



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *X v Canada Employment Insurance Commission and MM*, 2020 SST 1108

Tribunal File Number: GE-20-1645

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: Gary Conrad

DATE OF DECISION: August 25, 2020

DECISION

[1] The employer has proven the Claimant lost her job because of misconduct. This means the Claimant is disqualified from being paid benefits.¹

OVERVIEW

[2] The Claimant separated from her employment in August 2019 and subsequently applied for Employment Insurance (EI) sickness benefits.

[3] The Commission approved the Claimant's request for sickness benefits but informed her that after sickness benefits were paid out, they could not pay her regular EI benefits as they had determined she lost her employment as a result of her own misconduct.

[4] The Claimant requested the Commission reconsider their decision, arguing she had not lost her employment due to misconduct, but instead her termination was retaliation for complaints she had raised.

[5] After reviewing their initial decision the Commission decided in the Claimant's favour, finding that the reasons she had lost her employment did not amount to misconduct.

[6] The Claimant's employer appealed this decision to the General Division of the Social Security Tribunal (Tribunal).

[7] The General Division of the Tribunal dismissed the appeal of the employer, determining the Claimant did not lose her employment due to misconduct.

[8] The employer appealed the decision of the General Division to the Appeal Division of the Tribunal, where they were successful.

[9] The Appeal Division remitted the issue back to the General Division for redetermination due to gaps in the evidentiary record and the parties possibly not having the chance to elicit evidence that may have been relevant.

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

[10] In redetermining the issue the General Division requested additional submissions. The employer's submissions were received on August 11, 2020. The Commission had no additional submissions and the Claimant's submissions were received on August 11, 2020, as well.

[11] In making my decision I have considered all the information that was in the appeal file before the General Division in the original hearing, the recording of the original hearing and the information received from both the employer and Claimant on August 11, 2020.

ISSUES

[12] I must decide:

1. Why did the Claimant lose her job?
2. Is the reason for the Claimant's dismissal misconduct under the law?

ANALYSIS

1. Why did the Claimant lose her job?

[13] I find the Claimant lost her job due to filing a police report on August 30, 2019, which the employer believed contained false and defamatory accusations thereby creating a situation where the trust between employer and employee was broken.

[14] In their submissions of August 11, 2020, the employer states the Claimant was fired for the cumulative reasons set forth in the termination letter dated September 3, 2019, but summarized the reasons as follows²:

- Dishonesty and failure to be forthright in two internal investigations;
- Filing a harassment complaint with X against her manager that was found to be baseless;
- Time theft where the Claimant was fraudulently recording hours and being paid for those hours which she had not worked;

² RGD3-3

- A failure to complete job inspection logs which was an essential element of her job;
- Aggressive, angry and insubordinate behavior towards her manager;
- Asserting a sudden need for a three week medical leave under suspicious circumstances;
and
- Calling the police on August 30, 2019, and reporting false and defamatory information to them regarding her supervisor.

[15] The employer states that in essence, by September 3, 2019, they had an employee who had been dishonest with them in two investigations; made a meritless complaint against her supervisor to a regulatory body; stolen time and money from them by billing for work she did not do; failed to complete an essential element of her job; acted insubordinately with her supervisor; and then made false and defamatory statements about her supervisor to the police³.

[16] In the September 3, 2019, termination letter the employer states that over the past few months the Claimant's actions had demonstrated an increasingly antagonistic and untrustworthy pattern of behavior, putting her own interest before the employer's.

[17] The termination letter states there was no longer any trust left between the employer and the Claimant and so her working relationship with the employer was no longer viable.

[18] The termination letter reiterates from primary concerns of the employer. Those concerns are:

- The Claimant not being entirely truthful during an investigation into sexual harassment in the workplace;
- Complaining to X about the way her manager conducted the investigation into the workplace harassment, a complaint which was dismissed by X;

³ RGD3-4

- Concerns about time theft, not being at work for the time the Claimant booked hours, as demonstrated by vehicle GPS;
- Having sparse and poorly detailed inspections logs, that, coupled with reports of the Claimant being rarely seen on sites, suggest the Claimant was not carrying out the basic duties of her position;
- Threatening to take time off to meet with X and then sending in a general medical note saying the Claimant may need three weeks off work, which the employer was concerned about; and
- Filing a police report against her supervisor.

