Citation: *A. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 24

Appeal #: GE-14-3000

BETWEEN:

A. B.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

and

Télé-Mobilité/Tele-Mobile Company

Employer

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	February 5, 2015
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

The Appellant attended the hearing by teleconference on February 5, 2015. There was no one else in attendance.

The Tribunal checked the file and was satisfied on the basis of the Canada Post confirmations in the file that the Employer had received the Notice of Hearing.

As such, the Tribunal was satisfied that the parties received the Notices of Hearing and it proceeded in absence of the parties and pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* SOR/2013-60 (the "SST Regulations").

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 benefits on March 4, 2014 (GD3-14). His claim was established effective February 23, 2014 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on May 13, 2014, that it was unable to pay the Appellant benefits because he lost his employment as a result of his misconduct (GD3-20).

[4] The Appellant filed a request for reconsideration. On June 26, 2014, the Commission reconsidered its original decision and decided to maintain its original decision (GD3-29).

[5] The Appellant filed an appeal to the Tribunal on July 24, 2014 (GD-2) and a copy of the reconsideration decision on August 7, 2014 (GD2A).

[6] On October 16, 2014, the Tribunal added the Employer as a party to the appeal on its own initiative pursuant to section 10 (1) of the *Social Security Tribunal Regulations*

SOR/2013-60. No submissions were received from the Employer notwithstanding that it was given an opportunity to make submissions (GD7).

[7] On January 22, 2015, the hearing was adjourned on the Tribunal's initiative because the Employer did not receive the Notice of Hearing (GD1A).

FORM OF HEARING

[8] The hearing was heard by teleconference for the reasons indicated in the Notice of Hearing dated November 21, 2014 and January 22, 2015.

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

Employer 's Evidence in the File

[12] According to the record of employment from the Employer dated March 28, 2014 (the "ROE#1") the Appellant worked for "Tel" (the "Employer") from June 26, 2012 to February 26, 2014 as a "client bus analyst". The reason for issuing the ROE was listed as Code "M". The "observations/comments" box18 provides: "involuntary violation of company policy". He had also been paid $502.50 because he was no longer working (GD3-16).

[13] A second ROE, ("ROE#2") appears to have been filed at GD3-17 and is dated May 26, 2014. The "observations/comments" Box 17c has been amended to include an amount of $66.11. Box 18 provides that this is on account of commissions. The remainder of ROE2 appears to be substantially the same as ROE1 (GD3-17).

Dismissal Letter:

[14] By letter dated March 12, 2014, the Employer stated that the letter was written following the investigation over the last few weeks and the meetings on February 14 and 26, 2014. During the meetings the Employer asked the Appellant regarding credits and adjustments, which he had made to the accounts of his friends and family. The Employer presented the Appellant with the changes, which he made to the accounts, including, the application of a credit, changes to savings, and the addition of features. The Employer asked the Appellant about accounts, which he had accessed for personal reasons. The Appellant completed his training and his 2013 updated training on the code of ethics and integrity and client experience. One part of the training covers the principles relevant to the ethical policy, which provides that an employee cannot, for any reason, access, modify, or complete transactions or effect changes for his or her own account, or that of his family or friend or colleague. During the investigative meetings, the Appellant was not frank with respect to the totality of his actions until he was confronted with irrefutable evidence, at which point, he admitted certain misconduct. The Appellant was not able to furnish a justification for his actions. The Appellant's conduct contravened the rules and policies of the Employer and

could not be tolerated. The Appellant breached the Employer's trust. The Appellant was dismissed effective February 26, 2014 (March 12, 2014, Employer Dismissal Letter, GD3-26).

[15] The second page of the dismissal letter, highlighted the portions of the code of conduct, which the Appellant offended: "Fraudulent Activity: Accessing, completing transactions, making adjustments or providing any type of service on accounts associated with any of the following: Yourself; Co-Workers; Family and Friends; Acquaintances….Team members are required to comply with this Code of Conduct and follow all Company policies and procedures. Contravening actions and behaviours will be subject to appropriate corrective steps and discipline, up to and including termination of employment (Excerpt from Code of Conduct, GD3-27)"

[16] The Appellant was dismissed for breaching the Employer policy, which is very clear. Under no circumstance may an employee access, consult or perform any transaction in his personal account, his co-worker's, his family and friends' accounts. When the Appellant was dismissed, he was aware of the policy because he had just signed and confirmed in February that he was aware of the policy. The employees sign the code of conduct on an annual basis. Through the investigation, the Employer became aware that he had accessed his daughter's pre-paid account and his co-worker's account to get more features (Commission notes, re: Employer conversation, June 25, 2014, GD3- 28).

