Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *7 West Café v. Canada Employment Insurance Commission,* 2016 SSTGDEI 41

Tribunal File Number: GE-15-1592

BETWEEN:

7 West Café

Appellant

and

Canada Employment Insurance Commission

Respondent

and

C. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: January 26, 2016 and February 4, 2016

DATE OF DECISION: March 14, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant in this appeal is the employer, 7 West Café, and is represented by R. A. (Ms. R. A.), the owner of 7 West Café. Ms. R. A. attended the hearing of the employer's appeal via videoconference on January 26, 2016, and via teleconference on February 4, 2016. The Claimant, C. B. (Ms. C. B.), was added as a party to this appeal by the Tribunal on July 27, 2015. Ms. C. B. attended the hearing of the appeal via teleconference on both January 26, 2016 and February 4, 2016.

INTRODUCTION

[1] On November 6, 2014, Ms. C. B. applied for regular employment insurance benefits (EI benefits). On her application, Ms. C. B. indicated she had been dismissed from her job as a server at 7 West Café because her employer accused her of causing an interruption of business at the restaurant. On December 10, 2014, the Respondent, the Canada Employment Insurance Commission (Commission), approved Ms. C. B.'s reason for separation for employment and she was able to establish a benefit period effective November 2, 2014.

[2] On December 17, 2014, the employer requested the Commission reconsider its decision, claiming that Ms. C. B. had been terminated for closing down the restaurant without the knowledge or consent of the owner or management, and staging a walkout of its employees. On January 20, 2015, following an investigation, the Commission maintained its original decision.

[3] On February 13, 2015, the employer appealed to the General Division of the Social Security Tribunal of Canada (Tribunal).

[4] The hearing was held on January 26, 2016 by videoconference and teleconference because credibility may be a prevailing issue, more than one party would be in attendance and the 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. As the hearing did not conclude within the time allotted on January 26, 2016, the hearing continued via teleconference on February 4, 2016, at which time it was concluded.

ISSUE

[5] Whether the Appellant is disqualified from receipt of EI benefits because she lost her employment due to her own misconduct.

THE LAW

[6] Subsection 30(1) of the *Employment Insurance Act* (EI 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 the claimant is disentitled under sections 31 to 33 in relation to the employment.

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

[8] The terms “employment” and “loss of employment” are defined in section 29 of the EI Act. Subsection 29(a) of the EI Act provides that for the purposes of sections 30 to 33, “employment” refers to any employment of the claimant within their qualifying period or their benefit period.

[9] Subsection 29(b) of the EI Act provides that for the purposes of sections 30 to 33, “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.

EVIDENCE

[10] Ms. C. B. made an initial application for EI benefits on November 6, 2014 (GD3-3 to GD3-16) and advised that she was dismissed by her employer, 7 West Café, on November 1, 2014. On the "Questionnaire: Fired (Dismissed)" completed as part of her application (GD3-9 to GD3-10), Ms. C. B. stated she was terminated for what the employer alleged was "willful misconduct and deliberate interruption of business without just cause" in connection with an incident that occurred during an evening service at 7 West Café, when the manager arrived and advised that he did not have pay checks for some employees (Ms. C. B. had been paid the day before) and told the staff to "feel free to stop serving", which led the staff to close the first floor of the restaurant and wait for a meeting with the owner (GD3-9). Ms. C. B. stated she was dismissed for "vocalizing my rights as an employee and attempting to ask questions", and advised that she had filed a claim against the employer with the "Labour Board" (GD3-9). Ms. C. B. also referred to her fear of "bullying" by the employer (GD3-9), who had threatened to sue Ms. C. B. and a coworker over the incident (GD3-10).

[11] A Record of Employment (ROE) was provided by the employer which indicated Ms. C. B. had accumulated 1,414 hours of insurable employment as a "Server" for 7 West Café, and gave the reason for separation on November 1, 2014 as "Dismissal" (GD3-17).

[12] An agent of the Commission made two (2) attempts over 48 hours to contact Ms. R. A. on behalf of the employer regarding the reason for separation, but did not receive a return phone call from Ms. R. A. (see Supplementary Record of Claim at GD3-18). The agent then proceeded to process Ms. C. B.'s claim in accordance with the Commission's benefits procedures.

[13] On December 10, 2014, the Commission wrote to the employer and advised it had approved Ms. C. B.'s reason for separation and, therefore, would allow the hours and earnings on the ROE provided by the employer to be considered in calculating Ms. C. B.'s claim for EI benefits (GD3-19). The Commission considered that the employer had not provided enough information to prove that Ms. C. B. lost her job because of her own misconduct.

