Citation: *O. K. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 94

Appeal #: GE-13-1671

BETWEEN:

O. K.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

and

Bantam Tenthirty LLC

Employer

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	August 20, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal dismissed.

PERSONS IN ATTENDANCE

No one attended the hearing in person on August 20, 2014.

The Employer advised the Social Security Tribunal in a telephone conversation with a case management officer on August 14, 2014, that he would not be attending the hearing.

The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") was satisfied that the parties had received the Notice of Hearing (on the basis of a Canada Post signed confirmations of receipt in the file and the Employer's own advice to the case management officer) and it proceeded in absence of the parties pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* SOR/2013-60.

DECISION

[1] The Tribunal finds that the Commission has proven on a balance of probabilities that the Appellant lost his employment because of his own misconduct. The appeal is, accordingly, dismissed.

INTRODUCTION

[2] The Appellant filed an initial claim for sickness benefits on February 4, 2013 (GD3-10). His claim was established effective February 3, 2013 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on July 16, 2013, that it was unable to pay the Appellant benefits because he lost his employment as a result of his misconduct (GD3-21).

[4] The Appellant filed a request for reconsideration. On September 13, 2013, the Commission reconsidered its original decision and decided that the Appellant did not voluntarily depart from his employment without just cause (with respect to another matter). With respect to the decision regarding misconduct, however, the Commission decided to maintain its original decision (GD3-29).

[5] The Appellant filed an appeal to the Tribunal on October 15, 2013 (GD-2).

[6] On November 20, 2013, the Social Security Tribunal wrote to the Appellant and requested to be provided with a copy of the reconsideration decision of the Commission so that the appeal could proceed (GD2A-5);

[7] The Tribunal added the Employer as a party on April 25, 2014. No submissions were received from the Employer within the deadline provided by the Tribunal.

FORM OF HEARING

[8] The hearing was heard in in person for the reasons indicated in the Notice of Hearing dated July 7, 2014.

ISSUE

[9] Whether or not the Appellant lost his employment by reason of his own misconduct pursuant to subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")?

THE LAW

[10] According to subsection 30(1) of the Act, a claimant is disqualified from receiving benefits if the claimant lost any employment because of their misconduct. It provides as follows:

30. (1) 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.

[11] Subsection 30(2) provides that "the disqualification is for each week of the claimant's benefit period following the waiting period 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.

EVIDENCE

The Appellant's Evidence in the File :

[12] The Appellant filed a claim for sickness benefits on February 4, 2013. The Appellant worked at "B. Restaurant Services" (the "Employer") from October 31, 2011 to January 30, 2013 (Application for Benefits, GD3-2 to 11).

[13] The Appellant reported that he was incapable of working from January 31, 2013 to March 7, 2013. A medical certificate dated March 7, 2013 on a Commission Form shows that Dr. Daniel Solonyne of Pointe Claire whose specialty is listed as "psychiatry" advised that the Appellant was incapable of working from January 31, 2013 to April 29, 2013 (pending progress) (GD3-14).

[14] On June 7, 2013, the Appellant attempted to have his sickness benefits converted to regular benefits and he advised the Commission as follows: He was not returning to work because he was dismissed. He did not already provide the details as to why he had been dismissed from work. His sickness benefits were allowed until June 8, 2013 and he became capable of working on June 9, 2013. He is available and capable of working and doing the same type of work under the same conditions as in his previous employment. His last day worked was January 30, 2013 (GD3-15 to 17, Appellant's answers to questionnaires).

[15] Regarding his dismissal from work, he was the general manager and was responsible for making the cash report. An amount was missing in the cash report and he did not have control of this. He was given 3 warnings after the event on February 4, 2013. He did not attempt to remedy the situation because he was sick and depressed and went on sickness benefits (GD3-15 to 17, Appellant's answers to questionnaires).

