



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *X v Canada Employment Insurance Commission and M. M.*, 2020 SST 128

Tribunal File Number: GE-19-4308

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

M. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: January 28, 2020

DATE OF DECISION: February 10, 2020

DECISION

[1] I am dismissing the Employer's appeal. The Employer has not proven that the Claimant lost her job because of misconduct.

OVERVIEW

[2] The Claimant worked as a safety inspector for the Employer. Her job required her to travel to various worksites in the metro area. The Employer became suspicious that the Claimant was not working during the day. The Employer used a GPS device to monitor the Claimant's movements. When the Claimant learned that the Employer had been monitoring her movements, she made a police report. She claimed that the Employer was harassing and stalking her. The Employer believed that the Claimant had made the police report maliciously and dismissed her.

[3] The Claimant applied for employment insurance benefits. The Canada Employment Insurance Commission (Commission) decided that the Claimant had lost her job because of misconduct. The Commission decided that the Claimant could not receive regular employment insurance benefits. The Claimant asked the Commission to reconsider its decision. The Commission changed its decision. The Commission decided that the Employer had not proven that the Claimant had lost her job because of misconduct and allowed benefits. The Employer appealed to the Tribunal.

[4] I am dismissing the Employer's appeal. The Employer has not proven that the Claimant made the police report maliciously. I believe that the Claimant made the police report out of a genuine concern for her safety. I do not believe that she knew or ought to have known that she would lose her job because of her actions. The Employer has not proven that the Claimant lost her job because of misconduct.

ISSUE

[5] I must decide whether the Claimant lost her job because of misconduct. To make this decision, I must first decide why the Employer dismissed the Claimant. Then I must decide whether that conduct amounts to misconduct.

ANALYSIS

What were the events leading to the Claimant's dismissal?

[6] There is a large volume of material in this appeal file. Both the Claimant and the Employer have submitted many documents to the Commission and the Tribunal describing the breakdown of the employment relationship. Not all of this material is directly relevant to the question of misconduct. However, I believe a brief summary of the breakdown of the employment relationship is useful to understand what led to the Claimant's dismissal.

[7] The employment relationship between the Employer and the Claimant started to become difficult about five months before the Claimant's last day of work.

[8] At a work party, an employee sexually assaulted the Claimant by touching her inappropriately. After some time, the Claimant learned that there were rumours that she had a sexual relationship with this employee. The Claimant reported the sexual assault and the rumours to the Employer. She also reported the sexual assault to the police. The Employer investigated. During the course of its investigation, the Employer also examined the Claimant's own conduct. After the investigation, the Employer gave several employees, including the Claimant, written warnings about their behaviour in the workplace. The Employer gave the Claimant the written warning on May 15, 2019.

[9] The Claimant disagreed with how the Employer conducted the investigation and made a complaint with the provincial workplace safety authority. The safety authority investigated and decided that the Employer had conducted its investigation appropriately.

[10] The Claimant worked with little supervision and travelled to various worksites. At the hearing, the Employer said that they became concerned that the Claimant was not actually working during the day while they were investigating her initial complaint. The Employer emailed the Claimant on May 31, 2019 and instructed her to use the company vehicle instead of her own vehicle for insurance purposes. At the hearing, the Employer said that they had actually asked the Claimant to use the company vehicle so that they could monitor her movements using the GPS device installed in the company vehicle. The Employer said that they did not tell the Claimant that they intended to use the GPS device to monitor her movements.

[11] At the hearing, the Employer said that they downloaded daily GPS reports about the Claimant's movements. They tracked her movements for the entire month of June 2019 and the last two weeks of August 2019. They did not track her movements in July and the first two weeks of August because the Employer and the Claimant were on vacation.

[12] On August 28, 2019, the Employer met with the Claimant to compare her time sheets with the daily GPS logs. At the hearing, the Employer said that this was the first time they told the Claimant that they had been monitoring her movements with the GPS device.

[13] The Employer held back the Claimant's paycheque to review her hours. The Claimant learned of this on August 29, 2019, the evening before she expected her direct deposit. She phoned the Employer. The Claimant and the Employer disagree about the content of this phone call.

[14] According to the Employer, the Claimant was angry and aggressive during the call. She accused them of using a GPS device without her knowledge. The Employer remained calm and said that they had the right to use GPS to track their own vehicle. The Claimant denied misreporting her hours on her time sheets. The Employer told the Claimant that they were using GPS to monitor her movements. As an example, the Employer described the Claimant's movements on a particular afternoon.¹

[15] According to the Claimant, the Employer told her that he had been watching her and her son. He told her that he knew when she left the house, knew when she dropped her child off at daycare, and had been watching her child's social media. He told her that there would be "hell to pay" if she reported this to the provincial workplace safety authority.

