



Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1300

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: A. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (515903) dated August 22, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: October 20, 2022

Hearing participant: Appellant

Decision date: October 20, 2022

File number: GE-22-2833

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was employed casually at a Shoppers Drug Mart store. The employer cut off her employee discount and removed her from the company roster. The Claimant's employer said that she was let go because she violated its social media policy by making a disparaging post about the company.

[4] Even though the Claimant doesn't dispute that this happened, she says that it isn't the real reason why the employer let her go. The Claimant says that she was friends with the manager. They had recently had a dispute and she says the manager let her go because of his personal feelings towards her.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matters I have to consider first

The Claimant has multiple appeals

[6] The Claimant has three separate appeal files. I chose to hear all of her appeals in the same hearing in the interest of proceeding as informally and quickly as circumstances, natural justice, and fairness permit.

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

[7] However, I did not join the appeals. I am only able to join appeals if a common question of law or fact arises in the appeals and no injustice is likely to be caused to any party.² In this case, the appeals do not share a common question of law or fact. As such, I will issue separate decisions.

The employer is not a party to this appeal

[8] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

[9] Did the Claimant lose her job because of misconduct?

Analysis

[10] The law says that claimants who lose their job because of misconduct are disqualified from receiving benefits.³

[11] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[12] I find the Claimant lost her job because she made a social media post that referenced Shoppers Drug Mart in a negative way.

² See section 13 of the *Social Security Tribunal Regulations*.

³ See section 30 of the Act.

[13] The Claimant and the Commission don't agree on why the Claimant lost her job.

[14] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant was dismissed for making a social media post that violated the company's social media policy.

[15] The Claimant disagrees. She says the real reason she lost her job is because the manager was upset at her for personal reasons. After he found out about the social media post, he used that as an excuse to let her go.

[16] The Claimant worked in a casual position at Shoppers Drug Mart. She explained that she was friends with the manager and had accepted the position so she could help him out when he needed added staff.

[17] On March 25, 2020, the Claimant made a post on her social media about COVID-19 pandemic restrictions.⁴ The post was critical about a Shoppers Drug Mart store's choice to consider cosmetic advisors as essential workers. She said that this put underpaid workers at additional risk simply to make more money.

[18] In the comments section of the post, she responded to someone else's comment by saying that she knew Shoppers Drug Mart didn't care about their workers and their choice to have cosmetic advisors as essential workers reinforced that opinion. She then praised one of the chain's stores for choosing to close the entrance to the cosmetics section and not have employees stationed in that section.

[19] On March 30, 2020, the Claimant discovered that her employee discount was no longer active.⁵ She contacted her manager, who responded by saying the Claimant was self-centered and self-absorbed, which is shown in her social media posts. The Claimant asked why the manager made the decision to cut off her employee discount. The manager asked why she thought it was him and said that she should understand that it's because she posted whatever she wanted about the company.⁶ Then asks why

⁴ See GD3-48 to GD3-52.

⁵ See GD3-53 to GD3-72.

⁶ See GD3-59.

she is giving him grief about her discount when she hasn't worked a shift in over four months.

[20] The manager then says the Claimant made "nasty comments" about the company, "thus bringing [his] having [her] on post into question."⁷ The Claimant responds by acknowledging that the manager is upset about her social media post, and questioning why he didn't speak to her about it before she found out she was let go when she tried to use her employee discount at a store. The manager doesn't confirm that's the reason for her dismissal, but indicates that he that the Claimant should have considered her own responsibility in causing the loss of her employee discount rather than blaming him.

[21] It is clear from the text messages that there was hostility of a personal nature between the Claimant and her manager. The manager made several derogatory remarks about the Claimant's character. The Claimant explained that her post wasn't about the store she worked at, it was in response to an article about a Shoppers Drug Mart store in Vancouver. She called his reaction to her social media post "extreme" and asked him to explain why he was reacting this way and why her employee discount was removed. The manager doesn't give a clear answer, instead speaking in vague terms about how the Claimant is responsible for no longer having a discount to a store that she badmouthed.⁸

[22] The Commission spoke to several representatives of the employer.