[16] He was the manager and was responsible for the deposit and he was accused of stealing an amount of money. He went in regularly when the store was closed because he would forget things. On the night in question, he forgot his wallet and he went into the store when

it was closed. He did not want to go back in the morning to get his wallet because he was not scheduled to work and knew that if he went in, he would have to work. There was a police investigation and he provided the necessary information to the police. He did not take the money. There were other managers or employees who had access to the safe and the deposits and they also have the key and the access code so it could be someone else who took the money. He met with the area manager and the President. He does not remember confessing to having taken the money (July 10, 2013, Commission notes GD3-20).

[17] He went back to the restaurant around 1.00 to 1.30 because he forgot his wallet. He had used his interac card to run a test with the interac machine because it had not been working. That is why he forgot his wallet there. On the camera, he is only seen entering and exiting from the store. He did not mention his dismissal when he completed his claim for sickness benefits on February 3, 2013 because the reason for the separation at the time was his sickness benefits. He was really very sick. His employer told him about the robbery prior to the sickness but it is only in a conversation on February 4, 2013 that the Employer told him that the police would call him (Commission notes, September 5, 2013) (GD3-26).

[18] The Appellant met with the detective in August 2013 and was told that the investigation was not being continued on the basis that it was the Appellant's word against the Employer's and they could not do anything (GD3-26, Commission notes, September 5, 2013).

[19] He received a call at 7.00 am the next day. He threw some bread bags in the garbage because they were expecting a visit from the food inspector (additional evidence from the Request for Reconsideration GD3-23 and the Notice of Appeal GD2).

Complaint to the Normes du Travail:

[20] A letter to the Appellant dated July 23, 2013 from the Commission des normes du travail ("NDT"), provides that it reviewed the complaint, which he made and determined that it would be proceeding to an investigation and would contact him (GD3-25).

[21] The Appellant reported that NDT advised him that because the police cannot prove that it was him, the NDT will ask his former Employer to pay him the vacation pay, which it owes him and which it did not want to pay him (Commission notes, September 6, 2013, GD3-28).

Employer's Evidence in the File

[22] According to the record of employment from the Employer dated February 6, 2013 ("RO E") the Appellant worked from February 19, 2012 to February 3, 2013 and the reason for issuing the ROE was listed as Code "M" (GD2-24).

[23] The Appellant was dismissed because he stole around $7,000.00 from the company. He knew the safe code because he was the general manager. He broke into the store during the night to steal the money (Commission notes, February 20, 2013, GD3- 13).

[24] He broke in on January 30 or 31st around 2 to 3 am. He was caught by security cameras in the store. He was the only one in the store because the store was closed. There is still an ongoing police investigation. The Employer called the police the next day. The access code was the Appellant's and the camera showed the Appellant in the store when it was closed. There was $7,000.00 missing. At first, the Appellant denied it but when proof was presented to him, he confessed in front of the Employer that he took the money. The Employer was represented by "WS" the President of the Company and the area manager "RV". They dismissed him right away (July 19, 2013, Commission notes, GD3-19).

[25] The Employer does not know whether or not the police investigation is continuing. The Employer does not have a video of what happened inside of the restaurant that night because the thief took the recorder. The Employer got the video from the neighbourhood. It shows his car parked next to the restaurant around 2am. The Employer repeated that the Appellant confessed to the robbery in front of her, the president, and "RV" the manager (September 10, 2013, Commission notes, GD3-27).

[26] The Commission gave the following evidence: When the Appellant applied for benefits, he claimed that the reason for the separation was sickness and not misconduct. He received 15 weeks of sickness benefits.

SUBMISSIONS

[27] The Appellant submitted that he did not lose his employment by reason of his own misconduct for the following reasons:

a) The Employer has no proof that it was him who stole the money; The detective acquitted him and did not accuse/charge him with anything (GD2 and GD3-23); and,

b) There were other managers or employees who had access to the safe and the deposits and they also have the key and the access code so it could be someone else who took the money (GD3-20).

