[TRANSLATION]

Citation: *P. R. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 51

Appeal #: GE-14-4392

BETWEEN:

P. R.

Appellant
Claimant

and

H. H. for ACM Canada Inc.

Employer
Added Party

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Jean-Philippe Payment
HEARING DATE:	February 19, 2015
TYPE OF HEARING:	In person
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

The claimant and the employer attended the hearing alone.

DECISION

[1] The Tribunal dismisses the claimant's appeal and finds that he must be disqualified from receiving any benefits under sections 29 and 30 of the *Employment Insurance Act* ("the Act").

INTRODUCTION

[2] The claimant filed a claim for regular benefits on June 25, 2014 (Exhibit GD3-15). On August 7, 2014, the Canada Employment Insurance Commission ("the Commission") informed the employer in writing that employment insurance benefits would be paid to the claimant because the employer had not provided enough information to show that the claimant had lost his employment because of his misconduct (Exhibit GD3-20). On September 5, 2014, the employer asked the Commission to reconsider that initial decision (Exhibit GD3-22). On October 17, 2014, the Commission informed the claimant and the employer that it was replacing its decision, which meant that it was disqualifying the claimant from employment insurance benefits (Exhibits GD3-70 and 71). The claimant has therefore appealed the Commission's decision to the Tribunal (Exhibits GD2).

FORM OF HEARING

[3] The hearing was held in person for the reasons stated in the notice of hearing (Exhibit GD1-1). Further, because the credibility of the parties might be a prevailing issue, because of the information in the file, including the nature of gaps or need for clarification in the information and, finally, because the employer had been added as a party.

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 Act.

THE LAW

[5] Paragraphs 29(a) and (b) of the Act indicate that, for the purposes of sections 30 to 33, (a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period, and (b) loss of employment 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] Subsection 30(1) of the Act provides that 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] Subsection 30(2) of the Act provides that, 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 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 clarified what constitutes misconduct. Thus, 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 described and refined the concept of misconduct. It thus established that there ". . . will be 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 the consistent case law while looking mainly at wilfulness or recklessness.

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

[13] In *Canada (Attorney General*) *v. Cartier* (2001 FCA 274) and *Smith v. Canada (Attorney General)* (A-875-96), among other cases, the Court held that there must be a causal relationship between the misconduct of which an employee is accused and the loss of 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.

EVIDENCE

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

(a) the claimant's defence/cross demand in the Superior Court (Exhibit GD2-6 to 10);

(b) a claim for regular benefits dated June 25, 2014 (Exhibit GD3-15);

(c) a record of employment from the employer showing the last day worked as February 24, 2014 and code M, or dismissal, as the reason for issuing the record (Exhibit GD3-17);

(d) a dismissal letter from the employer to the claimant (Exhibit GD3-24 to 26);

(e) a series of emails exchanged between the claimant and various staff members in the company (Exhibit GD3-23 to 39);

(f) a motion by the employer to institute proceedings against the claimant, among others (Exhibit GD3-40 to 44);

(g) a copy of the contract of employment signed by the claimant on November 15, 2011 (Exhibit GD3-48 to 52);

(h) an addendum to the contract of employment concerning the amounts payable to the claimant on the employer's contracts (Exhibit GD3-53);

(i) an addendum to the contract of employment concerning the amounts payable to the claimant on the employer's contracts (Exhibit GD3-54 and 55);

(j) a "communiqué" from the employer explaining certain changes in some of the claimant's financial benefits at work (Exhibit GD3-56 and 57);

(k) an examination after defence of the employer's representative (Exhibit GD7-6 to 111).

