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

Citation: *P. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 49

Tribunal File Number: GE-15-3814

BETWEEN:

P. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Teskey & Associates Inc

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: March 14, 2016

DATE OF DECISION: April 11, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. P. P., the Appellant (Claimant) attended the hearing.

Mr. M. B., Director of Operations along with legal counsel Mr. Gary Smith, representing Teskey & Associates Inc (employer) attended the hearing.

INTRODUCTION

[1] On July 12, 2015 the Appellant made an initial claim for employment insurance benefits. On August 5, 2015 the Canada Employment Insurance Commission (Commission) allowed the Appellant benefits. On August 18, 2015 the employer made a request for reconsideration. On October 8, 2015 the Commission changed their original decision and denied the Appellant benefits as it was determined he lost his employment by reason of his own misconduct. On November 20, 2015 the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal).

[2] The hearing was held by In person for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the credibility may be a prevailing issue.

c) The fact that more than one party will be in attendance.

d) The information in the file, including the need for additional information.

e) The fact that the appellant or other parties are represented.

ISSUE

[3] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification pursuant to sections 30 of the *Employment Insurance Act* (Act) because he lost his job due to his own misconduct as per paragraph 29(1)(b) of the Act.

THE LAW

[4] Paragraphs 29(a) and (b) of the Act states for the purposes of paragraph 30(a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[5] Subsection 30(1) of the Act states a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.

EVIDENCE

[6] In his application for benefits the Appellant stated he was terminated because he shared a photo of a coworker that he was in a personal and mutual relationship to another coworker. He stated the employer considered it a breach of confidentiality and inappropriate at work. He stated when he showed the photo it was off company property and during a break. He stated the photos were on his personal phone and the coworker falsified information saying he sent inappropriate pictures. He stated this is not the case because he never sent J. M. any pictures. He stated he wasn't aware if the employer had a policy on this or not. He stated he spoke to his employer and outside organizations. He stated his employer stated they had received information but they failed to provide any evidence to support the allegations (GD3-9).

[7] In his application the Appellant stated he tried to plead his case to the Director of Operations but he had already made up his mind and was given the final decision to terminate his employment by the employer. He stated he spoke to Employment Standards who stated sharing personal information with another coworker off company property on his break does not constitute grounds for termination (GD3-10).

[8] In his application the Appellant stated that the case manager had shown a great deal of favoritism with two coworkers and the information provided by G. A., whether true or false was automatically believed by A. S. He stated this led to the story being blown out of context resulting in his false termination (GD3-10).

[9] A record of employment indicates the Appellant was employed with Teskey and Associates from February 16, 2015 to July 7, 2015 when he was dismissed (GD3-17).

[10] On August 5, 2015 the employer stated to the Commission the Appellant was terminated for distributing a highly inappropriate photo of another female coworker whom the Appellant had a relationship with, to another coworker. He stated they debriefed the situation to the female coworker who was shocked and embarrassed. He stated it was very inappropriate and not professional. He stated the Appellant was actually a good worker but it was serious enough that they had to dismiss him. The Commission asked the employer to verify "distribute" and he stated that the Appellant showed to one coworker. He stated he never saw the photo because he was on vacation but the manger reported to him and they made the decision. He stated they did not have a policy for this in place because it never happened before. He stated they have a policy of cell phones but the picture was on his personal phone (GD3-19).

[11] On August 5, 2015 the Appellant stated to the Commission that he was in a relationship with the female coworker and there had been gossips about them so he decided to show a photo of them to a coworker to stop the gossip. He stated he only showed the photo to one person and the photo was of the two of them in a public place. He stated the coworker who saw the photo made up all the stuff to get him fired. He stated there was no policy in place regarding showing photos to a coworker, especially when it was done his break and off company property (GD3-20).

[12] On August 5, 2015 the Commission notified the employer that they would be paying the Appellant benefits because they did not find the Appellant lost his employment due to misconduct (GD3-21).

[13] On August 18, 2015 the employer made a request for reconsideration stating the Appellant was terminated for just cause. He stated on his cell phone he displayed a photograph of a female coworker clad only in a bra and panties to other coworker(s). His actions are (1) a fundamental breach of standard of conduct owed to co-workers; and (2) seriously detrimental to the effective functioning of our workplace environment. The employer also provided additional reasons submitted by their legal counsel that the Appellant's actions constituted a breach of his coworkers privacy rights and a breach of trust as well have been materially harmful to the well-being of the coworker whose image was displayed; as well as to other; and the incident is causing adverse job related consequences (GD3-22 to GD3-25).

