



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. N. v Canada Employment Insurance Commission*, 2020 SST 514

Tribunal File Number: GE-20-1108

BETWEEN:

R. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: May 6, 2020

DATE OF DECISION: May 19, 2020

DECISION

[1] The Commission has not proven that the Claimant lost her job because of misconduct. As such, the Claimant is not disqualified from being paid benefits.¹

OVERVIEW

[2] The Claimant lost her job. The Claimant's employer, a national charity, says it dismissed the Claimant because her actions around one of the employer's fund-raising activities irreparably damaged its trust and confidence in her. The Claimant says she did not do what the employer says she did.

[3] The Claimant applied for employment insurance benefits (benefits) in November 2019. The Canada Employment Insurance Commission (Commission) paid the Claimant benefits.

[4] In early January 2020, the Commission notified the employer that it was paying the Claimant benefits. In mid-January 2020, the employer received a letter from the Claimant's lawyer for a wrongful dismissal action. In early February 2020, the employer asked the Commission to reconsider its decision.

[5] Upon reconsideration, the Commission determined that the Claimant lost her job because of misconduct. This meant she was disqualified from being paid benefits. The Commission sent her a notice of debt for the benefits it had already paid her.

[6] I have to decide if the Claimant lost her job because of misconduct.

POST-HEARING DOCUMENTS

[7] During the hearing, the Claimant realized that the Tribunal did not have all the available documentary evidence. I allowed her two days to file additional documents in support of her claims. Since the documents were relevant to her appeal and she filed them within the allowed time, I accepted the Claimant's documents into evidence. The Tribunal sent the documents to the Commission. I allowed the Commission three business days to respond. As 11 days have passed

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

and the Tribunal has received no further documents or submissions from the Commission, I am going ahead with the decision.

ISSUE

Did the Claimant lose her job because of misconduct?

ANALYSIS

What happened before the employer dismissed the Claimant?

[8] The employer's head office is in Alberta. When the Claimant was dismissed, the employer had four employees. The Claimant was the only employee working in Ontario.

[9] The employer ran a recycling program in the Toronto area known as Liberty Village. The employer collected certain recyclables from condominium corporations and businesses. I will call these organizations the donors.

[10] When the program started, the Claimant's common-law partner volunteered his time to collect the recyclables and deliver them to the Beer Store. After the program was established, the employer hired the Claimant's common-law partner to collect the recyclables and deliver them to the Beer Store. The employer had an account with the Beer Store. The Beer Store provided the delivery person with a receipt and deposited the money directly to the employer's bank account.²

[11] Around 2018, the program stopped being financially feasible. The employer stopped the program in April 2019. The parties dispute whether the Claimant properly notified the donors that the program had ended. The Claimant's common-law spouse continued to collect recyclables from some donors.

[12] Similar programs in Edmonton and Alberta, which were not overseen by the Claimant, ended in early 2019.³

² This is explained in the Operational Review–Recycling Programs document dated October 22, 2018, at page GD3-72, and in the Business Plan at page GD3-62.

³ Page GD3-67.

[13] On October 29, 2019, a donor complained to the employer about a mess from the recycling collection. The employer questioned whether the Claimant had actually ended the program. It conducted an investigation by speaking to two donors. The Claimant says the employer did not talk to her as part of its investigation. After the employer suspended her with pay, her next contact with the employer was on November 8, 2019, when she received her dismissal letter.

What is misconduct?

[14] To be misconduct under the law, the conduct has to be willful. This means the conduct was conscious, deliberate, or intentional.⁴ Misconduct includes conduct that is so reckless that it approaches willfulness.⁵ The Claimant does not have to have a wrongful intent for her behaviour to be misconduct under the law.⁶

[15] 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.⁷

[16] The Commission has to prove that it is more likely than not that the Claimant lost her job because of misconduct.⁸

Why did the Claimant lose her job?

[17] I find the Claimant lost her job because her employer feels she destroyed the relationship of trust and confidence necessary for her continued employment by:

- a) lying to the employer about the reason for the decline in revenues from the recycling program, which was why the employer stopped the program;
- b) failing to notify donors that the employer was no longer running the program so donors believed the employer was still benefiting from their donations;

⁴ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ *Attorney General of Canada v Secours*, A-352-94.