PARTIES' ARGUMENTS

[15] The claimant argued that:

(a) the employer was not able to offer him work, and he accepted work from a former coworker (Exhibit GD3-7);

(b) the employer dismissed him for having a bad attitude (Exhibit GD3-7);

(c) the employer refused any mediation when he filed a labour standards complaint (Exhibit GD3-8);

(d) he worked three hours during his last week of work (Exhibit GD3-9);

(e) he worked for a coworker because the employer did not have work for him (Exhibit GD3-18);

(f) he informed the employer that he was going to work elsewhere for a week, and the employer dismissed him for that reason (Exhibit GD3-18);

(g) since the employer did not comply with the contract of employment, he did not think he had to comply with it himself (Exhibit GD3-18);

(h) he did not know he would be dismissed, since other employees worked for other organizations (Exhibit GD3-18);

(i) he did not solicit the employer's contracts for another firm (Exhibit GD3-18);

(j) the employer tried to make him sign a new salary agreement and he refused (Exhibit GD3-18);

(k) the employer tried to make him pay for the loss of a bank card and he refused (Exhibit GD3-18);

(l) he refused to sign the salary agreement because, under that new agreement, the employer could send him to a client's premises for a short period and not have to pay him for more than the hours worked (Exhibit GD3-60);

(m) when he accepted the contract from his former coworker, he did not know which client was involved (Exhibit GD3-60);

(n) he would not have accepted that assignment if he had known that it was one of the employer's clients (Exhibit GD3-61);

(o) the employment agreement with the employer had lapsed, he had no work and he had to work (Exhibit GD3-68);

(p) the analysis stage was well before his own work for the employer (hearing);

(q) he never received any verbal or written warnings from the employer (hearing);

(r) the clauses of the contract were illegal and the Commission had no jurisdiction to judge them (hearing);

(s) the employer offered him only two full days of work between January 25 and March 25, 2014 (hearing);

(t) the employer tried to change the contract of employment unilaterally (hearing);

(u) at the time he went to the premises of a client of a competitor of the employer, he did not know that the client was a "prospect" of the employer, since he did not know the employer's methods of prospecting (hearing);

(v) he did not want to sign documents that put him at a disadvantage and were possibly illegal (hearing);

(w) he did not want to leave the company, but he wanted to work (hearing);

(x) he was powerless if a contract was a "flop" (hearing).

[16] The employer argued that:

(a) the claimant was dismissed for refusal to work, refusal to comply with policies, misconduct and unlawful competition (Exhibit GD3-22);

(b) the claimant was dismissed because he was found doing his work for a competitor on the premises of one of the employer's clients (Exhibit GD3-45);

(c) February 2014 was a very slow period for the company (Exhibit GD3-45);

(d) if he had had to dismiss the claimant for his attitude, he would have done so much sooner (Exhibit GD3-45);

(e) he had information indicating that his employees were on that client's premises, and he wanted to go and confirm that information (Exhibit GD3-62);

(f) the client in question was not under contract, but "analyses" had been done by his company (Exhibit GD3-62);

(g) if the claimant had been available to work for the employer the week he said he was unavailable, he would have had four or five assignments to complete (Exhibit GD3-62);

(h) only one of his consultants could work outside the company, and the employer had a special contract with him (Exhibit GD3-63);

(i) the claimant was dismissed because he worked for one of the employer's competitors, because he did work for that competitor that he would have done for the employer and, finally, because he did his work for that competitor on the premises of one of the employer's clients (Exhibit GD3-63);

(j) at the time he was hired, the claimant was not told that he had to purchase a car; he was told that he had to travel (hearing);

(k) at the time he was hired, the claimant was promised a salary of between $50,000 and $70,000 a year based on a normal schedule (hearing);

(l) during the period between January 25 and March 25, 2014, the claimant was given three contracts that fell through on the first day, which was very unusual (hearing);

(m) an assignment involved about 100 hours of work for $3,500 in two weeks (hearing);

(n) the claimant was the only person who refused to sign the communiqué (hearing);

(o) the communiqué was created to support the consultants (hearing);

(p) the claimant's attitude was not such as to warrant dismissal (hearing);

(q) what triggered his dismissal was encountering him on the premises of one of the employer's clients (hearing);

(r) the file on which the claimant worked for someone else was stolen from the employer (hearing);

(s) the company's contract of employment stated that an employee who left the employer could not work in the same field in the province of Quebec for one (1) year (hearing);

(t) the claimant never said that he was leaving, but he left for a direct competitor of the employer (hearing);

(u) the competitor in question was a small group of former employees of the employer who did business with the employer's clients or former clients (hearing);

(v) the employer did not act in bad faith in making the contract that is now partly in dispute; at the time the company opened, the contract was one that he had himself signed with his former employer and that he thought was legal (hearing).