[14] On August 31, 2015 legal counsel for the employer stated that he was not sure how many people saw the photo but he knows it was more than one. He stated the employer provides community based individualized support services for special needs individuals, who have high needs/high risk profiles, including sex offenders that require intensive supports as they live independently in the community. He stated that the Appellant had been employed for five months and he was dismissed for showing pictures on his cell phone to coworkers, of another coworker that he was in a relationship with. These pictures were of the female coworker clad in bra and panties and were shown without her consent. He stated the coworkers would be available as witnesses for corroboration. Additional documents were submitted to support the request for reconsideration (GD3-26 to GD3-31).

[15] On September 11, 2015 the Appellant reiterated the reason for his dismissal. He stated he showed the picture to his coworker to prove he was in a relationship with the coworker. He never sent him any picture and J. M. is lying to say he did. He stated he only showed the one photo to J. M. and it was not inappropriate. He stated the witness statements the employer provided were untrue and the employer just trying to get rid of him (GD3-32 to GD3-33).

[16] On September 15, 2015 the employer's legal counsel submitted four witness statements. One dated September 10, 2105 from D. W. who stated that on June 5, 2015 the Appellant showed a picture on his cell phone of a female coworker who had just gotten out of the shower and she was naked and covering her breasts with her hands. A second one dated September 10, 2015 from J. M. who stated the Appellant showed him two pictures of a female coworker while they were working in a group residence. One was of the female in her bra and panties and the other was a closer shot of her in a bra. A third dated September 10, 2015 from F. R. stating that on June 30, 2015 it was brought to her attention that the Appellant had been showing inappropriate pictures of a coworker. He stated he met with the Appellant who admitted he had shown a picture to J. M. as proof the coworker liked him. He stated he asked the Appellant if he had the permission of the coworker to show the picture and he said no. He stated she told him this was unacceptable and there would be consequences for his actions. A fourth statement dated September 9, 2015 by A. S. stated on July 2, 2015 she observed the Appellant in an angry state. She stated when she asked him what was wrong he stated that M. I. had led him on and dumped

him. During the brief conversation he told her that he had shown J. M. underwear shots of M. I. after she ended their relationship (GD3-34 to GD3-39).

[17] On September 17, 2015 the Commission spoke with the Director of Operations and the employer's legal counsel. The Director of Operations stated that J. M. and D. W. reported the incident to the program manager. He stated he does not know why it took three weeks for the front line workers to report it to the program manager. He stated that this adversely affected the work environment because the core trust has been broken between the staff members and the other staff was no longer comfortable working with the Appellant. He stated he did not know if the female worker had filed a complaint against the Appellant. He stated she was very embarrassed and just wants it all to go away. He stated the female coworker was satisfied that the situation had been dealt with when the Appellant was dismissed. He stated he did not ask her to not file a complaint and that he ensured her the pictures had been deleted off the Appellant's phone (GD3-40).

[18] On September 21, 2015 the Appellant submitted details of his history of employment as well as a time line of the events as they occurred. He stated that M. I. and told him that J. M. had been gossiping about them on June 9, 2015 so he kindly asked J. M. to stop. He stated he and M. I. didn't know where their relationship was going so they didn't want them knowing at work. He stated that he showed J. M. a picture of the two of them that he had on his personal phone. He stated he asked J. M. to keep it quiet and he agreed to do so. He stated on June 26, 2015 he called in sick and he sent a text message to F. R. the program director. He stated he returned to his scheduled shift on June 28th. His next scheduled shift was June 30th and he was asked to work on July 1, 2015 and he agreed. On July 2, 2015 A. S. shoved him into her office and she was furious, she stated she overheard that he had been showing inappropriate pictures to J. M. She also stated that she knew of his conversation with F. R. regarding his alcoholism disclosure and that J. M. had told G. A. what he had showed him. The Appellant stated he wanted to leave but A. S. demanded he stay because they were short staffed. He stated after that A. S. said she was going to relay the information to the Director of Operations. He stated he tried to explain he was a victim of gossip but it was already determined that he was to be fired. The Appellant included the text message conversation between himself and F. R. (GD3-42 to GD3-50).

[19] On September 25, 2015 the Commission contacted the employer regarding the statements submitted by the Appellant. The Director of Operations reiterated the Appellant was dismissed for showing these pictures to other coworkers at work. He stated they work in a very high risk field and this type of thing is damaging to the employer, employee and the clients they serve. The Commission then asked F. R. if he had a conversation with the Appellant and he stated they never had a conversation with the Appellant on alcoholism or he has never sent text messages to the Appellant. The Director of Operations confirmed the Appellant called in sick on June 26, 2015. F. R. stated the day he was made aware of the photos he called the Appellant into his office and asked what was going on. He stated the Appellant told him he showed pictures to J. M. to prove that M. I. liked him. He asked the Appellant if he had permission to show the pictures and he did not. He stated the Appellant admitted to him the pictures were of M. I. in her bra and panties. He stated he told the Appellant there would be consequences to his actions. F. R. further stated he attended the meeting on July 7, 2015 with the Director of Operations, J. C. and the Appellant regarding the issue. In this meeting he advised the Appellant he would have to delete the pictures he had shown J. M. and he would have to do it in front of him. He stated he stood by and watched the Appellant delete four pictures, including one of her in bra and panties, and one of her naked, covering her breast with her hands. He stated following this the Director of Operations advised the Appellant his actions were a breach of trust and respect for his coworkers, the agency and the clients they serve and that due to his misconduct is employment was terminated effective immediately (GD3-51 to GD3-52).

