[TRANSLATION]

Citation: ***Simbol Test Systems Inc. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 176**

Date: October 16, 2015

File number: GE-15-1475

GENERAL DIVISION – Employment Insurance Section

Between:

Simbol Test Systems Inc.

Employer/Appellant

and

Canada Employment Insurance Commission

Respondent

and

R. L.

Added party

Decision by: Jean-Philippe Payment, Member, General Division — Employment Insurance Section

In-person hearing on August 31, 2015, Gatineau, Province of Quebec

REASONS AND DECISION

PERSONS IN ATTENDANCE

The claimant attended the hearing alone.

The employer attended and was represented by both the company's owner and the company's director general.

Two witnesses for the employer spoke and were questioned by the claimant at the hearing.

INTRODUCTION

[1] The claimant filed an initial benefits claim on December 16, 2014 (Exhibit GD3-15). Between September 26, 2011 and December 14, 2014, the claimant worked for Simbol Test Systems Inc. ("the employer or the Appellant") (Exhibit GD3-18). The *Canada Employment Insurance Commission* (the "Commission") then informs the employer of the measures taken regarding the claimant's employment insurance claim and states that it can provide benefits to the claimant because the claimant was apparently not terminated due to his misconduct (Exhibit GD3-25). On February 18, 2015, the employer files an appeal for reconsideration to the Commission and on April 10, 2015, the Commission upholds its initial decision to pay employment insurance benefits to the claimant (Exhibit GD3-86). Dissatisfied with the Commission's revised decision in the case of its former employee, the employer files an appeal of the Commission's decision to this Tribunal (Exhibits GD2).

[2] This appeal was heard by the in-person form of hearing for the following reasons:

a) The fact that credibility could be a determining factor;

b) The fact that more than one party will be in attendance;

c) The information in the file, including the need for additional information;

d) The fact that more than one participant, such as a witness, might be present.

e) The fact that the Appellant or other parties are represented;

f) This form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] The Tribunal must determine whether the claimant committed one or more acts of misconduct under section 29 and subsections 30(1) and 30(2) of the *Employment Insurance Act* (the "Act").

THE LAW

Misconduct

[4] Paragraphs 29(a) and (b) of the Act indicate 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 includes a suspension from employment (b) 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.

[5] Subsection 30(1) of the Act stipulates 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.

[6] Subsection 30(2) of the Act stipulates 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.

[7] 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.

[8] 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."

[9] 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/her conduct was such as to impair the performance of the duties owed to his/her employer and that, as a result, dismissal was a real possibility."

[10] 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.

[11] In *Crichlow* v. *Canada (Attorney General) (*A-562-97), the Court determined that (the General Division) was perfectly entitled to conclude that the Applicant had not committed the

"misconduct" required for a disqualification under section (29) of the Act and that the (Appeal Division) had no reason to interfere with the majority decision of the (General Division) as to the interpretation to be given to the facts and no jurisdiction to substitute his opinion for that of the Board as to the meaning of those facts.

EVIDENCE

[12] The evidence in this file is as follows:

a) a letter of engagement between the claimant and the employer dated September 9, 2011 (Exhibits GD3-47 and 48);

b) a renewal of the contract of employment between the claimant and the employer dated March 28, 2014 (Exhibits GD3-49 and 50);

c) an email between former colleagues other than the claimant on an amount of material and equipment to be purchased to make a repair dated November 20, 2014 (Exhibits GD3-51 to 53);

d) a series of emails between former colleagues and the claimant about "tasks" in relation to the repair of a device dated November 23, 2014 (Exhibits GD3-54 and 55);

e) an email from the claimant addressed to a former colleague about the part number of a laser dated November 26, 2014 (Exhibit GD3-56);

f) an email between workers and the claimant on information found at the employer's dated December 9, 2014 (Exhibit GD3-57);

g) a Record of Employment showing December 14, 2014 as the last day worked and code M, or dismissal, as the reason for issuing the record (Exhibit GD3-18);

h) a claim for regular employment insurance benefits dated December 16, 2014 (Exhibit GD3-15);

i) a safeguard order for a period of two months in a case against the claimant as well as former colleagues and the employer dated March 30, 2015 (Exhibits GD2-8 to 15);

j) an email from the employer notifying the claimant of his suspension without pay due to work performed for a competitor (Exhibit GD3-24);