[14] On December 17, 2014, the Commission received a request for reconsideration in connection with Ms. C. B.'s claim, on which the employer was identified as "R. A." (GD3-20 to GD3-23). Under "Reason for Request for Reconsideration", Ms. R. A. wrote "See attached". The attached item was a letter dated two (2) days previously, on December 15, 2014, from Ruscitto Law Firm, "legal counsel for 7 West Café" addressed to Ms. C. B. regarding the matter identified as "Employee Misconduct – C. B." (GD3-22 to GD3-23). The letter sets out the employer's version of what happened on the night of November 1, 2014 when Ms. C. B. and "another former employee, Ms. B. N., acted without the consent, knowledge and authority of the owner or management of 7 West Café, to close the restaurant down and to stage a walkout of its employees." The letter also identifies the damages the employer suffered and its intention to bring a legal action against Ms. C. B. as a result:

> "By causing the walkout and closing down the restaurant for approximately one (1) hour on November 1, 2014 you caused our client damages both in loss of business and as well as to the restaurant's reputation within the community, and negatively impacted the patrons that were at the restaurant at that time and those that were attempting to enter the establishment. In addition, during you *(sic)* unlawful tirade you proceed *(sic)* to verbally admonish the owner of the restaurant in front of the patrons indicating that "the owner of this restaurant does not pay", causing the patrons and others outside of the restaurant to hear of your libelous and slanderous comments. Ironically, despite your wrongful and shameful actions, and after your lawful and just termination, you have proceeded to commence a complaint against 7 West Café to the Ministry of Labour, claiming false and misleading allegations of wrongdoing on our client's part.
>
> Please be advised that our client fully intends to defend itself in relation to the current complaints raised by you and Ms. B. N. to the Ministry of Labour, and will proceed to seek vindication against you to the fullest extent of the law. In addition our client is in the process of determining its losses caused directly by you and Ms. B. N.'s misconduct, and has intentions of bringing a legal action against the both of you seeking damages and its legal costs on a substantial indemnity basis. Our client has not taken your actions lightly, and intends to be made whole from the damages you have caused.
>
> At present time, we are putting you on notice of our client's intention to proceed with an action against you in court. Clearly, any potential resolution to our client's action will require payment of our client's damages, as well as a written apology from you for your actions. Please be advise *(sic)* that if you fail to respond with a proposal of settlement and a written apology our client will be commencing an action against you forthwith at which time we will be seeking our client's full damages in addition to pre and post judgment interest, and aggregated *(sic)* and punitive damages, and all legal costs on a substantial indemnity basis. Let this correspondence serve as the only notice that you will receive of our client's firm instructions to fully proceed with all necessary steps in relation to a litigation action against you in this matter should one be required, and to seek all compensation as allowable under the *Courts of Justice Act*."

[15] On January 15, 2015, an agent of the Commission spoke with Ms. R. A. regarding the employer's request for reconsideration, and documented their conversation in a Supplementary Record of Claim (GD3-24). The agent noted that Ms. R. A. made the following statements:

(a) Ms. R. A. was unwell and went home sick at 2:00pm on the day of the incident, Saturday, November 1, 2014.

(b) Ms. C. B. had received her pay and her tips the day before, but her co-worker, B. N., was absent and did not receive hers.

(c) Ms. C. B. and B. N. reported to work on November 1, 2014, B. N. asked for her pay but it was locked up and the manager did not have access. The manager was unable to reach Ms. R. A. because she was ill and asleep. B. N. said that she was not working for free. The manager, M. F., told B. N. that he could not force her to work. M. F. then walked to Ms. R. A.'s other restaurant to talk with Ms. R. A.'s business partner. While he was gone, Ms. C. B. and B. N. started to bill out customers and close the door. Ms. C. B. and B. N. worked on the first floor of the restaurant. They went to the second floor and told customers that they were closing. M. F. got a hold of Ms. R. A. and she was at 7 West Café by 8:00pm, in shock and very upset at the scene. Ms. C. B. was crying. Ms. R. A. told Ms. C. B. and B. N. to go home and they could discuss this with her on Monday.

(d) Ms. C. B. texted that she would come in to give her statement, but she never did.

(e) Ms. R. A. has statements from the other employees and video footage showing Ms. C. B. and B. N. billing out customers and standing at the door not letting anyone in. Ms. R. A. said she would put together what she had and send it to the Commission.

[16] On the same day, the agent spoke with Ms. C. B. regarding the employer's request for reconsideration, and documented their conversation in a Supplementary Record of Claim (GD3-26). The agent noted that Ms. C. B. made the following statements:

(a) Ms. C. B. did receive her pay and tips on October 31, 2014, but there were issues with pay in the past when it was sometimes late and employees were asked not to cash their pay check until a certain date. She had questions about this.

(b) When Ms. C. B. started work on November 1, 2014, the manager on duty, M. F., announced that he did not have some of the staff's pay cheques. Ms. C. B. told him that she had received hers. M. F. then told the staff that he had no idea when the rest of them would be paid and he said to the staff "you can stay or leave feel free to blame it on me".

(c) Ms. C. B.'s co-worker, B. N., went up to the restaurant's 2nd floor, where a 2nd floor server told her they were giving out bills to customers. B. N. came back to the first floor and said she saw the 2nd floor server handing out bills to customers. It was M. F. who said that the staff could meet and talk on the first floor and they could send new customers up to the 2nd floor or to the sister restaurant next door. There was no chaos. They explained to customers that they had a bit of an issue that they needed to discuss and that the customers were welcome to finish their meals before leaving.

(d) Ms. C. B. denied that she turned anyone away. The video will show that it was only the last set of customers that were told to go across the street to the sister location, which would be pleased to serve them.