[28] The Respondent submitted that the Appellant lost his employment by reason of his own misconduct for the following reasons:

a) Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant loses his employment by reason of her own misconduct. For the conduct in question to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or so reckless as to approach willfulness (*Mishibinijima* 2007 FCA 36). There must also be a causal relationship between the misconduct and the dismissal and it must constitute a breach of an express or implied duty of the contract of employment (*Lemire* 2010 FCA 314) (GD4-3 and 4);

b) The evidence for misconduct is sufficient on a balance of probabilities. This is because, during the night in question, the Appellant went to the restaurant between 1am and 2am while it was closed. A video shows this. The Appellant does not deny this (GD4-3);

c) The access code was the Appellants. The explanation that the Appellant went back because he had forgotten his wallet is not credible. Also, that the Appellant wrote sickness when he filed his claim on February 4, 2013, suggests that the Appellant would prefer not to say exactly what happened (GD4-3);

d) The argument about the complaint with the NDT is useless because it was not a complaint regarding dismissal for good and sufficient cause (GD4-3); and,

e) The Commission does not have to investigate the allegations and prove them beyond a reasonable doubt. The withdrawal of the charge also has no bearing on the claim it only means that the Crown may not have sufficient evidence to prove the matter beyond a reasonable doubt (GD4-3).

ANALYSIS

"Misconduct" is not defined in the Act. The test for misconduct is whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his or her actions would have on job performance (*Tucker* A-381-85) or of a standard that an employer has a right to expect (*Brisette* A-1342-92, [1994] 1 FC 684 ("Brisette")). For conduct to be considered "misconduct" under the Act, it must be so willful or so reckless so as to approach willfulness. (*Mackay-Eden* A-402-96; *Tucker* A-381-85).

[29] The misconduct may manifest itself in a violation of the law, regulation or ethical rule and it should be shown that the impugned conduct constitutes a breach of an express or implied duty or condition included in the contract of employment of such scope that the employee would normally foresee that it would be likely to result in his or her dismissal (*Brisette; Nolet* A-517-91; *Langlois* A-94-95).

[30] It is also required to be established that the misconduct was the cause of the Appellant's dismissal from employment (*Cartier* A-168-00; *Namaro* A-834-82). In fact, the misconduct must be the operative cause for the dismissal and not merely an excuse to justify it (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398; *McNamara* A-239- 06, 2007 FCA 107; CUB 38905; 1997).

[31] In this regard, the Commission must prove on a balance of probabilities that the Appellant lost his or her employment due to his own misconduct (*Larivee* 2007 FCA 312, *Falardeau* A-396-85).

[32] With respect to the question as to whether or not the termination of the Appellant's employment by the employer was the appropriate sanction, the Commission, the Tribunal and the Court are not in a position to evaluate or review the severity of the sanction. Rather, the sole question with which the Tribunal must concern itself, is whether or not the impugned conduct amounts to "misconduct" within the meaning of section 30 of the Act (*Secours* A-352-94, [2002] FCJ. 711 (FED CA); *Marion* 2002 FCA 185, A-135-01; *Jolin* 2009 FCA 303; *Roberge* 2009 FCA 336; *Lemire* 2010 FCA 314).

[33] As such, the Tribunal must query whether or not it has been clearly established, on a balance of probabilities that the Appellant violated a rule or law, or a standard which was established by the employer or otherwise amounted to an express of implied condition of his employment (*Tucker* A-381-85).

[34] The Appellant was accused of theft. The Tribunal finds, that if the impugned conduct occurred, it would amount to a violation of the law and the breach of the express or implied duties of general respect, honesty and trust, which are included in the contract of employment. The Tribunal finds that the conduct and breach would be of such scope that the Appellant would normally foresee that it would likely result in her dismissal *(Brisette; Caul* 2006 FCA 251; *Nolet* A-517-91; *Langlois* A-94-95).

[35] Did the impugned conduct occur?

[36] The Tribunal finds that the Commission has proven that the theft has occurred on a balance of probabilities. As no one attended the hearing in person, the Tribunal had to make its findings of fact on the basis of the hearsay nature of the evidence in the file. Although this kind of evidence is not ideal, the Tribunal was comfortable relying entirely on the hearsay evidence because it had no other choice and because the Employer's statements to the Commission appeared to have been reliable. This is especially the case because the Employer appears to have repeated its version of the events with little or no inconsistencies over a fairly long period of time (The first interview of the Employer appears to have been in February 2013 and the last one was in September 2013 with little or no inconsistencies)

(*Morris* A-291-98, leave to appeal to S.C.C. refused [1999] S.C.C.A No. 304; *Mills* A-1873-83).