[19] The termination letter states the Claimant has demonstrated she has not been a trustworthy employee and she is increasingly acting against the employer's best interests, noting particularly the allegations against her supervisor, which the employer states is filled with false allegations.

[20] In the recording of the initial hearing before the General Division the employer's representative stated multiple times it was cumulative reasons that resulted in the Claimant being dismissed, not one single issue that led to the dismissal⁴.

[21] The Claimant states she feels her employer fired her as a way to prevent a claim for short-term disability through extended benefits and as retribution for ongoing investigations⁵.

[22] The Claimant states in her request for reconsideration her dismissal was fabricated as retribution for raising safety concerns and reporting sexual assault⁶.

[23] The Claimant states that after her report of sexual assault and subsequent bullying and harassment by the person that committed the sexual assault, the employer's attitude toward her changed and she knew they were preparing to terminate her employment⁷.

⁴ 15:54, 16:33, 30:15 and 31:15 of the recording of the initial General Division hearing.

⁵ GD3-21

⁶ GD3-36

⁷ GD3-39

[24] The Claimant states the 17.5 hours her employer is claiming she booked that she did not work was merely an excuse for her termination and was not the real reason⁸.

[25] I find the Claimant was fired due to filing the police report on August 30, 2019, which the employer believed contained false and defamatory accusations thereby creating a situation where the trust between employer and employee was broken.

[26] I understand the employer's arguments the Claimant was terminated for cumulative reasons, but I find the evidence supports otherwise.

[27] At the initial hearing of the General Division the employer's representative stated the employer thought the employment relationship with the Claimant may have been salvageable up to the point where she filed the police report as it was then the employer determined the relationship was irreparably broken⁹. I find this supports it was the filing of the police report that led to the Claimant's dismissal, as, up to that point, her employer was still willing to employ her and work with her.

[28] Further, the employer told the Commission the Claimant made false accusations in her police report of August 30, 2019, and they no longer wanted to continue her employment, therefore, they dismissed her. They were still investigating and no decision was made in regards to if the Claimant was using the company vehicle for personal use and stealing time from the company¹⁰. The employer told the Commission they were thinking about giving the Claimant warnings in regards to misuse of the company vehicle and company time, but after the police incident they decided to end her employment¹¹. I find this further demonstrates that it was the filing of the police report that resulted in the Claimant's termination.

[29] I find the email the employer sent to the Claimant which, she says she received on the morning of August 30, 2019¹², further supports it was the filing of the police report which led to the Claimant being fired.

⁸ GD3-40

⁹ 15:54 of the recording of the initial General Division hearing.

¹⁰ GD3-63

¹¹ GD3-63

¹² GD3-23

[30] I find the email indicates the Claimant's employer is hoping to speak with her to clear up issues regarding the 17 hours of pay they withheld. I find this demonstrates that, although they had concerns, they were still, before becoming aware of the police report filed by the Claimant, willing to work with her on resolving those concerns.

[31] I find, at the time the Claimant was dismissed, if she had not filed the police report, she would not have been fired. While the results of the investigation into time theft and misuse of the company vehicle may have resulted in the Claimant's loss of employment at a later date, that is purely speculative as no determination on those issues had been made at the time the Claimant was dismissed. It was the act of filing the police report, which resulted in her dismissal.

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

[32] Having determined the Claimant was fired from her employment for filing a police report I now have to decide whether doing so is misconduct under the law. I find the Claimant's action of filing the police report is misconduct under the law.

[33] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.¹³ Misconduct also includes conduct that is so reckless that it approaches willfulness.¹⁴ The Claimant does not have to have a wrongful intent for her behavior to be misconduct under the law.¹⁵

[34] There is misconduct if the Claimant knew or ought to have known 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.¹⁶

[35] As it is an employer appeal it is the employer that has to prove it is more likely than not¹⁷ the Claimant lost her job because of misconduct.¹⁸

¹³ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁵ *Attorney General of Canada v Secours*, A-352-94.