[16] At the hearing, the Claimant said that the Employer had told her about his history as a private investigator. She said that the Employer had a history of following other employees outside of work in order to find cause for termination. The evening of August 29, a strange vehicle came to her home and someone inside the vehicle photographed her and her child as they got out of her car.

¹ The Employer's summary of the phone call is at GD8-70.

[17] The Claimant said that the Employer's comments and the strange vehicle frightened her. The following day, August 30, she made a police report that the Employer was stalking, harassing, and threatening her. She also visited her doctor. The doctor advised her to take time off work. The Claimant gave her employer a copy of the doctor's note.

[18] The police visited the Employer on August 30 to discuss the Claimant's complaint. The police warned the Employer not to communicate with the Claimant.

[19] The Employer dismissed the Claimant on September 3, 2019. According to the termination letter, the relationship of trust had broken down. The Employer referred to the following issues:

- The Claimant's complaint to the provincial safety authority about the manner of the Employer's investigation into her sexual harassment complaints;
- The Employer's suspicion that the Claimant was not working during the day. The Employer noted that the GPS logs did not match the Claimant's time sheets.
- The validity of the doctor's note the Claimant provided on August 30;
- The fact that the Claimant had made a police report. The Employer considered the police report to be false and malicious.

Why did the Employer dismiss the Claimant?

[20] I find that the Employer dismissed the Claimant because she made a police report about stalking and harassment. The Employer dismissed the Claimant because they believed that the Claimant made the police report out of malice.

[21] The Claimant argues that the Employer dismissed her as retaliation because of her reports about sexual harassment and her complaints to the provincial workplace safety authority.

[22] The Employer argues that the police report was the trigger for the Claimant's dismissal. They argue that the Claimant completely damaged the employment relationship because the police report was false and malicious.

[23] At the hearing, the Employer said that their investigation into the Claimant's time sheets and the GPS reports was not yet complete when they dismissed the Claimant. They were concerned that the Claimant was not being honest, but they had not made any final decisions about the employment relationship.

[24] The Employer told the Commission that they dismissed the Claimant because of the police report.² The termination letter refers to the police report. At the hearing, the Employer said that the police report caused the Claimant's dismissal.

[25] I acknowledge that the Claimant argues that the Employer decided to dismiss her because she had reported a sexual assault and harassment in May 2019. The Claimant provided a copy of the audio recording of her report to the police about the sexual assault. During the police interview, the Claimant starts crying and says that she is afraid that she is going to lose her job. The Claimant argues that the Employer monitored her movements so that they would have a reason to dismiss her.

[26] However, the Employer has consistently said that they did not dismiss the Claimant because of the discrepancies between the GPS reports and her time sheets. The Employer says that they dismissed the Claimant because of the police report.

[27] I accept the Employer's statements. I find that the Claimant's action – making a police report about stalking and harassment – was the cause of her dismissal.

[28] I will not consider whether the Claimant falsified her time sheets or engaged in time theft, because the Employer consistently said that this was not the reason for her dismissal.

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

[29] I am not satisfied that the Claimant made the police report maliciously. The Employer has not proven that the Claimant's actions amount to misconduct.

² GD3-63.

[30] The Employer argues that the Claimant made a police report maliciously. They argue that the Claimant made false allegations that could have led to the Employer's arrest or criminal charges.

[31] The Claimant argues that she made a police report because she was afraid for her safety and her son's safety. She argues that the Employer's actions aggravated her mental health conditions.

[32] I must make a decision on the balance of probabilities.³ I must decide which version of events is more likely to be true. Did the Claimant make a false police report out of malice? Or is it more likely that the Claimant made a police report because she was afraid of the Employer's actions?

[33] Given the way the Employer conducted its investigation into the Claimant's movements, I find it credible that the Claimant was genuinely frightened. The Employer's own evidence demonstrates that they conducted their investigation secretly. They gathered specific and intrusive notes about the Claimant's location, even outside of working hours. I also give significant weight to the Claimant's medical evidence. She has proven that she experienced anxiety and panic attacks. I do not believe that the Claimant deliberately made a false police report. I do not believe that the Claimant made a police report out of malice or to retaliate against the Employer.

[34] The Claimant provided medical evidence.⁴ According to her doctors' reports, she began experiencing anxiety in May 2019. In June 2019, her doctor noted that the Claimant was having panic attacks daily. On August 30, 2019, her doctor noted that the Claimant had a panic attack the day before and continued to be very anxious. The doctor noted that the Claimant had made a police report. The doctor told the Claimant not to go to work for safety reasons.