(e) Ms. R. A. arrived at 7 West Café angry and yelling at them, and refused to let them have a word. Ms. R. A. told them to leave and they could discuss it on Monday if they wanted. On Sunday, Ms. R. A. texted Ms. C. B. for her email address, which she provided. That day, someone from the restaurant called Ms. C. B. to tell her Ms. R. A. was going to sue them. Later that same day, Ms. C. B. received an email from Ms. R. A. advising that she was terminated for willful misconduct and no longer welcome on the property. Ms. C. B. felt there was no point going in to discuss anything after receipt of the dismissal email. .

(f) Ms. C. B. denied that she instigated anything. It was the manager's decision for them to collectively meet on the first floor of the restaurant to discuss the situation with Ms. R. A. and to have any new customers served at the sister location next door.

[17] On January 17, 2015, Ms. R. A. forwarded further documentation to the Commission (GD3-27 to GD3-45), including two (2) written statements from Ms. R. A. (one regarding what transpired on November 1, 2014 and the other setting out what she was told by the manager, M. F.), and written statements from the following: a patron who was in the restaurant at the time of the incident, Ms. R. A.'s partner and manager of one of Ms. R. A.'s other restaurants, four (4) employees who were working at 7 West Café that night, and two (2) employees from other of Ms. R. A.'s restaurants. Some of these statements are dated and others are undated.

[18] On January 19, 2015, Ms. C. B. forwarded further documentation to the Commission (GD3-49 to GD3-51), including a copy of text messages between herself and "M. F., the manager on duty the night of November 1st", a copy of text messages between M. F. and Ms. R. A., and a copy of the dismissal email sent by Ms. R. A. on November 2, 2014. The text message exchange at GD3-29 includes a text from Ms. C. B. to M. F. about what he "sparked" at 7 West

the night of November 1, 2014, and his response: "Thank you so much…Getting people fired was my biggest fear. Made me wanna cry when I saw all the messages today."

[19] On January 19, 2015, the agent of the Commission contacted Ms. C. B. and documented their conversation in a Supplementary Record of Claim (GD3-46 to GD3-48). The agent noted Ms. C. B.'s statement that the text messages show an acknowledgment that the manager, M. F., "sparked" what took place, and that Ms. C. B. acted under his instruction. The agent then read Ms. C. B. all eleven (11) of the written statements Ms. R. A. had submitted and noted Ms. C. B.'s detailed rebuttals to each one (except the two (2) statements from employees who worked at Ms. R. A.'s other restaurants, which Ms. C. B. had no comment on).

[20] On January 20, 2015, Ms. R. A. contacted the agent of the Commission, who documented their conversation in a Supplementary Record of Claim (GD3-52). The agent noted Ms. R. A.'s statement that she had decided not to submit the video footage to the Commission and to use it at Court instead. According to Ms. R. A., the video does not show that M. F. instructed "the girls" on what to do, and that when "the two girls" were behind the curtain talking, M. F. was not around and they ignored customers for 20 minutes while they planned out what to do. The agent also noted Ms. R. A.'s disagreement with Ms. C. B.'s rebuttals, and Ms. R. A.'s statement that what "these girls" did was wrong.

[21] On January 20, 2015, the Commission maintained its original decision of December 10, 2014 approving Mr. C. B.'s reason for separation (GD3-55 to GD3-56). The Commission determined that, based on the statements on file, Ms. C. B. operated under her manager and, therefore, her conduct was not considered as willful misconduct (GD3-52).

[22] In the employer's appeal materials (GD2) filed on February 13, 2015, Ms. R. A. identified herself as the Appellant (GD2-2) and gave the reason for appeal as follows:

> "My lawyer is in the process of building a case against the employee. We have requested a statement from the acting management working the evening of the incident. This statement will prove that the employee acted without consent or authorization from management."

[23] On July 27, 2015, the Tribunal added Ms. C. B. as a party to the employer's appeal (GD6) and, on September 15, 2015, Ms. C. B. submitted her responding materials (GD10). They included a letter dated three (3) days prior to Ms. R. A.'s appeal (GD2), namely February 10, 2015, from Ruscitto Law Firm to Ms. C. B. regarding the matter identified as "Employee Misconduct – C. B." (GD10-1). It reads as follows:

> "As you are aware we are legal counsel for 7 West Café in relation to the above noted matter.
>
> We understand that based upon information you have recently provided to Service Canada, your former manager at 7 West may have been involved in relation to the walkout that took place at our client's place of business on November 1, 2014. At this point we would request that you provide a sworn statement outlining the involvement that your former manager had in relation to the walk out, as well as your position as to what occurred that evening. Should we receive the sworn statement which provides that you are not responsible for what occurred at our client *(sic)* place of business then we may recommend to our client to not commence an action against you for damages sustained.
>
> Should we not receive you response by February 20, 2015, then let this letter serve as final notice that our client will be proceeding with an action against you in court for the damages sustained due to your actions of misconduct and to seek all compensation and legal fees on a substantial indemnity basis as allowable under the Courts of Justice Act.
>
> We expect your immediate response. Govern yourself accordingly."