The Appellant's Evidence in the File:

[17] The Appellant filed a claim for regular benefits on March 4, 2014. The Appellant worked at the Employer from September 18, 2006 to February 26, 2014. The Appellant reported that it was unknown whether he would be returning to work with the Employer. The Appellant was dismissed or suspended and accused of some form of misconduct, other than what the form provided (Application for Benefits, GD3-2 to 14).

[18] The Appellant provided a document dated October 2, 2013, which appears to explain his remuneration and a pay statement from the Employer dated March 4, 2014, (GD2-4 and 2-5).

[19] The Appellant is not allowed, as per the company policy, to use the internet to access his accounts or employees' accounts. His colleague was away in Cuba and could not call the call centre because it was a Saturday and because she only had texting. She texted the Appellant to add a $20 texting package to her account. He did. He reported this to his manager. He was suspended during the investigation, which began on February 26, 2014 (Application for Benefits, GD3-2 to 14).

[20] There was no other occurrences of this type of misconduct in the last 6 months. He spoke to his Employer, acting team manager, "MCL" and his union representative ("IM" and "MD") and his labour relations board. His Employer never returned his call. The union could not help him. He expected to be suspended as per company policy for 5 days without pay. The Employer was supposed to provide him with a verbal warning. He was working there since 2006 and never had a suspension (Application for Benefits, GD3-2 to 14).

[21] The Appellant was employed at the Employer for over 7 years. He made a mistake and advised his manager and he regrets the act. The Employer could have suspended or provided him with a warning and did not (May 20, 2014, Request for Reconsideration,GD3-21).

[22] The Appellant worked from home and had to go into the office twice a month. The Appellant repeated the story from his application for benefits regarding adding a feature to his co-worker's phone while she was abroad in Cuba. He stated that he knew that it was against the Employer policy but that the disciplinary measures were too harsh. The code of conduct allows for warnings and suspensions and they decided to terminate him. He filed a grievance. He told the manager one week later because he forgot about it and because the manager was on vacation. He never received a warning during the 8 years that he was employed (Commission notes, June 19, 2014, GD3-24).

[23] After the Commission agent spoke with the Employer, it contacted the Appellant and the Appellant admitted that he did some transactions on his daughter's account (Commission notes, June 25, 2014, GD3-24).

Testimony at the Hearing:

[24] The Appellant testified under solemn affirmation.

[25] The Appellant explained that he worked at the Employer as a call center employee for 7 years. He worked mostly from home. He was required to go into an office a few times a month.

[26] He did not have any issues at work and liked his job very much. In the first few years, he had to work later shifts and weekends but his hours were then changed so that he was working 8 to 4 pm during the week with some overtime and some work on statutory holidays.

[27] He did not have a bad relationship with his manager but it was not a great one. He did not feel that he could approach her to discuss any issues. He felt as though the managers had pressure to prove that they were managing effectively and that they did this by sending out warnings etcetera on a regular basis. The Appellant suspected that the Employer was trying to terminate employees by giving its employees notices and that it wanted to hire more people overseas to do the call centre work.

[28] The Appellant had access to client accounts and he had the discretion to reduce bills or permit certain credits and to add features at discount rates. This discretion was to be exercised when he worked to retain customers who advised that they were leaving the Employer and seeking the services of another phone company. It was also exercised at the time that certain promotions were in effect.

[29] On or about December 20, 2013, the Appellant was provided with a warning letter. It advised that he had to respect the code of conduct, including, not hanging up the phone on clients or not to abusing company time, he could not take longer breaks than necessary, he was only allowed 3 minutes a day for emergencies and should not go beyond 1 hour a month, and also had to complete reports or notes in the computer system at the end of each call.

[30] He had to sign the written warning. He denied that he ever hung up on clients. He said that only two of the warnings made sense to him. He said that he understood that he had to improve in noting up his conversations with clients in the system. If a client called for a payment, he had to try to sell the client additional products or services and make a note

about it in the file. The Appellant said that this criticism was a little unfair because when it was very busy, the employees were told not to stay on the phone for too long. He also had to change the way that he took his lunchtime.

[31] He was never late and never hung up on clients.

[32] The Appellant admitted that he went into his colleague's account to add her text plan when she was in Cuba. Her new iPhone was not working so she was unable to call the call center. She wanted to have access to text messaging to text her family. When he first refused to do it because he told her that he was not allowed, the colleague advised that she would explain it to the manager afterwards. He then did it for her.

[33] In December and January, corporate security started tracking and checking accounts. They then tracked every call that he ever placed in the last 4 or 5 years.

[34] He added certain features to specific accounts, which were not to his benefit, and which were "retention calls". He was allowed to add new features for 3 to 6 months.