⁷ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ *The Minister of Employment and Immigration v Bartone*, A-369-88.

- c) in April 2019 without telling the employer, advising the Beer Store that the employer's program had ended and to deposit the funds to her common-law partner's recycling company.

[18] These are the reasons set out in her dismissal letter, and the Claimant does not dispute that this is why she was dismissed.

Has the Commission proven the Claimant lost her job because of misconduct?

[19] The Commission says there was misconduct because the Claimant ought to have known that:

- providing incorrect information about the decrease in revenue, and
- failing to inform the employer that her common-law spouse was benefiting from the program

would have a negative impact on the employment relationship.

[20] The Claimant says that there was no misconduct because she did not do what the employer says she did.

[21] I find the Claimant's statements are reliable because she has provided consistent statements throughout the process, and her statements are generally consistent with the documentary evidence.

[22] I find that the Commission has not proven that there was misconduct, because it is more likely than not the Claimant did not do what the employer says she did to destroy the employment relationship.

Reason for the decline in revenues.

[23] I find the Commission has not proven it is more likely than not the Claimant lied about the reason for the decline in the program's revenues.

[24] The parties agree there was a decline in revenues and that they spoke about the decline.

[25] The employer says it based its decision to stop the program on the Claimant's statements that the decline in revenues was because the Liberty Village Tenants Association/Liberty Village Condo Board instituted its own recycling program. The employer says the Claimant made efforts to the Liberty Village Condo Board to continue their recyclable donations.

[26] The Claimant says she never suggested that the Liberty Village Tenants Association/Liberty Village Condo Board had taken over their recyclables. She says she made no efforts to have them continue with their donations because she is not aware of any such organization. She says Liberty Village is a geographic area, not a specific condominium association. She maintains that there were many reasons for the decline in revenue. These include changes in the way the Beer Store determined the value of the recyclables, there was a decline in recyclables, with some hidden rather than put in bins, presumably by condominium staff, and there was a lot of garbage in the bins. She said there were so few bottles that the pickup had to be done less often. She said the recycling programs in Alberta also stopped because of decreasing revenues.

[27] I found the Claimant's statements about the declining revenue to be credible. She has repeatedly said that she never mentioned anything about Liberty Village Tenants Association/Liberty Village Condo Board collecting their own recyclables because she is not aware of such an association. I find it likely the employer misunderstood what the Claimant said about the declining revenues. For example, it is plausible the employer interpreted her comments about the hidden recyclables to mean that the donors were collecting their own recyclables.

[28] Considering all the evidence, I find it is equally likely the Claimant did not misrepresent the reasons for the decline in revenues. This means the Commission has not proven it is more likely than not that the Claimant misrepresented the reason for the decline in the program's revenues.

Failed to end the program.

[29] I find the Commission has not proven that it is more likely than not the Claimant failed to notify its donors that it was stopping the program.

[30] Given the following, I find it is more likely than not the notice ending the programs was sent to the donors by B., the employer's office manager, and that the Claimant fulfilled her obligation to make sure the notices were sent:

- a) The emails in GD7 among C. P, Director of Technology and Business Development for the employer, B., and the Claimant, support the Claimant's statements that C. P. approved the notice to the donors, and that it was B., not the Claimant, who emailed the notices ending the program to the donors.
- b) The email from B. to the Claimant on April 12, 2019, shows that B. sent the notices to the donors on April 11, 2019. Only one email bounced back, and B. confirmed that she would call that donor.⁹ The program ended on April 15, 2019.
- c) I see no evidence that either the employer or the Commission talked to B. about sending the notices.
- d) The email from X, one of the donors, dated October 31, 2019, confirms that it was aware that the employer's program had ended, that the donation was not being made to the employer, and that it agreed that the Claimant's common-law spouse would collect its recyclables.¹⁰
- e) The email exchange between A., manager for X, a donor, shows that the donor asked for a recyclable pickup in May 2019. The Claimant responded that the employer was no longer running the recycling program, but the driver was still available. A.'s response was simply an acknowledgment. A. did not say she was not aware the program had ended. Since A.'s email address is the same as on the Claimant's donor contact list, I find it likely that she received notice that the program had ended.¹¹ This suggests that donors who received the notice did not pay it much attention as she still contacted the employer about the recycling pickup.