¹⁶ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ The employer has to prove this on a balance of probabilities which means it is more likely than not.

¹⁸ *The Minister of Employment and Immigration v Bartone*, A-369-88.

[36] The Commission submits the Claimant's conduct does not constitute misconduct.

[37] The Commission submits the employer states the Claimant made false accusations against them and contacted the police department and at that time they decided they no longer wanted to work with the Claimant and terminated her employment. The Commission submits it is not clear why the Claimant would chose to continue working for an employer if the stalking allegations are true but the Claimant did not leave, she was fired.

[38] The employer submits the Claimant's conduct, considered cumulatively, indicates that the Claimant engaged in a variety of wilful and/or reckless conduct that she knew or ought to have known would impair the performance of her duties owed to her employer and that she could be dismissed for it¹⁹. Because I have determined that it was the act of filing the police report that actually led to the Claimant's dismissal, I will address the employer's submissions in relation to that act.

[39] The employer submits the Claimant's call to the police on August 30, 2019, where she reported to the police many false and defamatory statements, was wilful. It was also, or in the alternative, made recklessly and without care for her employer's interests and the Claimant knew or ought to have known that would impair the performance of her duties owed to the employer and that she could be dismissed for it²⁰.

[40] I find the Claimant's actions amount to misconduct under the law.

[41] I find the Claimant was aware her employer had concerns about her behavior during the first investigation into sexual harassment and bullying as noted in the May 15, 2019, warning letter to the Claimant²¹.

[42] I further find the Claimant was aware her employer had concerns about her work, the way she was booking time and her whereabouts during working hours, and her inspection reports, as shown in the August 28, 2019, email to her from her employer²² and her own words to the

¹⁹ RGD3-7

²⁰ RGD3-7

²¹ GD2-8

²² GD3-61

Commission that her employer was questioning 17.25 hours²³. The Claimant also states she was aware her employer was withholding pay as they were questioning her hours²⁴.

[43] I find, that while aware her employer was investigating concerns they had with her work related to her hours, her inspection reports, and her use of the company vehicle, filing a police report, with unfounded allegations, against her manager, the one doing the investigation, was behavior so reckless as to constitute willfulness.

[44] I find the Claimant ought to have known, that while her working relationship with her employer was under stress and her behavior was under investigation, as evidenced by her employer withholding pay, that filing a police report making unfounded allegations against her manager, the one conducting the investigation, would significantly impair the employer/employee relationship to the point that such an action would result in her termination.

[45] I note the Claimant has argued that her filing of the police report was not malicious, as she did it to protect herself and her child²⁵, but respectfully, I disagree with her submission.

[46] The Claimant has made extraordinary claims against her employer, saying to the Commission that he threatened her and her child²⁶, although she did argue in the recording of the initial hearing of the General Division that her supervisor did not threaten her²⁷; telling the Commission her employer had been watching her and her child and following her child's social media²⁸, that her employer was stalking and harassing her²⁹.

[47] The Claimant told the same to the police, saying her employer had threatened her; was following her and following her and her child to their residence and to her child's daycare; had sent someone to follow her to her residence and was generally stalking and harassing her³⁰.

²³ GD3-65

²⁴ GD3-22

²⁵ 1:35:54 of the recording of the initial hearing before the General Division.

²⁶ GD3-65

²⁷ 1:27:30 of the recording of the initial hearing before the General Division.

²⁸ GD3-40

²⁹ GD3-27

³⁰ RGD3-16

[48] The employer disputes all of the Claimant's statements to the police saying they never followed her outside of work at any time, nor did they have someone do it for them³¹ and they never issued any threats against her or her child³².

[49] I find the Claimant has failed to present sufficient evidence to support her claims against her employer that she made to the police. Her claims against her employer are further called into question in light of her informing the Commission her employer threatened the life of her and her child and then changing her mind and saying such a thing ever happened at the initial hearing of the General Division. I find that with something so serious as a threat to the life of herself and her child, there would be no doubts about whether such a thing happened or not.