[24] Ms. C. B.'s appeal materials also included a 6-page memo with her rebuttal to the eleven (11) written statements provided by Ms. R. A. in connection with the employer's request for reconsideration (GD10-2 to GD10-7), as well as two (2) written statements from former employees of 7 West Café (including a further clarifying statement from J. A., one of the employees who had earlier provided a statement relied upon by Ms. R. A. at GD3-41), and Ms. C. B.'s own written statement describing the incident at 7 West Café on November 1, 2014 (GD10-12 to GD10-13).

At the January 26, 2016 Hearing: Testimony on behalf of the Employer (Appellant)

[25] Ms. R. A. advised the Tribunal that she had not received a copy of Ms. C. B.'s responding materials (GD10), but wanted to proceed with the hearing nonetheless. The Member advised all present that the Tribunal would provide Ms. R. A. with another copy of the GD10 documents immediately following today's hearing, and that the hearing of her appeal would start

today, but would be adjourned to continue at a later date to allow Ms. R. A. a chance to review Ms. C. B.'s materials and make submissions in connection with same. Ms. R. A. and Ms. C. B. agreed the hearing would proceed on this basis.

[26] Ms. R. A. testified that she has been a business owner for 27 years and has "never had such issues" as in the incident on November 1, 2014. When she "found out that C. B. was collecting EI", Ms. R. A. was "disappointed in the system", and challenged the Commission's decision "because the system needs protection". Ms. R. A. stated "I am a good operator" and that there is a decision by the Ontario Labour Relations Board (LRB decision) ruling that Ms. C. B. engaged in "willful misconduct" in connection with the events on November 1, 2014.

[27] Ms. R. A. asked to file a copy of the LRB decision and the Tribunal agreed to admit it. Ms. C. B. stated that she was aware of the LRB decision. The Member advised all present that the Tribunal would provide Ms. C. B. with a copy of the LRB decision following receipt of same from Ms. R. A., and that Ms. C. B. would have a chance to review the LRB decision and make submissions in connection with same when the hearing resumed at a later date. Ms. R. A. and Ms. C. B. agreed the hearing would continue on this basis.

[28] Ms. R. A. testified that she has a "separate proceeding" against Ms. C. B. that is before the courts.

[29] Ms. R. A. further testified that she has "video footage" from 7 West Café that shows Ms. C. B. "blocking the entrance, closing the curtains and stopping customers from coming in" to the restaurant, and "blocking access" to the second level. Ms. R. A. stated that she has made a decision not to file the video footage with the Tribunal because her lawyer said she should save it for the civil trial in her action against Ms. C. B.

[30] Ms. R. A. stated that she never received a written statement from M. F., the manager on duty the night of November 1, 2014, and further stated that he is "not a reliable source" and "they're all friends" and "he refused to offer any support" to Ms. R. A.. According to Ms. R. A., there were 6-8 employees at 7 West Café who were "very close knit, with a lot of negativity", which "led to problems" and "the bad apples took control", so Ms. R. A. had to "clean house".

[31] Ms. R. A. testified that M. F. had been employed at 7 West Café for less than a year and had given his notice when the events of November 1, 2014 occurred and was not authorized to close the restaurant. Ms. R. A. stated that M. F. was on his final week at the time and, as a result, "had even less authority" to make statements about the status of pay cheques or to call for a staff meeting with Ms. R. A.. According to Ms. R. A., M. F. told her that he was not in the building when the restaurant was closed, having gone to another of Ms. R. A.'s restaurants, "Smith", which is a 15 minute walk away; and that he did not instruct the staff to close the restaurant.

[32] Ms. R. A. admitted that she helped to write M. W.'s statement (at GD3-36), because English is not his first language, but stated that the statement was what he saw and "was correct". Ms. R. A. disputed that she is "unapproachable" or "intentionally dismissive", but stated there is a lot of pressure in the restaurant business and she has a lot of employees to deal with. With respect to the incident where Ms. C. B. said Ms. R. A. told her "you have no voice", Ms. R. A. stated that this occurred when Ms. C. B. had been working at 7 West Café for less than a month and had shown "a lack of respect" to a senior employee (Pat Boyer). Ms. R. A. said her statement to Ms. C. B. was appropriate in the circumstances and that she should have "ended the problem there and let C. B. go".

At the January 26, 2016 Hearing: Testimony by the Claimant (Added Party)

[33] Ms. C. B. testified that the incident at 7 West Café on November 1, 2014 happened under the leadership and direction of M. F., which he has admitted. Ms. C. B. stated that she did not close the restaurant and didn't "initiate an uprising", but "followed the directions of the manager on duty that night" and his instructions so that the staff could have a meeting at the restaurant with Ms. R. A..

[34] According to Ms. C. B., the workplace at 7 West Café was "unhappy" and "we were all looking for other jobs at that time", but "I needed my job and I followed his (M. F.'s) instructions in the hope that a meeting with her (Ms. R. A.) would resolve some issues".