k) a demand letter from counsel for the employer to the claimant dated December 17, 2014 (Exhibits GD3-27 to 29);

l) a letter of response to the demand from counsel for the claimant to the employer dated January 14, 2015 (Exhibits GD3-59 and 60);

m) a letter explaining the action by the employer from counsel for the employer to counsel for the claimant dated January 22, 2015 (Exhibits GD3-30 to 32);

n) a series of emails between the claimant and the employer, as well as the employer and various stakeholders about his “suspension without pay” (Exhibits GD3-64 to 70);

o) an email from the claimant to the Commission containing various web links about the parts in question in the emails mentioned by the employer (Exhibit GD3-64);

p) a pay stub from the claimant for the period ending December 6, 2014 (Exhibit GD3-76);

q) a report of entries and exits from the employer's security system for the claimant between November 14, 2014 and December 12, 2014 (Exhibit GD3-77);

r) arguments to the Tribunal prepared by the employer (Exhibits GD9-1 to 3);

s) a series of discussions between the claimant and the employer on the issue of a new group (Exhibits GD9-4 to 7);

t) a series of emails between stakeholders about a “test” to be given to the claimant (Exhibits GD9-8);

u) a photo of a part from JDSU (Exhibit GD9-10);

v) a series of administrative documents proposing a schedule and tracking statuses (Exhibits GD9-12 to 15);

w) a series documents and technical references from the claimant (Exhibits GD10-1 to 7);

x) a copy of the policy on the use of meal times (Exhibit GD10-8);

y) timing of a meeting on the policy on the use of meal times (Exhibit GD10-9);

z) a series of emails between the claimant and the employer in December 2014 (Exhibits GD10-10 to 18);

aa) a “summary of the context of the demand dated December 17, 2014” (sic) (Exhibits GD11-1 to 4);

bb) a summary of the “meeting of November 5, 2014” (Exhibit GD11-8);

cc) a series of administrative policies in force at the employer (ExhibitsGD11-18 to 46);

dd) a copy of a letter from a third party explaining how to obtain a serial number on a machine like the one that is discussed throughout this case (Exhibits GD12-1 to 4);

ee) a series of exhibits concerning a complaint from the claimant with Quebec's *Commission des normes du travail* (Exhibits GD15-8 to 13);

ff) a series of emails between the claimant and stakeholders proposing becoming competitors of the employer (Exhibit GD15-14 to 20);

gg) that the company specializes in the sale and repair of material used in fibre optic networks (Hearing);

hh) that the company is the largest of its type in the world (Hearing);

ii) that in some cases, since some machines no longer have support from their manufacturers, the company develops methods to repair such machines (Hearing);

jj) that the company has intellectual property rights on the methods they have developed (Hearing);

P. L., laboratory technician for the company — witness

kk) that he did not know the laser numbers by heart (Hearing);

ll) that he knew that the claimant had received a job offer from Radio-Canada (Hearing);

mm) that the employer did not tell him about the claimant's salary conditions;

nn) that the claimant told him about his conditions of employment and the confidentiality agreement that bound him to the company (Hearing);

oo) that he was not a specialist of the device repaired with the laser in question, but he was doing so at the time of the incident (Hearing);

F. S., laboratory technician for the company — witness

pp) that she often saw devices repaired with the laser in question, but that she didn't know the number of the laser in question (Hearing);

qq) that she comes into work very early in the morning (Hearing);

rr) that she knows the company's inventory very well and that she sometimes went to the inventory to get parts that she needed for work (Hearing);

ss) that she knew that the claimant wanted to go and work for Radio-Canada (Hearing);

tt) that it is possible that she had asked questions about his new salary and terms (Hearing);

uu) that she cannot say that the time sheets have been changed, but that she may have reported errors in the past (Hearing);

vv) that the claimant entered very early when he started his job, but less so toward the end, but that it is plausible that he arrived at work at 6:30 a.m. (Hearing);

ww) that the employer told her before that if she was not happy, to go look elsewhere (Hearing).

