file.⁶ The letter advises that all employees must remain active, working regularly to be eligible for continued employment. The letter says the Claimant's last day worked was June 29, 2014 (Note: The employer confirmed to the Commission that the date of June 29, 2014 was a typo. The date should have read November 10, 2014⁷). The letter advised further that if the Claimant did not respond to the employer within 10 days of the date of the letter her employment would be terminated. The letter said if she failed to respond as well, she would be asked to return her issued uniform items at which point the final pay and ROE would be released. The letter stated that if her uniform had been paid, then she only had to return the employer's patch.

[11] The employer also provided the Commission with the Claimant's employment contract signed on October 16, 2014. This states it is a condition of employment that the Claimant is able to work full, rotating shifts, which includes day, afternoon and midnight shifts and weekends and public holidays. The contract also notes it is a condition of employment that the Claimant comply with the employer's general regulations. The contract says that any non-compliance is subject to disciplinary action up to and including dismissal.⁸

[12] Additionally, the employer provided the Commission with a letter of understanding dated October 16, 2014 signed by the Claimant agreeing to work any shift assigned to her, and acknowledging that the shifts may occur any day of the week and may be during the day, afternoon or night. She also acknowledged that she had no personal reason that would preclude

⁴ GD3-14.

⁵ GD3-17.

⁶ GD3-21.

⁷ GD3-35.

⁸ GD3-22.

her from working any assigned shift.⁹ The employer also told the Commission that they only hire employees who are available for all shifts.¹⁰

[13] The employer also provided a copy of its general regulations signed by the Claimant on October 16, 2014 specifying types of unwanted behaviour that would result in discipline. The employer highlighted regulation #15 which states, “Excessive absenteeism, (four (4) of more days off in a thirty (30) day period.” The general regulations note that failure to comply with the regulations will result in disciplinary action, which may include termination of employment.¹¹

[14] The Commission specifically asked the employer to provide a code of conduct/policies indicating how a casual employee gets their shift and outline the procedures employees have to follow to get a shift. The employer responded that there was no official policy. The employer said that employees call when they want to work and company schedulers call employees when they have work available. The employer explained that the 10-day termination letter states to call in because the employer hasn’t been active.¹²

[15] The Commission says that the reason given by the employer is the reason for the dismissal. The Claimant says that she was not even aware she had been dismissed. The employer never told her she had been dismissed.

[16] The Claimant told the Commission that she had accepted the casual on-call job but did not pick up any shifts because the employer offered evenings and night shifts. She acknowledged signing the employer’s documents but said that she is a single mother and her children at that time were 4 and 7 years old. She advised that although she signed the documents advising her availability for all shifts, during her training she verbally informed that her preference was to work day shifts. The claimant stated that initially she worked in few evening, night and weekend shifts by making child care arrangements but she was not able to pick any other shifts.¹³

⁹ GD3-23.

¹⁰ GD3-35.

¹¹ GD3-24.

¹² GD3-19.

¹³ GD3-34.

[17] The Claimant testified that when she was hired, she went to an orientation and got a uniform. She was hoping for a full time job but she was hired as a “roving” security guard for “event” security. She explained to the hiring manager at her interview that she was a single parent and had two small children so she would do her best to pick up hours as she could. The interviewed said that was fine and that was why she was a “roving” security guard and they would let her know if anything permanent came up. She was also told that, as a roving guard, she would be offered shifts and she would be able to select shifts based on her availability. The Claimant explained that she was not on a permanent schedule. She was assigned a scheduling manager. She was told the scheduling manager would let her know what hours were available and she had the choice to pick what suited her. The Claimant said she took the shifts she was offered as long as she had enough notice to make arrangements for her children. She said she did work some evenings and weekends, when she could. The Claimant acknowledges she signed the employment documents provided by the employer to the Commission. However, she says it is not correct that she was obligated to take whatever was offered to her. She said she was told otherwise in the interview.

[18] The Claimant said to obtain shifts she was not required to call in. Either she could call the scheduling manager to ask for a shift or the scheduling manager might call her if something came up. The Claimant explained she called the scheduler several times to seek work. Sometimes she was not able to take the shift offered as the scheduling manager might call her with a few hours notice to take a shift. She asked the employer for one to two days’ notice so she could make childcare arrangements. She testified that there was no discussion when she was hired about what would happen if she did not call in to seek a shift for a certain period of time. She said she had no daily schedule. Her schedule was “whatever comes up and whatever you can take”. She was on probation she thinks for a three-month period.