[37] On the other hand, the Tribunal found the Appellant's evidence to have been lacking in detail and information and not very credible.

[38] One of the reasons why the Appellant did not appear credible is the manner in which the Appellant appears to have filed his application for benefits and his failure to report his dismissal and the events surrounding it on his application (GD3-2 to GD3-11). While the Tribunal acknowledges that this event in no way proves that the theft occurred on a balance or probabilities or that the Appellant was not in some way wrongly accused of theft, the Tribunal is satisfied that it can draw a reasonable inference from the omissions in his disclosure, that the Appellant was a person who was strategically aware of how to navigate the employment insurance system to obtain benefits and was less concerned with appearing honest and forthright and in making full disclosure to the Commission on February 4, 2013. In this regard, the omissions in his application for benefits do affect adversely the Tribunal's appreciation of the Appellant's character, as well as his ability to operate strategically, and his credibility.

[39] The Tribunal also finds that this is not the case of an employer who is making bald allegations, which have not been proven. It would be different, for example, had the money went missing and it was only shown that the Appellant was the last person to have closed the restaurant for the evening. The facts in the file show that the thief used the Appellant's access code and that his car was recorded by a neighbourhood video camera as being at the Employer's premises on the night in question. The Appellant himself admitted that his car was parked there at the same time that the theft occurred (GD3-26, GD2, GD3-23). The Appellant's justification for his presence at the restaurant on the night in question (that he forgot his wallet) was not sufficiently believable to rebut the allegations against him without further explanation. His reason for not waiting until the next day to retrieve his wallet, (ie., that he did not want to have to come into work and attend to managerial issues when he was not scheduled to work), was also not believable and required further information.

[40] The Appellant emphasized the fact that he was not charged with anything following a police investigation in his submissions. He appears to have found such evidence entirely exculpatory for the purposes of his entitlement to benefits (GD3-23 and GD2).

[41] In reaching its conclusions, the Tribunal did not rely heavily on this fact. This is because there are many reasons why charges do not result from an investigation, including, a determination that the allegations may not be capable of being proven beyond a reasonable doubt in the criminal law context. In this regard, the Tribunal recalls that in the context of employment insurance law, misconduct only has to be established on a balance of probabilities. The burdens of proof are quite different. There is nothing to suggest for example, that the investigator would not have continued with the investigation or the laying of charges had the criminal standard of proof required something less (*Larivee* 2007 FCA 312).

[42] What is important, is that the Appellant has been accused of theft and the Tribunal has been provided with a solid and credible and reliable basis showing that the Appellant committed the theft on a balance of probabilities (*Meunier* A-130-96, 1996 Canlii 8983 FCA). The Tribunal does not find that the Appellant was able to refute the evidence despite the filing of his clear submissions to the contrary.

[43] The Tribunal finds that the foregoing conduct was misconduct because it amounted to a violation of the law and a breach of the express or implied terms of the Appellant's contract of employment (*Tucker* A-381-85; *Brisette* A-1342-92). The conduct was foreseeable because the Appellant knew or ought to have known what was expected of him in the context of his employment and this was especially the case because the conduct was illegal and amounted to a serious violation of the Employer's economic security and the standards of honesty and trust, which were expected of him (*Caul* 2006 FCA 251; *Lemire,* 2010 FCA 314; *Nolet* A-517-91; *Langlois* A-94-95). With respect to the element of causation, the Tribunal finds that there is no question that the conduct caused or contributed or ultimately lead to the dismissal and loss of employment (*Brisette; Caul* 2006 FCA 251; *Nolet* A-517-91; *Langlois* A-94-95).

CONCLUSION

[44] For the foregoing reasons, the appeal is dismissed.

Alyssa Yufe
Member, General Division

Date: August 22, 2014