

[TRANSLATION]

Citation: *P. C. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 82

Appeal #: GE-14-971

BETWEEN:

**P. C.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance**

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SOCIAL SECURITY TRIBUNAL MEMBER: Jean-Philippe Payment

HEARING DATE: May 12, 2014

TYPE OF HEARING: In person

DECISION: Appeal is dismissed

## **PERSONS IN ATTENDANCE**

The Claimant attended the hearing and was accompanied by his legal representative.

## **DECISION**

[1] The Tribunal dismisses the Claimant's appeal and finds that the Claimant must be disqualified from receiving Employment Insurance benefits since he lost his employment because of his own misconduct.

## **INTRODUCTION**

[2] On November 8, 2013, the Claimant filed a claim for regular Employment Insurance benefits (Exhibit GD3-15). On December 27, 2013, the Canada Employment Insurance Commission (the Commission) reviewed the Claimant's claim and concluded that he had ceased working for the employer because of his alleged misconduct (Exhibit GD3-22). The Claimant filed a request for reconsideration of the Commission's initial decision of December 27, 2013 (Exhibit GD3-24), and on February 19, 2014, the Commission upheld its initial decision in its entirety. The Claimant therefore appealed the Commission's reconsideration decision to this Tribunal (Exhibits GD2).

## **TYPE OF HEARING**

[3] The hearing was held for the reasons set out in the notice of hearing (Exhibit GD1-1).

## **ISSUE**

[4] The Tribunal must determine whether the Claimant lost his employment because of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (the Act).

## **APPLICABLE LAW**

[5] Paragraphs 29(a) and (b) of the Act state that, for the purposes of sections 30 to 33, "employment" (a) refers to any employment of the claimant within their qualifying period or their benefit period; and that loss of employment (b) includes a suspension from

employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers.

[6] Under subsection 30(1) of the Act, a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[7] Under subsection 30(2) of the Act, subject to subsections (3) to (5), the weeks of disqualification are to be served during the weeks following the waiting period for which benefits would otherwise be payable if the disqualification had not been imposed and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[8] In *Canada (Attorney General) v. Larivée* (2007 FCA 312), the Federal Court of Appeal (the Court) established that the determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts.

[9] In *Canada (Attorney General) v. Tucker* (A-381-85), the Court specified what constitutes misconduct, which the Act fails to do. The Court established that "... in order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."

[10] In *Canada (Attorney General) v. Hastings* (2007 FCA 372), the Court qualified and refined the concept of misconduct. The Court established that there is misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal

were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[11] In *McKay-Eden v. Canada (Attorney General)* (A-402-96), the Court supported consistent case law by examining mainly the aspect of wilful or reckless conduct.

[12] In *Canada (Attorney General) v. McNamara* (2007 FCA 107), the Court stated that the relationship between employment and misconduct is not one of timing, but one of causation.

[13] In *Canada (Attorney General) v. Cartier* (2001 CAF 274) and *Smith v. Canada (Attorney General)* (A-875-96), among other decisions, the Court stated that there must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment.

[14] In *Auclair v. Canada (Attorney General)* (2007 FCA 19), the Court stated that it is not for the Board of Referees to consider whether dismissal was the appropriate disciplinary action in view of the alleged misconduct.

[15] In *Fleming v. Canada (Attorney General)* (2006 FCA 16), the Court stated that it is not up to the Tribunal to determine whether the employer was guilty of misconduct by dismissing the applicant such that this would constitute unjust dismissal, but whether the applicant was guilty of misconduct and whether this misconduct resulted in his losing his employment.

## **EVIDENCE**

[16] The evidence in the file is as follows:

- a) an initial claim for regular benefits dated November 8, 2013 (Exhibit GD3-15);

- b) a Record of Employment with Code M for dismissal, dated December 4, 2013 (Exhibit GD3-17);
- c) a video showing the Claimant with rolls of toilet paper in his hands during the incident raised by the employer (Exhibit GD3-18);
- d) the company's floor plan (Exhibit GD7-2);
- e) a copy of the complaint filed with Quebec's Commission des normes du travail [labour standards board] (Exhibits GD3-27 and 28);
- f) two videos in which we see or hear the Claimant (exhibits not numbered but filed by the employer with the GD8 exhibits);
- g) time cards of five employees from the time of the events (Exhibits GD3-37 to 42 and GD8-7 to 11);
- h) a sworn affidavit with statements by M. R., pay clerk (Exhibit GD7-1 and GD8-3);
- i) a sworn affidavit with statements by H. E., accounting technician (Exhibit GD8-4);
- j) a sworn affidavit with statements by E. C, director (Exhibit GD8-5);
- k) a sworn affidavit with statements by C. B., pay clerk (Exhibit GD8-6);
- l) screen shots from the videos showing the Claimant (Exhibit GD3-13 and 14).