[19] The Claimant testified that the address is correct on the February 20, 2015 letter from the employer telling her that she would be dismissed if she did not contact the employer within 10 days but she cannot recall getting that letter. The Claimant also told the Commission she could not recall getting the letter.¹⁴ She says she still has her uniform from the employer and her badge

¹⁴ GD3-36.

and she did not receive an ROE from the employer when she was purportedly terminated in February 2015. The Claimant said the last she heard from the employer when she was on the road and a different scheduling manager than usual had phoned her. She was offered the choice of two shifts. The Claimant chose one of them. Later, the scheduling manager called back and said another employee could not take the other shift so she was giving the shift the Claimant had agreed to, to the other employee. She asked the Claimant to take the other shift. The Claimant was upset the other worker was being accommodated and not her. She refused that shift and told the employer she could not do that shift.

[20] The Claimant says she did not call the employer back after that conversation, as she was upset at that incident. The Claimant could not recall when this conversation took place. The Claimant said no one from the employer contacted her after this point. She said that even though she did not call in for shifts, she thought the employer still could have contacted her if something came up. It was not communicated to her by the employer that she had been terminated. The Claimant explained that even in 2018, when she learned this employer had taken over a site she had previously worked at with another employer, she went to the employer to apply for a job. She says even then the employer did not say anything to her. The employer told her that that the only thing pending on her file was her security guard license renewal. The Claimant then renewed her license but when she supplied that, she was then told by the employer that they could not find her file at that time and she would have to start all over again.

[21] The Claimant denies that she was ever told she was required to call in for a shift within a certain period of time. She says the employer never brought anything to her attention about that so she was surprised when they said she had been terminated for misconduct.

[22] I find the reason the Claimant was terminated because she had not called her employer for shifts for a lengthy period of time and she did not respond to the employer's letter of February 20, 2015 within 10 days of the date of that letter. This reason for termination is clearly set out in the February 20, 2015 letter and the employer advised the Commission this was the reason for termination. The Claimant has not provided any evidence suggesting any other reason for termination.

Did the Claimant committed the act for which she was fired?

[23] Yes. There is no dispute that the Claimant did not respond to the employer's letter of February 20, 2015 .The Claimant said she did not respond as she could not recall getting the letter. There is also no dispute that the Claimant did not call in to seek a shift for a lengthy period of time. I note the Claimant's last day paid was November 10, 2014 and the employer's letter requesting contact was February 20, 2015, which is a period of just over three months.

[24] Although the exact date of the Claimant's last communication with the employer is uncertain, the Claimant testified that she did not call the employer back to seek a shift after that last conversation. Based on the last day paid and the date of the employer's letter, I find that it is reasonable to conclude that the Claimant did not contact her employer over a period of approximately three months.

Is the reason for the Claimant's dismissal misconduct under the law?

[25] I find the reason for the Claimant's dismissal is not considered misconduct under the law.

[26] The Claimant questioned how she could be disqualified from benefits from an employment she held during her benefit period. "Employment" for the purpose of disqualification because a person has lost their job due to misconduct can be any employment during a claimant's qualifying period or benefit period.¹⁵ If the job loss occurs during the benefit period, the disqualification does not include any week in that benefit period before the week in which the event occurs.¹⁶

[27] The Claimant held the employment in question during her benefit period so it was open to the Commission to disqualify her from benefits for reason she lost her employment due to misconduct with the disqualification taking effect from the week of her job loss.

[28] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.¹⁷ Misconduct also includes conduct that is so

¹⁵ Subsection 29(a) of the *Employment Insurance Act*.

¹⁶ Subsection 30(3) of the *Employment Insurance Act*.

¹⁷ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

reckless that it approaches willfulness.¹⁸ The Claimant does not have to have a wrongful intent for her behavior to be misconduct under the law.¹⁹

[29] There is misconduct if the Claimant knew or ought to have known that her conduct could impair the performance of the Claimant's duties owed to her employer and, as a result, that dismissal was a real possibility.²⁰

[30] The Commission has to prove that it is more likely than not²¹ that the Claimant lost her job because of misconduct.²²

[31] The Commission says that the Claimant's absence for work constituted misconduct because she was aware of the requirement to be available for all shifts. She was warned by her employer, via letter, that her continued absence would result in termination. The Commission asserts that an employment relationship necessitates communication between both parties and the Claimant willfully disregarded this leading to her termination.

[32] The Claimant says that there was no misconduct because the employer never told her that there was any time period by which she had to call in for shifts and she had no warnings regarding her failure to call in. She says she was not required to call in for shifts. She could obtain shifts either by calling in to the employer to request a shift or the scheduling manager could call her to offer available shifts. She says she could accept what was offered or not, depending on her availability. The Claimant says she does not recall receiving the letter the employer sent her on February 20, 2015 requesting contact within 10 days. She says she did not even know she was terminated. She still has her uniform and badge and did not receive an ROE from the employer.