PARTIES' ARGUMENTS

[13] The employer argued that:

a) the claimant was working for the interests of another company with the stock and methods provided by the employer (Exhibit GD3-19);

b) this involves a case of fraud that is under investigation (Exhibit GD3-23);

c) the claimant committed theft of intellectual property considering that the information sent was specific technical information pertaining to highly specialized equipment known only to persons working in the employer's laboratory;(Exhibit GD3-41);

d) the claimant sent confidential information to a competitor to inform the competitor of which part he needed to use to repair a specific device (Exhibit GD3-41);

e) the situation described later on occurred several times and the actions were taken by the claimant while he was at work (Exhibit GD3-41);

f) equipment disappeared and this is under investigation with the X police (Exhibit GD3-41);

g) the claimant signed a confidentiality agreement with the employer when he was hired (Exhibit GD3-41);

h) two other employees had been laid off in November 2014 due to lack of work and they had registered their company in August 2014 (Exhibit GD3-43);

i) the exchanges of information between the stakeholders involved the employer's equipment (*sic.*) (Exhibit GD3-43);

j) there are other documents that demonstrate that the claimant contravened his conditions of employment (Exhibit GD3-43);

k) only the company knew the part number that the claimant talks about in his email to its competitor and he could only know the part number if he was working for them (Exhibit GD3-71);

l) the model in question has to be opened to access the part number and the claimant took a photo of the specific laser (Exhibit GD3-71);

S. B., company owner

m) during the year-end review, he discovered a "chat" between individuals who had worked for him and the claimant (Hearing);

n) he cannot prove that the claimant committed physical theft of property (Hearing);

o) the claimant was assigned to machine repair using methods owned by the company and documented on their servers (Hearing);

p) the claimant assisted the creation of a competing company while he was still employed by the employer (Hearing);

q) the claimant was in databases in which he had no business to give the information to external people (Hearing);

r) under the Civil Code of Québec, the claimant took part in unfair competition with the company (Hearing);

s) any person can open the machine of which the claimant took a photo, but will not see the part that the claimant photographed (Hearing);

t) knowing that the part in question is in that machine, taking a photo of it and sending it to someone external is an unfair practice (Hearing);

u) the Superior Court of Quebec judge exposed the facts concerning the claimant's unfair practice toward the company (Hearing);

v) for an employee to leave and start his own business, there's no problem, but for this person to act as a mole for others, that's unfair (Audience);

w) the claimant refused to meet him alone (Hearing);

x) he has no photos or videos of the acts that the claimant allegedly committed (Hearing);

y) the claimant was not dismissed for using a pseudonym to sell material on the Internet (Hearing);

z) an email in the file makes it clear that the claimant was "in" and that his acolytes asked him for the laser number to test him (Hearing);

A. D., Director General

aa) the part number is public, but the fact of linking that part number to a specific repair is the company's intellectual property (Hearing);

bb) the claimant and his colleagues had Excel spreadsheets on the list of tasks that they had to perform and acquire (Hearing);

cc) the photos and information sent to the competitors were sent during time paid by the company (Hearing);

dd) the company had a badge access system and the claimant came into work earlier than he declared (Hearing);

ee) the claimant contravened his contract of employment (Hearing);

ff) all the facts and actions reported concerning the alleged actions were done in a private setting, with assets belonging to the claimant and an email belonging to the claimant (Hearing);

gg) in the Excel file named "Stats de soccer," there is no mention of soccer statistics (Hearing);

hh) the claimant was supposed to come and talk about his professional activities outside of work with the employer, but the activities related to his work at the time would have been considered "unfair" under the Civil Code of Québec (Hearing);

ii) he lost his job because he was taking part in unfair competition while he was still employed by the company and this is what is on his notice of suspension and his demand (Hearing);

jj) the claimant's breaches directly contravened his employment contract (Hearing);

kk) the actions were taken knowingly and were hidden from the employer (Hearing).

[14] The claimant argued that:

a) the employer had planned to cut staff and he was looking for another job (Exhibit GD3-22);

b) he was contacted by former colleagues who had opened a company competing with his employer (Exhibit GD3-22);

c) he provided documents on his work, but it was information that was public (Exhibit GD3-22);

d) the employer intercepted one of these emails, it suspended him immediately and never wanted to hear his version of the facts (Exhibit GD3-22);

e) it involved ill will because the employer did not want competition (Exhibit GD3-22);

f) he did not receive a letter of dismissal from the employer (Exhibit GD3-61);

g) he refutes all the allegations made by the employer (Exhibit GD3-61);

h) the competing company in question was founded by a former work colleague, a personal friend who tried to start his own business (Exhibit GD3-61);

i) he never worked for any other employer during the entire time he worked for the employer (Exhibit GD3-61);

j) he wanted to find another job (Exhibits GD3-61 and 62);