[23] The owner of the pharmacy said the Claimant was employed as a casual relief employee, but was not available for an extended period because she was out of the country. Then, the Claimant "went on a rant" on social media about the company, which led them to dismiss her.⁹

⁷ See GD3-60.

⁸ See GD3-69.

⁹⁹ See GD3-18.

[24] The manager said that it was job abandonment because the Claimant went on an extended trip out of the country then wasn't available for shifts when she returned. He said "badmouthing" the pharmacy on social media was "the final straw."¹⁰

[25] The store administrator said that the Claimant was removed from the store's payroll system on March 26, 2020. Her employee discount would have been deactivated automatically when that happened.¹¹

[26] The evidence indicates that the Claimant was dismissed because she made a social media post that referenced Shoppers Drug Mart in a negative way. This is supported by the employer's statements to the Commission, as well as the timing of the Claimant's removal from the payroll system one day after she made the post.

[27] I do not doubt the Claimant's statements that the manager was upset with her personally, and that his personal feelings on this matter may have swayed the employer's decision to terminate her. However, I find the Claimant's social media post was the conduct which led to her dismissal. The evidence overwhelmingly points to this fact.

Is the reason for her dismissal misconduct under the law?

[28] No. The reason for the Claimant's dismissal isn't misconduct under the law.

[29] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹² Misconduct also includes conduct that is so reckless that it is almost wilful.¹³ The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.¹⁴

¹⁰ See GD3-21.

¹¹ See GD3-42.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

[30] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.¹⁵

[31] The Commission has to prove that the Claimant was dismissed her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was dismissed because of misconduct.¹⁶

[32] The Commission says that there was misconduct because the Claimant's disparaging comments about Shoppers Drug Mart violated the company's social media policy. As a result, she should have been aware that her post could result in the termination of her employment.¹⁷

[33] The Claimant says that there was no misconduct because her social media post didn't violate the employer's policy and she didn't think that it would affect her employment.

[34] The employer provided a copy of the social media policy.¹⁸ It states that employees who reference the company's name in personal use must make it clear that they are speaking for themselves and not on behalf of the business. The policy is signed by the Claimant and dated April 25, 2018.

[35] I find that the Commission hasn't proven there was misconduct because the evidence doesn't support that the Claimant's conduct violated the employer's social media policy.

[36] The Claimant testified that she understood the policy to mean that employees could not speak on behalf of Shoppers Drug Mart on their personal social media pages. I agree with her interpretation.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ See GD4-5.

¹⁸ See GD3-26 to GD3-27.

[37] The employer's policy doesn't state that employees are restricted from posting negative comments about the company on their personal social media pages. Rather, the policy sets limits on posts that make it appear the employee is speaking on behalf of the company. It directs employees to state clearly that they are not an authorized representative of Shoppers Drug Mart when posting on social media sites. It gives several examples of disclaimers the employee can use to make it clear that they are not representing Shoppers Drug Mart with their posts.

[38] It is my view that the employer's social media policy is concerned with employees posting information online that may be mistaken for official or authorized information when it is not. I see no evidence to support that the social media policy restricted the Claimant's ability to post personal opinions of the employer or its parent company.

[39] There's no dispute that the Claimant's post about Shoppers Drug Mart used disparaging language towards the company. But, these posts were clearly stated as her personal opinion.

[40] For example, the Claimant said, in part, that "Shoppers Drug Mart seems to think it's an essential to have Cosmetic Advisors there for you. What they really mean is direct our shitty customers to the milk" and "I've always know (*sic*) [Shoppers Drug Mart] didn't give a shit about their workers." These statements would be plainly understood to be the Claimant's personal view of the company and its actions. It is unmistakable that these statements were not made on behalf of the employer or Shoppers Drug Mart as a whole.

[41] Based on the evidence before me, I find the Claimant did not violate the employer's social media policy. So, the Commission has not proven that the Claimant lost her job because of her own misconduct.

So, was the Claimant dismissed because of misconduct?

[42] Based on my findings above, I find that the Claimant wasn't dismissed because of misconduct.

Conclusion

[43] The Commission hasn't proven that the Claimant was dismissed from her job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[44] This means that the appeal is allowed.

Catherine Shaw
Member, General Division – Employment Insurance Section