[35] According to a report from the provincial workplace safety authority, the Claimant also had a psychological assessment on September 9, 2019.⁵ The Claimant did not provide a copy of

³ The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

⁴ GD3-41 to GD3-50.

⁵ GD8-132.

this report, but according to the summary in the safety authority's report, the psychologist diagnosed the Claimant with an adjustment disorder with mixed anxiety and depressed mood, with panic attacks. The psychologist determined that the Employer's investigation into the Claimant's conduct and the Claimant's dismissal contributed to her mental health diagnosis.

[36] I accept the medical evidence. I also find the summary in the workplace safety authority's report reliable and persuasive. I accept that the Claimant started experiencing anxiety and panic attacks by June 2019. I give significant weight to the doctor's note that the Claimant had a panic attack on August 29, 2019.

[37] I am not making a decision about whether the Employer wrongfully or constructively dismissed the Claimant. However, I find it useful to consider how the Employer conducted its investigation into the Claimant's movements. The Claimant argues that she made a police report because she believed that the Employer was stalking her. By considering how the Employer conducted its investigation, I can decide whether the Claimant is credible.

[38] At the hearing, the Employer acknowledged that they used GPS to monitor the Claimant's movements for several weeks without telling the Claimant. They asked the Claimant to use the company vehicle for insurance reasons, but acknowledged that they actually asked her to use the company vehicle so that they could use the GPS device. The Employer said that they did not tell the Claimant that they were using GPS to monitor her movements until the meeting on August 28, 2019. I accept the Employer's statements. I find that the Employer monitored the Claimant's movements for six weeks without the Claimant's knowledge.

[39] The Employer provided several pages of GPS reports for February, March, April, May, June, and August 2019. The Employer also included their own notes comparing the Claimant's time sheets to the GPS reports. The Employer noted when the Claimant was at her child's school⁶ and babysitter's.⁷ The Employer even seems to have made note of when the Claimant spent the night at an address that was not her home address.⁸ I find that the Employer used the GPS data to make detailed notes about the Claimant's movements, even outside of work hours.

⁶ For instance, at GD8-44.

⁷ GD8-55, GD8-57.

⁸ GD8-34.

The Employer's observations also touched on the child's movements, since the Employer noted when the Claimant was at her child's school or her child's babysitter.

[40] The Claimant and the Employer disagree about the nature of the phone call on August 29, 2019. However, they both agree that the Employer gave the Claimant more details about the GPS tracking during this phone call. The Employer denies telling the Claimant that he knew when she was dropping her child off at daycare. However, the Employer's own notes show that he knew the address of the Claimant's babysitter. I find it likely that the Employer told the Claimant that he knew when she took her child to daycare during the phone call on August 29, 2019.

[41] The Claimant said that there was a strange vehicle at her home on the evening of August 29, 2019. I acknowledge that the Employer denies following the Claimant home. However, I accept the Claimant's statements, and I accept that she saw a strange vehicle by her home. I accept that this was frightening for the Claimant, particularly since her Employer had just told her that they were monitoring her movements.

[42] I find it credible that the Employer told the Claimant about the details they had collected about her movements during their investigation. The Employer collected details about the Claimant's movements outside of work hours. The Employer's investigation included details about the Claimant's child. I find it credible that the depth and detailed nature of the Employer's investigation frightened the Claimant.

[43] The Claimant's medical evidence also contributes to her credibility. The Claimant's doctor noted that the Claimant was having frequent panic attacks. She had a panic attack on the night before she made the police report. I find that the Claimant's medical evidence demonstrates that the Claimant was genuinely distressed.

[44] I find the Claimant credible. I do not believe that the Claimant deliberately made a false police report. I do not believe that she made the police report out of malice. I accept that she made the police report out of genuine concern.

[45] For me to find that the Claimant's conduct was misconduct under the law, the Employer must prove that her actions were wilful. The Employer also has to prove that the Claimant knew, or should have known, that dismissal was a real possibility because of her actions.⁹

[46] I do not believe that a police report, made out of genuine concern, amounts to misconduct. I do not believe that the Claimant knew, or should have known, that dismissal would result from her actions. The Employer has not proven that the Claimant lost her employment because of misconduct.

CONCLUSION

[47] I am dismissing the Employer's appeal.

Amanda Pezzutto
Member, General Division - Employment Insurance Section

HEARD ON:	January 28, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. R. for X, Appellant Preston Parson, Representative for the Appellant M. M., Added Party

⁹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.