[35] A person called and complained regarding the service and said that he wanted to switch providers. The Appellant offered him a discount in order to retain him as a customer. He gave this client a feature for $50.00, which normally costs $100.00. At the end of the call, the client said that the Appellant's voice sounded familiar and they figured out that he was a contractor who was doing work at the house of the Appellant's mother. The Appellant advised that he did not know who it was because he used a shortened name/alias when he was introduced to him as a contractor and a longer version of the his name was listed on the client account. After he discovered that he knew this person, he was not going to undo the transaction because that would not have been right.

[36] He did not make any commission when he retained a client.

[37] He was permitted to provide a credit and leave a note in the account.

[38] They accused him of giving a "freebie" to a client.

[39] The other issue was that in 2012, on his daughter's 8th birthday, he purchased a phone for his daughter. Then his parents purchased a $100 calling card from a store for the Employer for her to add to her phone, which would have provided her with $0.15 calls all year. They were unable to find the calling card.

[40] He knew that he could not go to manager to have the manager give him this credit for his daughter so he went and entered an $88.00 credit in her account, which was just under the value of the card before taxes.

[41] He realizes that he should have gone to the manager instead of doing it on-line. He did not approach his manager because he did not have a good relationship with her. He regrets it sincerely now.

[42] After the Tribunal questioned the Appellant further, he stated that the manager would not have done this because to get a credit back for a calling card, it was necessary to show proof of purchase and the pin number, which was on the missing card. He did not have a receipt and his parents paid cash for the calling card in 2012. He also lost the card so there was no pin number.

[43] The Employer approached him first regarding the retention discount, which he gave to the contractor. Then, they told him about the incident involving his daughter's account. He then told the Employer about the incident involving the twenty dollar package, which he added to his colleague's account when she was in Cuba.

[44] With respect to his advice to the Commission agent that he did not tell the manager about this because she was on vacation, he said that was the reason why he delayed telling the manager and he then told the manager in the context of the investigation.

[45] The colleague who texted from Cuba was not dismissed. She was just told to work from the office from then on and was no longer able to work from home.

[46] He was also asked about accessing his own account, which he wife used. He explained that he did this only to see the account information because the website, which he normally

had access to was not working properly. The Employer advised that it understood that he did not add any features or make any discounts or do anything improper in his own account.

[47] The Appellant has no knowledge of whether or not other people were ever dismissed or suspended for the same or similar conduct.

[48] He said that once he received the warning letter in December 2013, the Employer was able to dismiss him for any reason.

[49] Once a year, there is a 30 to 40 minute course, which they have to take on-line regarding the code of conduct and company procedures.

[50] He worked in the office for two weeks during the investigation. He returned the Employer's equipment and then they provided him with the letter that they were dismissing him.

[51] He filed a grievance with the union. The union took notes and did not help him and did not file a grievance on his behalf. They said that he could file a complaint against his manager but he did not want to have any problems. He wanted to retain his job so he asked them for help. He was disappointed in the union and did not find the union helpful.

[52] He spent 7.5 years there. He said that it was not an easy job but that he really loved his job and wishes that he could have the job back.

SUBMISSIONS

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

a) He did not intend to breach the code of conduct or to commit misconduct (GD2, GD3, testimony);

b) There was one person to whom he gave an advantage to but this was for retention purposes and was not related to his prior knowledge or relationship with this person. He serviced the client and then realized that he knew him (testimony);

c) He regrets his actions sincerely and wants his job back (testimony); and,

d) The Employer could have suspended or warned him and it dismissed him instead (GD2, GD3, testimony).

[54] 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) (GD4-2 and 3);

b) The Appellant breached the Employer's trust by performing actions he knew were against the Employer's policy (GD4-3);

c) The Appellant's deliberate action constituted misconduct because he knew or ought to have known that he was breaching the code of conduct by performing unauthorized transactions in his colleague's and daughter's accounts (GD4-3);

d) After being employed for several years, the Appellant cannot argue that he was unaware of the possible consequences of his actions (GD4-3);

e) An irreparable breach of trust should be considered misconduct within the meaning of section 30 of the Act (*Bellavance* 2005 FCA 87)(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).

[55] 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).

[56] 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).

[57] 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).

[58] 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).

[59] 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).

[60] The Appellant was accused of accessing accounts, completing transactions, making adjustments or providing services on accounts associated with the Appellant, his friends, family, co-workers, or acquaintances in contravention of a specific Employer code of conduct (GD3-27). The Tribunal finds that if the impugned conduct occurred, it would amount to a breach of the express or implied duties in the contract of employment of general respect for the Employer and the expectation of the Employer to have its reasonable instructions followed, including, its code of conduct, all of which are included in the contract of employment. The Tribunal finds that the provision of the code of conduct also related to the avoidance and prevention of conflicts of interest and preserving the integrity of the Employer and that if the Appellant breached the code then he can be said to have created a conflict of interest and acted against his Employer's interests or breached its trust. The Tribunal finds that the conduct and breach would be of such scope that the Appellant would normally foresee that it would be likely to result in his dismissal *(Brisette; Caul* 2006 FCA 251; *Nolet* A-517-91; *Langlois* A-94-95).