k) the employer was no longer respecting his employment contract since it decided to not pay him during break times anymore (Exhibit GD3-62);

l) he did not come into work that day for 6:30 a.m., the times shown on his time sheet could have been changed by the employer (Exhibit GD3-62);

m) his entrepreneur friend did not ask him to send confidential information to him and had that been the case, he would have refused to do so (Exhibit GD3-62);

n) the employer illegally (obtained) his friend's email to obtain this information (Exhibit GD3-62);

o) he has a background in electronic engineering, he knows how to do what he did for the employer (Hearing);

p) that he was applying recipes that he had learned from the employer

q) once he gained experience, it is normal for him to be able to use what he knows elsewhere (Hearing);

r) the people he was dealing with were very familiar with the environment in which he was operating (Hearing);

s) he was merely a facilitator in the sending of information (Hearing);

t) in March 2013, he signed a new employment contract (Hearing);

u) the employer found private information on the private email of a former work colleague (Hearing);

v) he had been looking for a job for some time and some friends approached him to find out whether he would be interested in providing expertise to their company (Hearing);

w) these people were interested in finding out what he did for work (Hearing);

x) Keysights gives the "error message" on the machine in question and this information is not secret (Hearing);

y) he took a photo out of laziness, but he could have sent the web link for Keysights (Hearing);

z) the important part of the serial number is the part that contains the first five characters, after that, the other characters refer to the length of the cable (Hearing);

aa) the laser was in the inventory, he was changing two a week (Hearing);

bb) the employer cannot prove involvement prior to the month of November (Hearing);

cc) he did not approve for his name to be on the Excel spreadsheet proposed by the employer and that was suggested to him as actions (Hearing);

dd) the cable specification is not important (Hearing);

ee) he never reached a salary or partnership agreement with his ex-colleagues (Hearing);

ff) he does not know whether his work entry records were retouched by the employer (Hearing);

gg) the time of the email is not a sure thing because his phone might wait for a signal to send it (Hearing);

hh) the recording of the judge in another case does not look at the *Employment Insurance Act* (Hearing);

ii) all the terms of his 2013 contract were the same as those of the 2011 contract except the salary and weeks of vacation (Hearing);

jj) since he has a good background, it is easy for him to find the part numbers without having to go through the employer's database (Hearing);

kk) he does not need to explain to his employer that he wants to work elsewhere (Hearing);

ll) he answered the competitor's questions as though he were searching for a job (Hearing);

mm) he does not recall what was in the file called "Stats de soccer" (Hearing).

[15] The Respondent submitted that:

a) the alleged act was not of a deliberate nature and the client should not have reasonably known that he was exposing himself to dismissal by sending a friend and former colleague a part number for a laser device that can be easily found and obtained on the Internet, at a supplier other than the employer's company (Exhibit GD4-4);

b) although the employer showed that the client sent the information during his work hours, this ground could not be used to establish misconduct since it was not named in the notice of termination issued by the employer on December 17, 2014 (Exhibit GD4-4);

c) it cannot see the causal relationship in this case (Exhibit GD4-5);

d) the alleged act represents the immediate cause of the dismissal, but does not constitute misconduct under the Act (Exhibit GD4-5);

e) although the employer provided many documents, this does not concretely demonstrate that the claimant's actions were deliberate and resulted in a carelessness such that he ought to have known that he would be dismissed for taking such actions (Exhibit GD4-5);

f) although the employer demonstrates that it has taken criminal proceedings against the client, the Commission's role is not to become involved in an in-depth investigation and demonstrate beyond all doubt that the client is guilty of the alleged infractions (Exhibit GD4-5).

ANALYSIS

[16] Subsection 30(1) of the Act stipulates that a claimant is disqualified from benefits for loss of employment due to misconduct and subsection 30(2) of the Act stipulates that 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. The *Larivée* (2007 FCA 132) decision 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. But since the Act does not establish what misconduct is, the *Tucker* (A-381-85) decision clarified, or better defines, the notion of misconduct by 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 *Hastings* (2007 FCA 372) decision added 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 or her conduct was such as to impair the performance of the duties owed to his or her employer and that, as a result, dismissal was a real possibility.