[35] With respect to the video footage, Ms. C. B. testified that Ms. R. A. has refused to provide a copy of it to Ms. C. B.'s lawyer defending her in the civil action, despite his requests. Ms. C. B. disputed Ms. R. A.'s version of what was on the video footage and stated it will show

M. F. and the other servers conferring behind the bar and M. F. "telling us what to do"; and it will also show "me sobbing" when Ms. R. A. arrived and "I tried to ask her some questions" and she refused to listen.

[36] Ms. C. B. disputed that she refused service to any customers. According to Ms. C. B., there was only one (1) group of customers who arrived after the curtain was closed on the first floor of the restaurant and she politely asked them to go down the street to one of 7 West Café's sister restaurants.

At the February 4, 2016 Hearing: Testimony on behalf of the Employer (Appellant)

[37] Ms. R. A. testified that she had received and reviewed the GD10 documents filed by Ms. C. B.

[38] Ms. R. A. testified that it is important for the Tribunal to understand that she's appealing the Commission's decision to allow Ms. C. B. to collect EI benefits because "I'm looking for support from the system. They're there to protect both the employer and the employee." Ms. R. A. stated that the Commission made a ruling on Ms. C. B.'s EI benefits "without contacting me and this is unfair to me".

[39] Ms. R. A. stated that she is a good operator who has employed over 3000 people in her career. Ms. R. A. further stated that "these two young women interfered with my business"; and "I was a victim - more than C. B. (Ms. C. B.)".

[40] Ms. R. A. disputed that Ms. C. B. ever asked questions of her when she arrived at the restaurant, and testified that she did not fire Ms. C. B. in that moment, but asked if she wanted to go home. Ms. R. A. stated that it was only after she got "the facts that C. B. attempted to harm my business" over the next day-and-a-half that she fired Ms. C. B.

[41] Ms. R. A. referred the Tribunal to the LRB decision at GD12 and stated that the decision shows Ms. C. B. was paid and there were no other issues involving compliance with the Ontario *Employment Standards Act*. Ms. R. A. further stated that, in the LRB decision, there is a reference to a conversation the Employment Standards Officer had with M. F. and that a statement he made was "determinative" evidence in their finding that Ms. C. B. engaged in

willful misconduct, namely that M. F. was not in the building and doesn't know who made the decision to close the restaurant.

[42] Ms. R. A. testified that she wants "an apology from these girls" and that "if they get EI it is rewarding them for bad behavior and that's not fair".

At the February 4, 2016 Hearing: Testimony by the Claimant (Added Party)

[43] Ms. C. B. testified that Ms. R. A. "has sued us for $25,000" and has "spread the word", making it very difficult to get a job.

[44] Ms. C. B. further testified that the reason she started crying after Ms. R. A. arrived at 7 West Café was not because she thought she'd done anything wrong, but because Ms. R. A. vehemently refused to listen to anything Ms. C. B. tried to say, repeating that she "didn't want to hear it". Ms. C. B. admitted that she became emotional, so she elected to go home when Ms. R. A. asked her if she wanted to go home.

[45] Ms. C. B. stated that on the one hand, Ms. R. A. had her lawyer write to Ms. C. B. for evidence against M. F. because Ms. R. A. believed he might have been involved and Ms. R. A. wanted to "go against him" (see GD10-1), then on the other hand, Ms. R. A. is trying to rely on M. F. and what she says he told her as evidence against Ms. C. B.

[46] Ms. C. B. reiterated that whatever she did on November 1, 2014 was under the direction of her manager, M. F.. Ms. C. B. stated that she is "only a waitress" and M. F. "started everything" by announcing he did not have the pay cheques and could not force people to work without pay, and suggesting a meeting at the restaurant with Ms. R. A. to discuss the situation. Ms. C. B. said different people took different steps from there, as set out in her rebuttal and statements at GD10, and that she was not responsible for closing the restaurant.

SUBMISSIONS

[47] Ms. R. A., on behalf of the Appellant, submitted that

(a) Ms. C. B. interfered with her livelihood and that of the other staff at 7 West Café by closing the restaurant without authorization;

(b) Ms. C. B.'s conduct in closing the restaurant without authorization was willful misconduct, for which she was terminated;

(c) The Ontario Labour Relations Board has determined that Ms. C. B.'s behavior was "willful misconduct" and this should be "determinative" for purposes of EI benefits as well; and

(d) It would be "unfair to reward" Ms. C. B. with EI benefits for this conduct.

[48] The Commission submitted that Ms. C. B. was one server on a team of employees under the authority of a manager when the events of November 1, 2014 took place, and that the evidence does not support the employer's allegations that Ms. C. B. personally shut down the restaurant that night. The employer has not proven that Ms. C. B. lost her employment by reason of her own misconduct and, therefore, Ms. C. B. is not subject to a disqualification from EI benefits.

[49] Ms. C. B., as the Added Party, submitted that she acted under the direction of the manager on duty at 7 West Café on November 1, 2014 and did not cause the restaurant to be shut down that night. Ms. C. B. further submitted that she did not engage in willful misconduct.

ANALYSIS

[50] Section 30 of the EI Act disqualifies a claimant from receiving benefits if the claimant has lost their employment as a result of misconduct.