## **SUBMISSIONS OF THE PARTIES**

[17] The Claimant pointed out that:

- a) he borrowed some toilet paper once on October 31 (Exhibit GD3-29);
- b) when the men's washroom is occupied he uses management's washroom (Exhibit GD3-29);

- c) for the entire day in question, he had problems with hemorrhoids and stained his pants (Exhibit GD3-29 and Hearing);
- d) on the day in question, he borrowed toilet paper, but he went to get some in the evening, planning to bring it in to the office, but he forgot it at home the following day (Exhibit GD3-29);
- e) he believes that the owner was trying to get him fired due to budget constraints (Exhibit GD3-29);
- f) he went to the hall closet to get four rolls of toilet paper because there was none left in the washroom right next to his office (Exhibit GD3-30);
- g) he meant only to borrow the rolls of toilet paper and not to steal them (Exhibit GD3-30);
- h) if he had known that he could be fired for such a trivial act, he would never have borrowed the roll (Exhibit GD3-30);
- i) the employer must have pressured the other employees to say that he had taken the rolls of toilet paper (Exhibit GD3-43);
- j) he did not cross paths with the director as she seems to state (Hearing);
- k) he left the office at around 4:44 p.m. (Hearing);
- l) he brought his own pencils to the office (Hearing);
- m) he was accused of stealing \$900 (Hearing);
- n) he was not told about [translation] “the event of 10 days earlier” (Hearing);
- o) the video shows only that he has four rolls of toilet paper under his desk (Hearing);
- p) at the time in question, he was called to his office to swear in clients for their guaranteed income supplement (Hearing);

- q) before physically leaving the office, the Claimant used the executive washroom close to the punch-out clock (Hearing);
- r) there was a quarrel between the two associates regarding the sale of part of the company (Hearing);
- s) the employer was looking for an opportunity to get rid of him (Hearing).

[18] The employer pointed out that:

- a) the video clearly shows the Claimant with rolls of toilet paper in his hands, putting them in his briefcase (Exhibit GD3-32);
- b) the Claimant was dismissed for theft, with supporting evidence (Exhibit GD3-32);
- c) on the evening the Claimant took the rolls of toilet paper, a director was on site (Exhibit GD3-33);
- d) if necessary, the Claimant could have asked a director for permission to borrow a roll of toilet paper (Exhibit GD3-33);
- e) at the time of the incident, the director was preparing to leave work but she was delayed and the Claimant perhaps believed that the director was not there (Exhibit GD3-34).

[19] The respondent pointed out that:

- a) the case law shows that there are numerous acts and omissions that can be labeled misconduct, in the sense that they are incompatible with the objectives of an employment contract and present a conflict of interest with the employer's activities, or have a negative effect on the relationship of trust between the parties (Exhibit GD4-5);
- b) although the Claimant says that he never stole rolls of toilet paper belonging to the employer, but rather borrowed a single roll with the intention of replacing it, the

employer has clearly shown that the Claimant's conduct was wilful, in the sense that the action leading to his dismissal was conscious, deliberate and intentional (Exhibit GD4-6);

- c) although the Claimant says that he was unable to obtain permission from one of the five directors because none was on site at the time, the employer has shown with the timecards of the employees involved that the Claimant's director left the workplace after he did (Exhibit GD4-6);
- d) the Claimant could have at least sent an email to his director to tell her that he had borrowed some toilet paper; that he was responsible for the breakdown of the relationship of trust between him and his employer (Exhibit GD4-6);
- e) the Claimant could reasonably see that this conduct would result in his dismissal (Exhibit GD4-6);
- f) in this case, the Claimant stole merchandise from his employer, a gesture that constitutes misconduct and disqualifies him from receiving benefits (Exhibit GD4-7).

## **ANALYSIS**

[20] Under subsection 30(1) of the Act, a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct, and under subsection 30(2) of the Act, the weeks of disqualification are to be served during the weeks following the waiting period for which benefits would otherwise be payable if the disqualification had not been imposed. In *Larivée* (2007 FCA 132), it was established that the determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts. However, because the Act does not establish what constitutes misconduct, the decision in *Tucker* (A-381-85) took on the task of defining misconduct, instructing that the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance.



More recently, the decision in *Hastings* (2007 FCA 372) adds that there is misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[21] Moreover, *Auclair* (2007 FCA 190) and *Fleming* (2006 FCA 16) indicate that it is not for the Tribunal to consider whether dismissal was the appropriate disciplinary action in view of the alleged misconduct or to determine whether the employer was guilty of misconduct by dismissing the applicant such that this would constitute unjust dismissal, but whether the applicant was guilty of misconduct and whether this misconduct resulted in his losing his employment.