The Commission's position

[17] In this case, the Commission argued that the alleged act was not of a deliberate nature and the client should not reasonably have known that he was exposing himself to dismissal by sending a friend and former colleague a part number for a laser device that can be easily found and obtained on the Internet, at a supplier other than the employer's company. For the Commission, although the employer showed that the client sent this information during his work hours, this ground could not be used to establish misconduct since it was not named in the notice of termination issued by the employer on December 17, 2014;

[18] The Commission says that it cannot see a causal relationship in this case and that the alleged act represents the immediate cause of the dismissal, but does not constitute misconduct under the Act. In fact, it states that although the employer provided many documents, this does not concretely demonstrate that the claimant’s actions were deliberate and resulted in a carelessness such that he ought to have known that he would be dismissed for taking such actions; Finally, the Commission states that although the employer demonstrates that it has taken criminal proceedings against the client, the Commission’s role is not to become involved in an in-depth investigation and demonstrate beyond all doubt that the client is guilty of the alleged infractions.

The claimant's position

[19] For the claimant in this case, he claims that he was contacted by former colleagues who opened a company competing with his employer. He apparently provided them with documents on his work, but it was public information.

[20] Specifically, he claims that he did not come into work at 6:30 a.m. on the day on which he communicated the information to his former colleagues and that the times shown on his time sheet and the entry records could have been changed by the employer. The claimant claims that he took a photo out of laziness, but he could have sent the web link for Keysights. About the serial number, he claims that the important part of the serial number is the part that contains the first five characters, after that, the other characters refer to the length of the cable and the cable specification is not important. About the fact that he was able to find the part number easily, the claimant claims that the laser was in the inventory, that he was changing it twice a week. He explains that since he has a good background, it is easy for him to find the part numbers without having to go through the employer's database.

[21] The claimant claims that he was merely a facilitator in the sending of information, but that the time of the email was not a sure thing because his phone might have waited for a signal to send it. The claimant argues that notwithstanding these facts, he does not need to explain to his employer that he wanted to work elsewhere and that he answered the competitor's questions as though he were looking for a job.

[22] Concerning his relationship with the employer's other ex-employees, the claimant states that he had been looking for a job for some time and his friends approached him to find out whether he would be interested in providing expertise to their company. The claimant states that these people were interested in knowing what he did for work, but that the people with whom he was dealing were very familiar with the environment in which he was operating. The claimant states that his entrepreneur friend did not ask him to send confidential information to him and that had that been the case, he would have refused to do so. The claimant adds that he never reached a salary or partnership agreement with his ex-colleagues.

[23] The claimant states that he has a background in electronic engineering, that he knows how to do what he did for the employer. He claims that he used the recipes that he learned from

the employer and that once he gained experience, it is normal for him to be able to use what he knows elsewhere. Concerning the question on the “industrial secret” issue, the claimant states that “Keysights” gives the “error message” on the machine in question and this information is not secret.

[24] On the questions related to human resources, the claimant states that the employer had planned to cut staff and that he was looking for another job. He adds that the employer was no longer respecting his employment contract when it decided not to pay him during break times anymore.

[25] On the question about his suspension, the claimant claims that the employer intercepted one of these emails, it suspended him immediately and never wanted to hear his version of the facts. The employer apparently obtained his friend's email illegally to obtain this information and that in short, this involves ill will because the employer does not want competition.

[26] Finally, the claimant believes that he did not approve for his name to be on the Excel spreadsheet proposed by the employer and that this was suggested to him as actions.

The employer/Appellant’s position

[27] In its arguments, the Appellant claims that the claimant was working for the interests of another company with the stock and methods provided by the employer. The employer claims that this involves a case of fraud that is under investigation. According to the employer, the claimant committed theft of intellectual property considering that the information sent was specific technical information pertaining to highly specialized equipment known only to persons working in the employer’s laboratory. The employer believes that the claimant sent confidential information to a competitor to inform the competitor of which part he needed to use to repair a specific device, while he was at work moreover.

[28] The employer claims that the exchanges of information between the stakeholders involved the employer's equipment. This apparently involved chats and emails sent using the personal emails of the individuals in question. The employer has evidence showing that the claimant contravened his terms of engagement, including a confidentiality agreement included in his 2013 employment contract. The employer believes that only the company knows the part number that the claimant talks about in his email to its competitor and that he could only know the part number if he was working for them. Again according to the employer, the model in question would have to be opened to access the part number and the claimant took a photo of the specific laser.