[51] The onus, on the balance of probabilities, is on the employer where the employer is the Appellant, to establish that the loss of employment by a claimant was due to her own misconduct (*Larivee A-473-06, Falardeau A-396-85*). To discharge that onus, the Tribunal must be satisfied that the misconduct was the reason for the dismissal and not the excuse for it, which necessitates a factual determination after weighing all of the evidence: *Bartone A-369-88; Davlut A-241-82*.

[52] In order to prove misconduct, it must be shown that the employee behaved in a way other than she should have and that she did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be demonstrated that the employee knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the employee's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528.*

What is the conduct that led to Ms. C. B.'s dismissal?

[53] In the email sent to Ms. C. B. on November 2, 2014, Ms. R. A. advised Ms. C. B. that she was terminated for "willful misconduct and deliberate interruption of business without just cause" (GD3-51).

[54] This alleged "deliberate interruption of business" has been described variously as:

(a) "acting without the consent, knowledge and authority of the owner or management of 7 West Café to close the restaurant down and to stage a walkout of its employees" and rejecting "the entry of other patrons who were waiting to be seated within the restaurant, and advised them that the restaurant was being closed because of malfeasance on the part of the owners, which was completely untrue and false" (from the December 15, 2014 letter from Ruscitto Law Firm to Ms. C. B., GD3-22 to GD3-23).

(b) "It is my understanding based on the statements and best recollection of other workers that B. N. and C. B. are responsible for closing my entire restaurant and cancelling the service of the existing customers, I also claim that they are responsible for not allowing new customers to enter and for defamation of my reputation by telling numerous patrons, "I do not pay"" (from Ms. R. A.'s written statement dated January 12, 2014 at GD3-28).

(c) "C. B. and B. N. started to bill out customers and close the door" (from Ms. R. A.'s statement to the Commission's agent on January 15, 2015 at GD3-24);

[55] Ms. C. B. denies that she deliberately interrupted the employer's business, and further denies that she closed the restaurant down, staged a walkout of its employees, cancelled service of the existing customers, barred entry of other patrons or advised anyone that the restaurant was being closed due to malfeasance by Ms. R. A. (GD3-26, GD3-46 to GD3-48, and GD10).

[56] The Tribunal undertook a consideration of the evidence put forward by the employer about Ms. C. B.'s deliberate interruption of business at 7 West Café on November 1, 2014, which included the following:

i) Statements given by Ms. R. A. ***about what others told her took place*** at 7 West Café on November 1, 2014 (GD3-24, GD3-27 to GD3-29, GD3-30 to GD3-31).

The Tribunal notes Ms. R. A.'s admission that she was not, in fact, at the restaurant when Ms. C. B.'s "willful misconduct and deliberate interruption of the business" allegedly occurred. The Tribunal also notes that her written statement of what M. F. told her about the events of November 1, 2014 was prepared on January 15, 2015 and not contemporaneously with those events. The Tribunal considered that the lawyers for 7 West Café wrote to Ms. C. B. less than a month later, on February 10, 2015, and requested a statement from her about M. F.'s involvement in the "walkout" that took place on November 1, 2014. By offering not to proceed against Ms. C. B., this letter indicates that Ms. R. A. had some doubt as to who was really responsible for the "walkout".

ii) Written statements from others ***about what took place*** at 7 West Café on November 1, 2014 (GD3-32 to GD3-43).

The Tribunal considered each written statement in turn:

(a) With respect to the January 6, 2015 statement of the patron, Anne Simone, the Tribunal notes her statement says nothing about Ms. C. B. It refers to two

(2) female servers and identifies them only as "a young lad" and by their hairstyles. No evidence was led as to Ms. C. B.'s hairstyle the night of November 1, 2014 and the Tribunal notes there were more than two (2) female servers working at 7 West Café that night.

(b) The undated statement of Ms. R. A.'s business and life partner, N. M., says nothing about Ms. C. B.

(c) The undated statement of the server, S. C., says nothing about Ms. C. B.

(d) The undated statement of the bus boy, P. T., identifies that his statement "reflects the actions of B. N.". It clearly describes "B. N." as the one directing events. His statement only refers to Ms. C. B. as follows: "the other girl who was participating in this shut down was C. B. I heard her and B. N. saying to customers at the door, "Go to the other restaurant down the street. It has a bar."

(e) The undated statement of the cook, M. W., says nothing about Ms. C. B.

(f) The undated statement of K. N., a server at another one of Ms. R. A.'s restaurants, says nothing about Ms. C. B.

(g) The January 12, 2015 statement of W. S., a manager at another one of Ms. R. A.'s restaurants, says nothing about Ms. C. B.

(h) The January 5, 2015 statement of C. T., a manager at 7 West Care who was not working on November 1, 2014, says nothing about Ms. C. B. beyond that she had been paid prior to the events of November 1, 2014.