[22] In its arguments, the Commission indicated that the case law shows that there are numerous acts and omissions that can be labeled misconduct, in the sense that they are incompatible with the objectives of an employment contract, present a conflict of interest with the employer's activities, or have a negative effect on the relationship of trust between the parties. Further, the Commission indicated that although the Claimant says that he never stole rolls of toilet paper belonging to the employer, but rather borrowed a single roll with the intention of replacing it, the employer has clearly shown that the Claimant's conduct was wilful, in the sense that the action leading to his dismissal was conscious, deliberate and intentional. The Commission added that the Claimant says that he was unable to obtain permission from one of the five directors because none was on site at the time, that the employer has the timecards to prove the opposite of what the Claimant says, and that the Claimant could have at least sent an email to his director to tell her that he had borrowed some toilet paper. According to the Commission, the Claimant could reasonably see that this conduct would result in his dismissal because the Claimant stole merchandise from his employer, a gesture that constitutes misconduct and disqualifies him from receiving benefits.

[23] For its part, the employer indicated that the video clearly shows the Claimant with rolls of toilet paper in his hands, putting them in his briefcase. The employer added that the Claimant was dismissed for theft, with supporting evidence, and that, if necessary, the Claimant could have asked a director for permission to borrow a roll of toilet paper. The employer added that, at the time of the incident, a director was preparing to leave work but that she was delayed and the Claimant perhaps believed that the director was not there. In support of its arguments, the employer filed a series of documents and two videos.

[24] As for the Claimant, he argued that he borrowed some toilet paper once on October 31 because, for the entire day in question, he had problems with hemorrhoids. After work hours, he therefore went to get some toilet paper at the drug store, planning to bring it in to the office, but he forgot it at home the following morning. The Claimant explained that he believes that, because of budget constraints, the employer found a way to fire him. More specifically regarding the events of the day in question, the Claimant said that he went to the hall closet to get four rolls of toilet paper because there was no more left in the washroom right next to his office. The Claimant indicated that, at the time in question, he was called to his office to swear in clients for their guaranteed income supplement. He also stated that he did not cross paths with the director, that he went to the washroom next to the punch-out clock before leaving, and that he left the office at 4:44 p.m. The Claimant indicated that, on the day he was dismissed, he was told about an incident that had taken place 10 days earlier and about \$900 that had allegedly gone missing from a file, and was told that he was being dismissed only for borrowing toilet paper. The Claimant also explained to the Tribunal that his relationship with the associate remaining in the company was not very good and that, on a number of occasions, he had argued with him.

[25] As mentioned by the employer and the Claimant at the hearing and in their various conversations with the Commission, the Claimant was dismissed for the alleged theft of one or more rolls of toilet paper on October 31, 2013. It is therefore within that framework that the Tribunal must determine whether or not the Claimant's actions constituted misconduct. Therefore, the allegations contained in the affidavits or in the various arguments filed in this case that are not directly linked to the allegations surrounding the events of October 31,

2013, can be used only to provide context; they cannot be used as lines of evidence in the Tribunal's analysis of this case.

[26] As a result, the employer's affidavits perhaps show that the Claimant may have committed acts similar to those committed on October 31, 2013, but they were not the reasons mentioned by the employer at the time he was dismissed, according to the information before the Tribunal. However, regarding the issue of whether the Claimant's actions constitute misconduct worthy of dismissal, the Tribunal believes that yes they do, based on the grounds set out in *Larivée* (2007 FCA 312).

[27] What seems, for the employer, to have been the factor that broke the relationship of trust was the fact that he left the employer's offices with one or more roll of toilet paper without notifying management. The Tribunal is of the view that, as innocent as the Claimant's action may seem, this action was careless and negligent in the circumstances. By failing to take the initiative and notify an immediate superior of the fact that he had "borrowed" a roll of toilet paper, the Claimant wilfully disregarded the effects his actions would have on his job performance, as set out in *Tucker* (A-381-85).

[28] Because of the tensions that existed between the Claimant and the employer which the Claimant himself explained, the unusual task assignments among his colleagues which he had noticed, the Claimant should have known that his actions might have been closely scrutinized. Even if the Claimant points to the fact that the employer was looking for ways to fire him, the Tribunal cannot depart from the authority of *Fleming* (2006 FCA 16), in which the Court instructs that the overzealousness shown or the determination to watch out for an employee's shortcomings does not do away with their existence. The Claimant, in fact, indicated that he indeed took home a roll of toilet paper belonging to his employer. The Claimant perhaps intended to replace what he had borrowed from his employer, but, as it happened, he did not do so at the earliest opportunity.

[29] It is true that the employer's videos in no way prove that the Claimant left with the rolls of toilet paper, but only that he placed them under his desk. However, the Claimant was very clear when he said that he had still taken a roll of toilet paper home for his personal use without notifying management.

[30] Unfortunately for the Claimant, the fact that he took a single roll of toilet paper from the employer is the operative cause of his dismissal.

## **CONCLUSION**

[31] The appeal is dismissed.

Jean-Philippe Payment  
Member, General Division

DATE OF REASONS: August 1, 2014.