[29] According to the company's owner, he cannot prove that the claimant stole physical property, but he was assisting in the creation of a competing company while he was still working for the employer. The claimant apparently went into databases in which he had no business to give the information to external people. S. B. believes that under the Civil Code of Québec, the claimant participated in unfair competition with the company. Moreover, he explains that the Superior Court of Quebec judge exposed the facts concerning the claimant's unfair practices toward the company. The claimant was apparently not dismissed for using a pseudonym to sell material on the Internet, but an email in the file makes it clear that the claimant was “in” and his acolytes asked him for the laser number to test him.

[30] Again according to the company owner, the claimant was assigned to machine repair using methods owned by the company and documented on their servers. He believes that any person can open the machine of which the claimant took a photo, but will not see the part that the claimant photographed. So, to the employer, knowing that the part in question is in that machine, taking a photo of it and sending it to someone external is an unfair practice. He believes that for an employee to leave and start his own business, there’s no problem, but for this person to act as a mole for others, that's unfair. Finally, S. B. tells the Tribunal that he has no photos or videos of the acts allegedly committed by the claimant.

[31] According to A. D., the company's director general, the part number is public, but the fact of linking that part number to a specific repair is the company's intellectual property. She claims that the photos and information sent to the competitors were sent during time paid by the company. She states that the company had a badge access system and the claimant came into work earlier than he declared. According to A. D., all the facts and actions reported concerning the alleged gestures were done in a private setting, with assets belonging to the claimant and an email belonging to the claimant.

[32] The employer believes that the claimant's breaches directly contravene his employment contract and his actions were taken knowingly and hidden from the employer. Moreover, A. D. states that the claimant and his colleagues had Excel spreadsheets on the list of tasks that they were supposed to perform and acquire, including one named "Stats de soccer" in which absolutely no mention is made of soccer statistics. According to her, the claimant was supposed to come and talk about his professional activities outside of work with the employer, but the activities related his work at the time would have been considered "unfair" under the Civil Code of Québec. Finally, the director general claims that the claimant lost his job because he was participating in practices of unfair competition while he was still employed by the company and this is what is on his notice of suspension and his demand.

Decision

[33] In examining all the facts as the *Larivée* (2007 FCA 312) decision prescribes, in order to constitute misconduct within the meaning of *Tucker* (A-381-85), "(...) 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 performance." More specifically, the *Hastings* (2007 FCA 372) decision clearly suggested 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 or her conduct was such as to impair the performance of the duties owed to his or her employer and that, as a result, dismissal was a real possibility." Therefore, the Tribunal must focus solely on the conduct of the claimant and not that of the employer as the *Canada (Attorney General)* v. *Mc Namara* (2007 FCA 107) decision makes very clear.

[34] First, the Tribunal does not believe that the sections of the Civil Code of Québec have any resonance within the meaning of the Act as presented by the employer. The employer consistently repeated that the claimant committed unfair competition under the Civil Code of Québec and appears to have tried more than once to draw the link between the Code, the Act and the case law applicable to the Tribunal's jurisdiction. However, this does not mean that it did not fulfil its obligation pursuant to *Canada (Department of Employment and Immigration)* v. *Bartone* (A-369-88), to prove the misconduct of the claimant within the meaning of the Act. However, as the Court very clearly set out in *Meunier* v. *Canada (Attorney General)* (A-130-96) decision, misconduct is not proven simply by submitting unproven allegations of a criminal nature.

[35] The claimant draws the Tribunal's attention to allegations according to which the employer might have dismissed him for administrative reasons, due to budget cuts. However, that is where any specific argument stops and he is not very vocal on this subject. Toward the end of the hearing, the claimant submitted to the Tribunal two audio clips from human resources meetings with the employer to support his argument that the claimant [sic] was not respecting its part of the employment contract on the issue of meal and break times for example.

[36] However, the claimant appears instead to justify his job search by the fact that the employer allegedly contravened the employment contract by no longer providing paid breaks and meal times. In the instant case, the Tribunal does not see a clear causal relationship in order to draw the conclusion that the alleged misconduct was just a pretext to his dismissal.

[37] As the director general very clearly expressed at the hearing and I cite: "(that the claimant) lost his job because he was participating in practices of unfair competition while he was still employed by the company and this is what is on his notice of suspension and his demand." Moreover, the employer stated that the claimant had violated certain clauses of his employment contract regarding disclosure of his salary for example. It is clear to the Tribunal that this is not the claimant's reason. Ultimately, it is the claimant's association with other individuals in a company similar to the employer's, and the fact that he sent the information to those competitors from company premises and moreover during his work hours, that resulted in

his dismissal. Any other ground cited for the employer subsequent to the claimant's dismissal is irrelevant in the circumstances.