⁹ This email is at page GD7-6.

¹⁰ This email is at page GD3-89.

¹¹ The donor contact list is at page GD6-3.

[31] I considered the June 13, 2019 email from the Claimant to one of the former donors, C. I find this email is unclear because the Claimant apologizes for confusion about the June 4 pickup but referred to the employer's program in the past tense. I find this email confirms that the employer's program had ended, but could mean that the Claimant was still involved in the program. Given the confusing wording, and since I do not have the original email from C. to the Claimant, I find this email is not enough to prove the Claimant represented to C. that the employer's program was continuing.

[32] I considered that J. R., one of the property managers, says she did not receive notice that the employer's program was ending. She thought the employer was still collecting and benefiting from its recyclables. J. R. told the Commission that she did not have any contact information for the employer so when she complained about a pickup, she had to look the employer's details up online.

[33] I find this is not enough to show the Claimant failed to notify the donors the program was ending. Since B. confirmed she notified all the donors, I find it more likely than not that J. R. missed B.'s email. She may have either overlooked B.'s email or her email could have been sorted to her junk email box.

[34] I considered that T. M., Senior Condominium Manager at X, says that neither she, nor C., the site supervisor, knew the employer's program had ended. This is not surprising because the Claimant's evidence shows that her contact at that location was the Property Manager having an email address of "admin" at the same domain address as T. M.¹²

[35] Given the email from B. confirming she sent the notices to the donors by email and the email from A. that she knew the program had ended, I find the statements from J. R. and T. M. are not enough to prove that it is more likely than not that the Claimant did not notify the donors that the program was ending.

[36] I find the employer contributed to any confusion about the continuation of its recycling program because it left the bins containing the employer's logo at the donor's premises.¹³ It is

¹² T. M.'s email address is at page GD3-43, and the email address where the notices were sent is at page GD6-3.

¹³ The notice letter (GD3-87), which was reviewed by the employer (C. P. and B.), confirms that the bins were left with the donors.

reasonable that any person who saw the bins with the employer's logo would assume that their recyclables were going to the employer. The Claimant explained that she had all removable logos and signs taken from the donors' premises but the logo could not be removed from the bins.

[37] While the Claimant may have done more to ensure the proper donor contacts received the notice, the evidence does not prove that she consciously, deliberately, or intentionally misrepresented to any donors that the program had not ended. Furthermore, the evidence does not show that her conduct was so reckless as to approach willfulness. This is especially so as the evidence suggests that C. P. likely knew the notice was only being sent by email.¹⁴ If he thought the Claimant should have done more, he could have so directed the Claimant.

Misrepresentations to the Beer Store.

[38] I find the Commission has not proven the Claimant failed to notify the Beer Store that the program was changing or that she advised the Beer Store to change the deposit information to her common-law-spouse.

[39] I find the email from the Claimant to the Beer Store on April 23, 2019, proves that the Claimant told the Beer Store that the employer was no longer running the recycling program.¹⁵ The email does not say anything about putting the account in someone else's name.

[40] I find the email exchange between the Claimant's common-law spouse and the Beer Store shows that he set up his own account with the Beer Store in May 2019. There is no persuasive evidence that the Claimant had any dealings with the Beer Store in relation to her common-law spouse's account.

Not misconduct under the Act.

[41] Since the Commission has not proven that it is more likely than not that the Claimant did the conduct that led to her dismissal, it has not proven that she lost her job by misconduct.

CONCLUSION

¹⁴ See the email at page GD7-4 where C. P. said the notice did not require a real signature.

¹⁵ See page GD3-86.

[42] The appeal is allowed. This means that the Claimant is not disqualified from being paid benefits.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section

HEARD ON:	May 6, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. N., Appellant