[17] The Respondent submitted that:

(a) the dismissal was caused by the fact that, on March 25, 2014, the claimant worked for a company that was a competitor of his employer and did the same work for one of his employer's clients that he would have done for his employer (Exhibit GD4-6);

(b) the employer's employment agreement contained non-competition clauses, and the claimant had signed and was familiar with his employment agreement (Exhibit GD4-7);

(c) the claimant stated in his first report that, since the employer did not comply with the employment agreement, he did not see why he would comply with it himself (Exhibit GD4-7).

ANALYSIS

Parties' arguments

Commission

[18] In this case, the Commission argued that the dismissal was "caused" on March 25, 2014 by the fact that the claimant worked for a company that was a competitor of his employer. According to the Commission, the claimant did the same work that he would have done for his employer, but he did it for a competitor that had obtained a contract with one of his employer's clients. The Commission stated that the employer's employment agreement contained non-competition clauses that the claimant had signed and with which he was familiar. In the Commission's view, the claimant stated in his first report that, since the employer did not comply with the employment agreement, he did not see why he would comply with it himself.

Employer

[19] The employer stated that the claimant was dismissed for refusal to work, refusal to comply with policies, misconduct and, finally, unlawful competition. The employer further stated that the claimant usually had an attitude that was often opposed to the employer's proposals. However, he was dismissed because he was found doing his work for a competitor on the premises of one of the employer's clients. The employer stated that, if he had had to dismiss the claimant for his attitude, he would have done so much sooner.

[20] The employer explained that February 2014 was a very slow period for the company. To reassure employees, the employer issued a communiqué explaining a new way of getting paid if the company did not assign work to its staff. The claimant allegedly refused to sign the communiqué because he claimed that it would put him at a disadvantage and he had said he was unavailable for a week. The employer told the Commission and the Tribunal that, during the week when the claimant was unavailable, he would have been assigned some contracts.

[21] On the salary issue, the employer stated that the claimant had been told that, if he worked for the company, he would make between $50,000 and $70,000 a year, which the claimant did one year when he took two months of vacation. On the issue of the contract of employment, the company's contract of employment stated that an employee who left the

employer could not work in the same field in the province of Quebec for one (1) year. The employer allegedly did not act in bad faith in making the contract some of whose terms are now in dispute. The employer explained that, at the time the company opened, the contract was one that he had himself signed with his former employer and that he thought was legal.

Claimant

[22] The claimant stated that the employer was not able to offer him work and that he accepted work from a former coworker. According to the claimant, the employer dismissed him for having a bad attitude and refused any mediation when he filed a labour standards complaint. According to the claimant, he told the employer that he was going to work elsewhere for a week and the employer dismissed him for that reason. The claimant stated that, since the employer did not comply with the contract of employment, he did not think he had to comply with it himself.

[23] The claimant stated that he did not know he would be dismissed if he went to work elsewhere, since other employees worked for other organizations. He also stated that he did not solicit the employer's contracts for another firm. He stated that he did not know that the client of his coworker, who had become self-employed, was a "prospect" of his employer. He also said that there was some compartmentalization among the various professions in the company and that he was not familiar with prospecting.

[24] The claimant stated that the contract of employment had lapsed and that, since he had no work, he had to work. In his view, the clauses of the contract of employment were illegal and the Commission had no jurisdiction to judge them. According to him, the employer tried to change the contract of employment unilaterally, which he did not accept. The claimant confirmed that he did not want to sign documents that put him at a disadvantage and were possibly illegal. He stated that, between January 25 and March 25, 2014, the employer offered him only two full days of work and that he did not want to leave the company but he wanted to work.