(i) The January 8, 2015 statement by the server, J. A., indicates he is "unable to point out the most active member" involved in the events of November 1, 2014. The only reference to Ms. C. B. is: "Those I perceived to be most frustrated with the situation, in order were, B. N., S. C., M. F., C. B. and M. A."

iii) The LRB decision of April 24, 2015 (GD12)

The LRB decision includes a ruling that 7 West Café was exempt from its obligation under the Ontario *Employment Standards Act* to provide Ms. C. B. with termination notice or pay in lieu of notice because Ms. C. B. was "guilty of willful misconduct" for her actions on the night of November 1, 2014 in shutting down the employer's business and turning customers away (GD12-8). The Tribunal has no way of knowing what evidence was "determinative" for the Labour Relations Board, as the LRB decision only refers to "the statements and evidence provided by both parties" (GD12-8) and two brief summaries of their positions. There are notes included with the LRB decision filed by Ms. R. A. (GD12-13 to GD12-14) where the Employment Standards Officer appears to document a call on April 15, 2015 to Ms. R. A. regarding the status of the investigation, and refers to having "received a statement from M. F. who stated was not present when decision was made to close restaurant who or what was said – he is unaware of". However, these notes appear to have had portions redacted.

iv) Ms. R. A.'s testimony at the hearing of the appeal describing "video footage" from 7 West Café that shows Ms. C. B. "blocking the entrance, closing the curtains and stopping customers from coming in" to the restaurant, and "blocking access" to the second level.

The Tribunal notes that a determination of misconduct can be based on hearsay evidence (*Morris A-291-98, Mills A-1974-83*), and Ms. R. A.'s description of Ms. C. B. on the "video footage" is, indeed, hearsay evidence. The Tribunal also notes that Ms. R. A. could easily have introduced the video footage itself as evidence and chose not to. Her statements as to what can be seen on the "video footage" are, therefore, not substantiated by proof on the record and need to be weighed against the sworn testimony at the hearing of Ms. C. B. that she acted under the direction of M. F., did not close the restaurant and never refused service to any customers in the restaurant, and that there was only 1 group of customers who were politely referred to one of Ms. R. A.'s other restaurants nearby.

[57] While there are numerous statements pertaining to the actions of B. N. on November 1, 2014, the employer's only evidence that is ***specifically about Ms. C. B.'s actions from an individual who was present and observed her at 7 West Café that night***, are the written statements of the bus boy, P.T., and the server, J. A. Neither of these statements establish that Ms. C. B. deliberately interrupted business that night by closing down the restaurant, staging a walk out, refusing entry to patrons who were waiting to be seated, advising patrons that the restaurant was being closed because of malfeasance on the part of the owner, or barring entry to new customers. The written statements simply do not confirm the version of events Ms. R. A. gave to the Commission's agent on January 15, 2015 (GD3-24).

[58] The Tribunal is also troubled by the many references in the employer's evidence lumping Ms. C. B. and B. N. together as "the girls", "the two girls", "these girls", "these two girls", "them" and "they", making it difficult, if not impossible, to discern which, if any, of the evidence related specifically to Ms. C. B. Indeed, the written witness statements provided by Ms. R. A. point the finger largely at B. N., with only two limited references to Ms. C. B. Nonetheless, Ms. R. A. repeatedly referred to "these two girls" in her testimony and, in fact, more broadly referred to 6-8 employees who were "very close knit, with a lot of negativity" which "led to problems" and "the bad apples took control", so Ms. R. A. had to "clean house". This does not assist the Appellant in proving willful misconduct specifically on the part of Ms. C. B.

[59] The Tribunal then considered the statements provided by the Appellant and her testimony at the hearing. The Appellant has been consistent in her statements that, while she herself had been paid, M. F. told the others that he did not have their pay cheques, didn't know when they would be paid, and that they could feel free to stop serving as a result and it would be "on him". The Appellant's description of the events that followed M. F.'s announcement, namely the staff conferring with M. F. about what to do, the attempts by M. F. and others to reach Ms. R. A., and the suggestion by M. F. that they assemble on the first floor of the restaurant to meet with Ms. R. A. have also been consistent. The Tribunal accepts Ms. C. B.'s evidence and testimony that she acted under the direction of M. F., the manager on duty at the time, to take steps so that the staff could meet with Ms. R. A. on the first floor of the restaurant. The Tribunal finds her evidence on this point to be credible and that it sets out an explanation that makes sense in the circumstances: Ms. C. B. had been paid and was not angry, but others who had not been paid were angry, were not prepared to continue working and wanted to meet with Ms. R. A. about their pay. As one waitress on a team of service staff on duty at 7 West Café that night, Ms. C. B. could hardly have continued service by herself in the circumstances. Ms. R. A.'s testimony that M. F. didn't have authority to close the restaurant and that because he had given his notice, he didn't have authority to make statements about pay cheques or call for a staff meeting with Ms. R. A. is not persuasive and does not negate the evidence that he, in fact, did just that. Nor does it establish that Ms. C. B. was somehow excused from following the directions of the manager on duty.

[60] The Tribunal is also not satisfied that the alleged misconduct was, in fact, the reason for Ms. C. B.'s dismissal and not the excuse for it. While Ms. R. A. said she did not dismiss Ms. C. B. on the spot when she arrived at the restaurant on November 1, 2014 but only after "a day-and-a-half" of fact-finding (see paragraph 40 above), the Tribunal notes that the termination email was, in fact, sent to Ms. C. B. on November 2, 2014 at 5:08pm, less than 24 hours after

Ms. R. A. arrived at the restaurant, and well before Ms. C. B. would have come in on the Monday (November 3, 2014) to give her statement to Ms. R. A. The Tribunal has doubt as to whether Ms. C. B. was dismissed for her actions on November 1, 2014 or because she was friends with B. N. and, therefore, included as part of Ms. R. A.'s steps to "clean house" at 7 West Café.