[61] The Tribunal finds that the Commission and the Employer have proven that the impugned conduct occurred on a balance of probabilities. Some of the facts were admitted by the Appellant. The Appellant admitted that he accessed his daughter's account and provided her with a credit regarding a calling card, which was lost. The Appellant also admitted that he assisted a colleague who was abroad and unable to access the call center even though he knew that this was in contravention of the rules or guidelines or Employer code of conduct.

[62] The Appellant denied, however, that he knew a person to whom he gave a preferential discount. He advised that he gave this person a credit as a legitimate retention incentive and found out at the end of the call that the person was someone who had done work at his mother's house.

[63] The Tribunal is prepared to accept the Appellant's testimony to prove his argument that he did not have knowledge of the material fact that the contractor was a friend or acquaintance prior to providing him with the discount. While the Tribunal finds that it seems unlikely that the Appellant could have serviced someone he knew and provided him with a

discount unknowingly, it has no information or statistics from the Employer regarding how calls were fielded, relayed or assigned or the likelihood of being assigned a call from an acquaintance. The Tribunal finds, therefore, that the Employer and Commission have not proven misconduct with respect to this one incident on a balance of probabilities.

[64] The Tribunal finds, however, that the given the Appellant's admissions in the file and the Employer's evidence, that the Commission has proven on a balance of probabilities that the Appellant breached the code of conduct and Employer policies when he accessed his own account and the account of his daughter and colleague and made the changes therein to which he admitted.

[65] The Tribunal finds that the Appellant attempted to minimize any harm in relation to his actions or to justify his conduct by explaining that when he executed the transaction in his daughter's account, he did so for less than the value of the calling card, which went missing. He also argued that he only tried to do for his colleague what the call center would have done for her had she been able to get in touch with the call center when she was abroad in Cuba.

[66] The Tribunal finds that it does not matter whether the money or benefit granted or advantage gained was nominal or whether the Appellant himself benefited from it directly or indirectly or not at all. What is important for the Tribunal is that the Appellant conducted himself dishonestly and in breach of the Employer's code of conduct and that such a breach constitutes misconduct (*Bellavance* 2005 FCA 87; *Caul* 2006 FCA 251; CUB 78255 (2011); CUB 77663 (2011); CUB 77337 (2011); CUB 76444 (2011).

[67] As such, notwithstanding the Appellant's able arguments and the sympathy which he invoked regarding the sanction of dismissal, the Tribunal finds that at the end of the day, the Appellant knew that what he was doing was wrong and was against the Employer's rules and policy. The Appellant also testified that he knew that he could not go to the manager to credit his daughter's account because she likely would not have infringed any rules or Employer policies for his benefit. By doing so himself, he was infringing and transgressing the code of conduct.

[68] As explained above, the Tribunal is also not empowered to opine on whether the sanction was appropriate in the circumstances and it may only determine whether the conduct can be characterized as misconduct at law (*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).

[69] The Tribunal finds that given the code of conduct and the Appellant's own testimony with respect to the extent of his knowledge, the conduct was such that the Appellant would normally foresee that it would be likely to result in his dismissal.

[70] The Tribunal also finds that it has been proven on a balance of probabilities that the misconduct was the operative cause for the dismissal and not merely an excuse to justify it. In this regard, the Tribunal considered carefully the submissions of the Appellant that the Employer terminated him in the context of reducing its local workforce and as part of its plan to rid itself of as many employees as possible and to replace them with employees overseas. The Tribunal finds that while this theory may be plausible, the Appellant did not tender any evidence of this fact and did not prove on a balance of probabilities that this (as opposed to his own conduct) was the operative cause of his dismissal (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398; *McNamara* A-239- 06, 2007 FCA 107; CUB 38905 (1997)).

[71] In conclusion, the Tribunal finds that the Appellant's conduct amounted to a breach of the express or implied terms of the Appellant's contract of employment and more specifically, a breach of the Employer code of conduct (*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 of the code of conduct which he had received. With respect to the element of causation, the Tribunal finds that the conduct caused or contributed or ultimately lead to the dismissal and loss of employment (*Bellavance* 2005 FCA 87; *Brisette* A-1342-92; *Nolet* A-517-91; *Langlois* A-94-95).

CONCLUSION

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

Alyssa Yufe
Member, General Division

Date: February 9, 2015