[50] I further find the evidence of emails the employer sent to the Claimant, continue to show a willingness to work with her on trying to resolve the concerns they had about her employment³³, and do not support a situation where her employer was out to get her and she had to file a police report to protect herself and her child.

[51] While the Claimant did submit multiple reports she filed with X and her doctor discussing the negative impact her work and the investigations at work were having with her mental health, along with claims of her employer harassing her and concerns for her safety³⁴, I find these reports, in and of themselves, do not demonstrate the allegations against her employer. The forms simply record what the Claimant told her doctor or X. While she may have been stressed at work due to the investigations, I find this does not mean that she had a genuine concern for her safety such that filing the police report was something she had to do.

[52] I further find the Claimant's employer using GPS to track the company car does not support the Claimant's statements her employer was stalking and harassing her. The Claimant stated she was aware the company vehicles had GPS in them before she expressed any concerns about stalking or harassing, although she thought most were disabled³⁵.

³¹ 1:26:29 of the recording of the initial hearing before the General Division.

³² 1:27:30 of the recording of the initial hearing before the General Division

³³ GD3-23

³⁴ RGD4

³⁵ 1:04:25 of the recording of the initial hearing before the General Division.

[53] Regardless of her thoughts on the fact the GPS may have been disabled or removed, she was not exactly sure of the status of it in the vehicle she was using. Yet, despite being aware that it was possible for her employer to track the location of her work vehicle during her working days, she did not express any concern that it constituted stalking or harassing at any point until the employer started discussing concerns with her regarding whether she was actually at work during work hours due to information they saw in the GPS tracking.

[54] Therefore, I find it cannot be said that it was a sudden revelation to the Claimant at the end of August 2019 her employer was using GPS to monitor her work vehicle throughout the day, as she was already aware it was possible her employer could track her prior to that date as noted above, that would prompt her to believe she was being stalked and harassed and would need to file a police report.

[55] I find the Claimant's argument her filing of the police report was not malicious but she did it as she needed to protect her self and her child is further called in question by the Cease and Desist letter dated October 3, 2019³⁶.

[56] The Cease and Desist letter, dated October 3, 2019, states the Claimant returned to her employer's premise on October 1, 2019, and made multiple statements, which the letter claims are false and defamatory regarding her supervisor to other employees. Statements that she had to buy a new vehicle to prevent her supervisor from stalking her and her child; that her supervisor hired someone to sit in front of her house and her child's school; the reason her employment ended was due to her supervisor stalking her and she had gotten a restraining order against her supervisor. The letter advised her to not return to her employer's premises and cease repeating the defamatory comments listed above³⁷.

[57] I find, the employer having asked their lawyer to draft this Cease and Desist letter, supports the allegations listed therein of the Claimant returning to the employer's premises and speaking to other employees about her supervisor stalking and harassing her. If no such things were happening there would be no need for such a letter.

³⁶ GD8-3

³⁷ GD8-3 to GD8-4

[58] Further, I find the Claimant's actions outlined in the Cease and Desist letter call into question her concern for the lives of herself and her child. I find, returning to a location where there was a very strong chance of encountering the person the Claimant felt was such a threat that it was necessary to file a police report for the safety of herself and her child, undermines her argument she felt this person was a threat. I find the Claimant could not have been genuinely concerned for her safety if she went to the employer's workplace after being fired where she would encounter her supervisor whom she claimed was threatening, stalking and harassing her.

[59] I further find the Claimant was aware her employer had concerns with her work, such as, but not limited too, the issue of whether she was working all the hours she booked, as she was informed as such by them. She ought to have known³⁸ that instead of fully co-operating in the investigation, with the concerns her employer already had about her work, by filing a police report against her supervisor, with very serious, but unsupported allegations and insufficient evidence to support she was required to file a police report for her safety, that her conduct could impair the performance of duties owed to her employer and as such, dismissal was a real possibility³⁹.

CONCLUSION

[60] The appeal is allowed, the employer has proven the Claimant lost her job because of misconduct. This means the Claimant is disqualified from being paid EI benefits because she lost her employment because of her misconduct.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	N/A
METHOD OF PROCEEDING:	Submissions
APPEARANCES:	N/A

³⁸ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36