[61] The Tribunal was struck by the statements that 7 West Café is seeking "vindication" and "a written apology" for Ms. C. B.'s "shameful actions" (GD3-22 to GD3-23), as well as Ms. R. A.'s testimony that she herself is "looking for support" from "the system" and "a victim", who "wants an apology". The Tribunal notes the letter from the lawyer for 7 West Café requesting a written statement from Ms. C. B.'s about M. F.'s actions on November 1, 2014 and the testimony by Ms. C. B. that she is being sued by Ms. R. A. for $25,000. The employer is clearly looking for someone to suffer consequences for the events at 7 West Café on November 1, 2014. However, an appeal to the Tribunal is not the forum for a party to seek vindication or a declaration of victimhood or an apology. The Tribunal has doubt as to whether Ms. R. A. has appealed to the Tribunal to protect the integrity of the employment insurance program or for some other purpose, such as gaining leverage in her civil action against Ms. C. B. and B. N., and potentially others.

[62] Having considered all of the evidence filed in this appeal and the testimony of Ms. R. A. and Ms. C. B., the Tribunal prefers the evidence of the Appellant and finds that the Appellant did not engage in the deliberate interruption of business that the employer alleges led to her dismissal.

Does that conduct constitute "misconduct" within the meaning of the EI Act?

[63] The Federal Court of Appeal has held that it is not the role of the Tribunal to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul 2006 FCA 251*), but rather whether the conduct in issue amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[64] Having found that Ms. C. B. did not engage in the conduct that the employer alleges led to her dismissal, the Tribunal is also not satisfied that Ms. C. B.'s behavior was "misconduct" within the meaning of the EI Act. On an objective assessment of all of the evidence filed and the testimony at the hearing, the Tribunal finds there is nothing that points to willful or reckless behavior on the part of Ms. C. B. that was such that she knew or ought to have known that her behavior on November 1, 2014 could lead to her dismissal. Her testimony that she was acting under the direction of her manager on November 1, 2014 is consistent and credible and, as she was acting under the direction of a manager, the willful element required for her behavior to constitute "misconduct" within the meaning of the EI Act is not present. Nor is it possible to

conclude that Ms. C. B. knew or ought to have known she could be dismissed for following the direction of her manager so that a staff meeting with Ms. R. A. could take place on the first floor at the restaurant.

[65] The Federal Court of Appeal has held that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely on speculation or suppositions (*Crichlow A-562-97)*; and that an employer's opinion or subjective appreciation of the type of misconduct which warrants dismissal for just cause does not satisfy the onus of proof (*Fakhari A-732-95*). There must be sufficiently detailed evidence before the Tribunal for it to be able, first, to know how the employee behaved, and second, to decide whether the behavior was misconduct*: Meunier A-130-96, Joseph A-636-85*. While Ms. R. A. has made statements about what can be seen on video footage taken at 7 West Café on November 1, 2014, the Tribunal gives more weight to Ms. C. B.'s sworn testimony about her actions that night and finds that the employer's evidence, overall, is simply not sufficient to prove that Ms. C. B. behaved as the employer alleges.

[66] While Ms. R. A. submitted that the LRB decision was "determinative" of the question of whether Ms. C. B.'s behavior was "willful misconduct", the Federal Court of Appeal has held that the Tribunal is not bound by how a third party (such as the Ontario Labour Relations Board) might characterize the grounds on which an employment has been terminated: *Morris A-291-98, Boulton A-45-96, Perusse A-309-81*. For the reasons already set herein, the Tribunal finds that the evidence relied upon by the employer in this appeal is not sufficient to prove misconduct within the meaning of the EI Act.

[67] The Tribunal finds that there is doubt as to Ms. C. B.'s alleged misconduct in connection with the closure of 7 West Café on the night of November 1, 2014 and, therefore, as per the Federal Court of Appeal's rulings in *Joseph, (supra)* and *Bartone, (supra),* the employer has not proven that the Appellant lost her employment as a result of misconduct.

[68] Finally, the Tribunal considered Ms. R. A.'s submission that it would be "unfair to reward" Ms. C. B. with EI benefits given her conduct. In order to qualify for EI benefits, a claimant must meet the requirements set out in the EI Act. The question of fairness is not relevant to the determination of qualification that is provided for in the EI Act. The Tribunal

accepts the Commission's evidence on the processing of Ms. C. B.'s claim and agrees with the Commission's conclusion that Ms. C. B. met the statutory requirements to qualify for EI benefits.

CONCLUSION

[69] The Tribunal finds that the Appellant has not proven, on balance of probability, that Ms. C. B. lost her employment at 7 West Café by reason of her own misconduct. The Tribunal therefore finds that Ms. C. B. is ***not*** subject to a disqualification from EI benefits pursuant to section 30 of the EI Act.

[70] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section