Tribunal's analysis

[25] In this case, the Tribunal is of the opinion that the Commission has proved misconduct by the claimant. The Tribunal is of the view that, in assessing the facts, it would be dangerous to conclude that the claimant was not guilty of misconduct within the meaning of the Act.

[26] In this dispute, raising the legality of a contract of employment may have a definite influence on the outcome of a case, but the party raising such a doubt must still be able to prove what the party is arguing. In this case, the claimant has not proved that the employer's contract was illegal or had "lapsed", as understood by him. Moreover, the Tribunal recognizes that it is a management right of an employer to amend a contract of employment within the parameters created by the applicable territorial legislation. However, it is also the right of an employee to refuse to perform a contract of employment if the employee so wishes, but it must be clear that an employee's refusal to comply with an amended contract of employment creates constraints, including the ultimate constraint of dismissal. With regard to the Commission's jurisdiction, the Tribunal finds that the Commission has the authority to judge any relevant documentation submitted to it by the parties in connection with a claim for benefits, including, for example, the contract in this case.

[27] In the case before the Tribunal, the claimant's acts in violation of the restrictions established by that contract of employment are what do or do not create the issue of misconduct. According to the contract of employment, the claimant could not practise his profession directly or indirectly in the territory where he worked for the company (Exhibit GD3-51). Based on the employer's definition, it seems that the clause covered the entire province of Quebec and New Brunswick.

[28] While the Tribunal considers the clause extremely restrictive from an employment standpoint, its mandate is not to judge or acknowledge whether the claimant's contract of employment was legal or illegal under provincial legislation. The Tribunal's role in this case is to determine whether the claimant knew or ought to have known that, if he did what he did, he would be dismissed because of the application of the contract's clauses.

[29] The Tribunal is satisfied, at the time of writing, that breaching that term of his contract in the circumstances of this case means that the claimant was guilty of misconduct. Since the claimant had been given few assignments by his employer, he undertook, as was his right, to look for employment until such time as the employer could offer him appropriate work. However, he ignored the wording of his contract of employment and accepted work with one of the employer's competitors doing a job very similar to his.

[30] In the Tribunal's view, the mere fact that the employer found him working for one of the company's competitors in the same field of activity in which he usually worked constituted grounds of misconduct. The claimant must have known full well that he was breaching the contract of employment he had signed with his employer. Indeed, the claimant made a statement – uncontested during the hearing – at the start of the Commission's investigation that suggests that he was fully aware of what he did:

> [Translation] *He (the claimant) says that the contract of employment specified that he did not have a right to work for the competition, but it was specified that he would earn $70,000 a year. Since the employer did not comply with the contract's clauses, he did not think he had to comply with them.* (third paragraph GD3-18)

[31] In the Tribunal's view, seeking employment other than the employment one holds is not misconduct, trying to earn a salary is not capricious and working for a former employer's competitor is not unusual. That is not the issue. However, the claimant must have known that what he did, namely working with former coworkers in a field that was in competition with the employer's field, could result in him being dismissed under his contract of employment with his employer. In the Tribunal's opinion, the claimant disregarded the effects his actions would have on his performance, as stated in *Tucker* (A-381-85), and 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, as stated in *Hastings* (2007 FCA 372).

[32] In addition to the above reasons – and this was confirmed by the employer – it was neither the claimant's attitude nor his unavailability during a specific period that triggered his layoff, but rather the fact that he was at a meeting where he was accompanying and working for competitors of the employer while still employed by the employer. In the Tribunal's opinion, the

claimant's misconduct was therefore an operative cause of his dismissal within the meaning of *Cartier* (2001 FCA 274).

CONCLUSION

[33] The appeal is dismissed.

Jean-Philippe Payment
Member, General Division

DATE OF REASONS: March 18, 2015