[33] I find that the Commission has not proven that there was misconduct. The Commission says that the Claimant's absence for work constituted misconduct because she was aware of the requirement to be available for all shifts. However, the Claimant was not fired for refusing

¹⁸ *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁹ *Attorney General of Canada v Secours*, A-352-94.

²⁰ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ The Commission has to prove this on a balance of probabilities which means it is more likely than not.

²² *The Minister of Employment and Immigration v Bartone*, A-369-88.

shifts. She was fired for not calling in to seek shifts for a lengthy period of time and for not responding to the employer's February 20, 2015 within 10 days.

[34] I have considered whether the Claimant knew or ought to have known that a failure to call in to seek a shift within a certain period of time and the failure to respond to the February 20, 2015 letter was conduct that could impair the performance of duties owed to the employer such that dismissal was a real possibility.

[35] I find there was no misconduct with respect to the Claimant's failure to respond to the February 20, 2015 letter as I am not satisfied she received it. She could not, therefore, have anticipated the possibility of dismissal. The Claimant testified that her address was correct on the letter but she could not recall receiving the letter. She also told the Commission the same thing. I found her testimony to be credible and to be supported by the fact that she did not return her uniform as requested by the employer in the letter to receive her final pay and ROE. She still has her uniform and did not receive the ROE from the employer. I note that the employer provided no evidence to the Commission that the letter had been sent by registered mail or in a manner in which receipt could be confirmed.

[36] I have next considered whether the Claimant's failure to contact the employer to seek shifts for a lengthy period of time was misconduct.

[37] I find as a fact, that although the Claimant could call in to seek shifts, there was no requirement that she do so. I find this was not an express duty of her employment. I prefer the Claimant's credible sworn testimony that she was never told that she was required to call in for shifts or that she had to call in within a specific period time to seek shifts over the unsworn hearsay information of the employer that she was required to call in for shifts. The Claimant testified that scheduling was done both ways. An employee could call in and seek work or the scheduler could call employees when they had shifts available. I also prefer the Claimant's credible sworn testimony over that of the unsworn information of the employer that despite what the written employment documentation provided for, she was told she could accept shifts based on her availability.

[38] There is nothing in any of the documentation supplied by the employer that speaks to a call in policy or what the consequence is if an employee does not call in for a certain period of time for a shift. The Commission asked the employer to provide a code of conduct/policies indicating how a casual employee gets their shift and outline the procedures employees have to follow to get a shift and the employer confirmed that there was no official policy. The employer said that employees call when they want to work and company schedulers also call employees when they have work available. The employer explained that the 10-day termination letter states to call in because the employee hasn't been active. The fact the employer says the employees all when they "want to work" supports the conclusion that there was no express requirement to call in for shifts or to call in within a specified time frame.

[39] The employer's general regulations refer to a prohibition against excessive absenteeism in the form of four or more days off in a 30-day period. However, I do not find that provision to impose an express duty on the Claimant to call in to seek a shift within a specified period of time. The Claimant was hired as an on-call casual "roving" security guard. She had no fixed schedule. The particular absence provision does not make sense in the context of an employee with no fixed schedule.

[40] I have also considered whether, even though there was no formal requirement to call in for a shift within a specified period of time and no formally communicated consequences for failing to do so, whether the Claimant had an implied duty to contact her employer within a reasonable period of time to seek shifts.

[41] The Commission submits that an employment relationship necessitates communication between both parties and the Claimant willfully disregarded this leading to her termination. I would agree that most employment relationships would imply a duty for an employee to contact their employer or attend at work within a reasonable period of time or risk being considered to have abandoned their employment. However, the Claimant did not have a typical employment with a fixed schedule or any regular work. She had an on-call casual position in which she could obtain shifts either by calling the employer or by the employer calling her. Because there was no fixed schedule and because she did not obtain shifts exclusively by calling the employer herself, I find there was an implied understanding that the employer would contact her if there was work

available, rather than her being obligated to contact the employer. In light of the unique nature of her employment, I find an implied duty to contact the employer within a reasonable period of time for work did not exist.

[42] I find the Commission has not proven that the Claimant lost her employment due to misconduct. She did not know or ought to have known that her conduct was such as to impair the performance of her duties owed to her employer and that dismissal was a real possibility. I am not satisfied that the Claimant received the employer's February 20, 2015 letter advising her to contact the employer. I also find the Claimant had no express or implied duty to contact the employer for shifts or to contact the employer within a reasonable period of time to obtain a shift. Therefore, her failure to contact the employer within an approximate three month period to seek a shift does not amount to misconduct.

CONCLUSION

[43] The appeal is allowed. This means that the Claimant is not disqualified from being paid regular EI benefits from February 15, 2015.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	September 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. N., Appellant