



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation : *L. L. v Canada Employment Insurance Commission*, 2019 SST 1463

Tribunal File Number: AD-19-678

BETWEEN:

L. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: December 23, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, L. L. (Claimant), started working for X in 2007. She held a number of in-branch positions for X, first as a direct employee and then through an agency. The Claimant's last position was that of member services agent. On April 20, 2018, investigators met with and questioned the Claimant as part of X's investigation. The Claimant left that meeting very shaken because she had been questioned intensively for four hours. She never returned to work after that meeting and took a sick leave.

[3] The agency that employed the Claimant dismissed her on October 2, 2018, following the results of the investigation by X, which found that she had breached its code of conduct and committed a breach of trust. The Employment Insurance Commission (Commission) determined that the Claimant had lost her employment because of her own misconduct. As a result, it imposed a disqualification from Employment Insurance benefits on her effective September 30, 2018.

[4] The General Division determined that the Claimant had failed to complete the required online training and that she had violated the code of ethics by authorizing a power of attorney in her name for a client who was a friend without informing the financial institution. It determined that, given her 10 years of experience with the financial institution, the Claimant could have anticipated that not completing her mandatory online training and granting herself power of attorney without transparency would be likely to result in her dismissal. The General Division found that the Claimant had lost her employment because of her misconduct under sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[5] The Tribunal granted leave to appeal. The Claimant argues that the General Division erred in law in its interpretation of the notion of misconduct under the EI Act.

She also argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[6] The Tribunal must determine whether the General Division erred in its interpretation of the notion of misconduct under the EI Act and whether the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] The Tribunal dismisses the Claimant's appeal.

ISSUES

[8] Did the General Division err in law in its interpretation of the notion of misconduct under the EI Act?

[9] Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

Appeal Division's Mandate

[10] The Federal Court of Appeal has established that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).¹

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

Issue 1: Did the General Division err in law in its interpretation of the notion of misconduct under the EI Act?

Issue 2: Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[13] The Claimant argues that the code of conduct does not say anywhere that her act constitutes an error. When her employer informed her that it was forbidden, she stopped the alleged act. The Claimant argues that she could therefore not have known that her act would constitute misconduct and she did not know that it could lead to dismissal.

[14] The Claimant argues that, to prove misconduct by an employee, it must be shown that the employee behaved in some way other than they should have. She argues that such an allegation is not proven simply by showing that the employer found their employee's conduct to be reprehensible, or charged them with misconduct in general terms.

[15] The Federal Court of Appeal has established that the notion of misconduct does not imply that the breach of conduct must be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that it could be said that the employee wilfully disregarded the effects their actions would have on their performance.

[16] As the General Division noted, the burden of proof rests on the Commission and the employer to show, on a balance of probabilities, that the Claimant's dismissal was the result of misconduct according to the EI Act.

[17] It is important to reiterate that the role of the General Division was not to determine whether the dismissal or the penalty was justified. Instead, it had to determine whether the Claimant's actions constituted misconduct under the EI Act.

[18] The uncontradicted evidence before the General Division shows that the Claimant had to complete mandatory training starting in January 2018, which she did not do until April 2018. After her training, the Claimant realized that she could not issue a personal power of attorney for a client's account, so she withdrew it. She never informed her employer that the power of attorney had been withdrawn because she feared her employer's reaction. The Claimant had a habit of acting transparently when she completed personal transactions.

[19] The General Division determined that the Claimant had failed to complete the required online training and that she had breached the code of ethics by authorizing a power of attorney in her name for a friend who was a client, without informing the financial institution. It determined that, given her 10 years of experience with the financial institution, the Claimant could have anticipated that not completing her mandatory online training and granting a power of attorney in her own name without transparency would be likely to result in her dismissal. The General Division found that the Claimant had lost her employment because of her misconduct according to sections 29 and 30 of the EI Act.

[20] The Claimant argues that the employer's code of conduct does not prohibit employees from using personal powers of attorney on client accounts.

[21] As the General Division stated, the Claimant's employment required integrity, rigour, and transparency during her duties. Although the code of ethics and conduct does not specifically mention that the Claimant could not authorize a power of attorney in her name unassisted, she did not act transparently in her transaction with her friend who was a client, which is in itself a violation of the code.

[22] As the General Division decided, the Claimant's failure to complete her mandatory training constitutes in itself an instance of misconduct. The Tribunal is of the view that the Claimant had an obligation to her employer to keep her knowledge up-to-date, which she did not do for some months. The Claimant's failure to complete her

training resulted in a second instance of misconduct in granting a power of attorney for the account of a friend who was a client when it was forbidden by the employer.

[23] Furthermore, the Claimant admitted that she did not tell her employer about withdrawing the power of attorney because she feared the employer's reaction. Therefore, it was the Claimant's conduct as a whole that was reckless to the point of approaching willfulness. In acting as she did, the Claimant should have known that her conduct was such that it might lead to her dismissal.

[24] It is clear to the Tribunal that the Commission and the employer have met the burden of proving the Claimant's misconduct within the meaning of sections 29 and 30 of the EI Act.

CONCLUSION

[25] The Tribunal therefore finds that the General Division considered the Claimant's arguments, that its decision is based on the evidence before it, and that this decision complies with the legislative provisions and the case law.

[26] For the reasons mentioned above, it is appropriate to dismiss the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	December 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Nadia Samy, Representative for the Appellant Julie Lachance, Representative for the Respondent