[38] First, the Tribunal would like to remind the parties that looking for a job while a worker is already employed is not illegal. At worst, it may be illegitimate to do so, but it is not up to the Tribunal to focus on this issue. Despite everything, the Tribunal would like to point out that in a free and democratic society such as ours, any worker may try to find a new job. In a capitalist society, furthermore, it would appear to me to be highly contestable to believe that a worker who tries to associate in one way or another with other people to form a company or negotiate salary benefits in this new company, could meet the definition of misconduct. Obviously, free enterprise is a clear attribute of Canadian society, and to know that we could be dismissed for trying to associate with other people to create a company in the same industry as our employer would condemn a very large portion of the labour force to the eternal rank of employee. Very clearly, for these reasons, the Tribunal believes that the claimant could not expect to be dismissed for this reason. The employer may consider this improper conduct, but this conduct was not such that the claimant could have known that he might be dismissed for this action. (*Locke v. Canada (Attorney General)* (2003 FCA 262)

[39] However, the act of taking photographs in the workplace and forwarding them to a group of persons with whom he is associated or from whom he hopes to obtain employment is misconduct within the meaning of the Act. In this case, it does not involve personal photos, but in fact photos of materials used by the employer as part of its operations on a specific machine. In contrast, the employer did not prove, although it raised it in the file, that the claimant was able to acquire the employer’s assets or that he went snooping around places on its servers where he was not authorized to do so. Nevertheless, at the request of persons with whom he was associated and who had competitive aims regarding the company, he provided his personal knowledge or the web links he submitted to the Tribunal (Exhibit GD10-1 to 7) not directly, but in a photo of a part that the employer had in stock to repair a device on which he worked. By the end of the discussion at the hearing it came to light that this photo had been taken using the employer’s inventory. The claimant argues that he knew where to find this part because he

repaired devices containing this part every week, but nothing compelled him to take the said photo and send it to a third party in competition with the employer.

[40] The Tribunal believes that the fact that the information can be found on the web and that it is not secret information as the claimant explained certainly has some relevance. However, the fact that the error message that appears on the machine when a part malfunctions may be available on the web is not relevant in this case. In this case, although the information that the claimant sent to the group competing with the employer was "public," the act of sending a photo of a part belonging to the employer to a potential direct competitor in answer to a technical question from the same competitor constitutes misconduct within the meaning of the Act.

[41] It is unclear whether, at the time of his action, the claimant was looking for work, negotiating a salary or payment, or negotiating his role in this new company competing with his employer's company. The Tribunal believes that the claimant was acting as a collaborator on behalf of a group in competition with his employer. In this regard, the Tribunal believes that his conduct was careless or negligent within the meaning of *Tucker* (A-381-85) and he decided to disregard the effects of his actions on his job performance. The fact that the claimant used his personal phone to send a photo from his personal email is a very clear sign that he knew his actions were improper and that if his actions were known it would impact his performance. It is very clear in this case that the claimant's conduct was deliberate and that the acts complained of were intentional within the meaning of *Hastings* (2007 FCA 372). Moreover, it was never a question of a photo taken by accident and sent by mistake, the claimant knew his contacts knew both the business of the employer and the industry in which it operated, and thus knew that the question asked was specific and designed to illicit a specific response.

[42] In this case, the employer attempted to establish the claimant's "intention." It produced two witnesses who ultimately had very little to say on the merit of the case. The two witnesses came primarily to explain to the Tribunal that they did not know the number of the specific replacement part for the machine that they have been able to repair for a few years. The specific link with the claimant's intention in this case is still not very clear. With regard to the rest of the response from the witnesses, they believe that the claimant discussed specific clauses of his contract. On this, the Tribunal demonstrated above that this was not the reason for the claimant's dismissal.

[43] In short, after examining and evaluating all the facts and evidence produced, the Tribunal finds that the employer proved the misconduct of the claimant under current case law. The claimant indeed committed misconduct within the meaning of the Act because he 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.

[44] The revised decision of the Commission is reversed.

CONCLUSION

[45] The appeal is allowed.

Jean-Philippe Payment
Member, General Division — Employment Insurance Section