[20] On September 29, 2015 the employer's legal counsel submitted a supplementary statement which reiterated the oral statements he provided with the Commission on September 25, 2015 (GD3-53 to GD3-54).

[21] On October 8, 2015 the Commission notified the employer and the Appellant they were rescinding the original decision and they have determined the Appellant lost his employment due to his own misconduct (GD3-55 to GD3-60).

[22] A notice of debt was issued to the Appellant in the amount of $2308.00 (GD3-61).

[23] On November 20, 2015 the Appellant filed an appeal to the Tribunal stating his employer dismissed him after he reported him to Manitoba Labor Standards for non-payment of overtime earned (GD2-1 to GD2-7).

EVIDENCE AT THE HEARING

[24] The Appellant stated that there is conflicting information when EI called asked what happened, and the employer (GD3-19) stated he was dismissed for distributing photos; however this was not true and then in (GD3-22) the employer changed his story to now saying displayed which changed the whole story.

[25] The Appellant stated there were no company policies in place and that the incident occurred off company property and not on company time. He stated he agrees he showed a picture to his coworker of himself and another female coworker that was not inappropriate.

[26] The Appellant stated the whole issue why this came about was because he went to employment standards and he found out he was owed overtime. Employment Standards told him to go to the employer and discuss the issue which he did with M. K. and H. A. They had a sheet with hours, so they admitted they owed him overtime but the dates and times were incorrect. He stated he told the employer that he would not accept this because it was incorrect. He stated the employer told him that if he didn't sign it he would make sure he never worked in social services again.

[27] The Director of Operations confirmed that they had a disclaimer they requested the Appellant to sign.

[28] The Appellant stated while at the meeting he called his legal counsel who told him not to sign off and to just leave. Following that the employer then provided the Commission with the information and the witness statements that he did. He stated it was in retaliation for the overtime that he was owed, and that employment standards approved that he was entitled to overtime.

[29] The Appellant agrees he was dismissed for showing a photo of a coworker to another coworker and he has never denied it. He stated it was off company property and wasn't on

company time. There was no policy on it. He and J. M. were just bonding, J. M. was showing a picture of his girlfriend and he was showing a picture of his.

[30] The Appellant stated there was nothing obscene in the photo he showed, and he can see how J. M. and D. W. may have come up with their stories was because if you go on the coworker's Facebook page you will see inappropriate photos she posts of herself.

[31] The legal counsel stated that they are there to support the decision of the EI people on reconsideration and not here to make a case only that they are here to answer any questions that arises. They support the information they provided on the record which speaks for itself.

[32] The Director of Operations stated that on June 30th it came to his attention by A. S. that the Appellant had allegedly had shown inappropriate pictures of a coworker. So he spoke to his legal counsel to see what options he had and there seemed to be none but to let him go and the legal counsel couldn't come with anything else. He spoke to F. R. and A. S. together and asked them to investigate. They both spoke to the Appellant and to J. M.

[33] The Director of Operations stated he believes it was a picture, at least one that was inappropriate but there were others. He stated that F. R. and A. S. then met with the Appellant who admitted he showed the picture. A. S. spoke with coworker and asked if she had authorized the Appellant to show the picture, to which she said no. Then July 7th he and J. C. met with the Appellant and terminated him, F. R. was there too. This was a week later. However prior to this F. R. got the Appellant to show him the pictures and delete them from his phone to protect the coworker's privacy.

[34] The Director of Operations stated that there was no specific policy of showing pictures or were there any specific company polices on conduct. He stated employees are given an employment offer and they sign a confidentiality clause.

[35] Legal counsel stated this is a small company; subsequently they have put in policy. There was no written policy on respect in the workplace; however it should just be common sense with the nature of the work being done. The employment agreement entails work performance it doesn't deal specially with conduct, integrity, harassment. This falls in respect to common sense, human rights and respect for women.

[36] The Director of Operations added that they are now working on extensive policies.

[37] The Director of Operations stated in regards to the text messages (GD3-48 to GD3-50) submitted by the Appellant. F. R. states he never had a conversation, he is adamant he never had the conversation. M. K. stated he has to take F. R. at his word and that he had asked his IT person who stated it was very easy to change a text message.

[38] The Appellant stated the conversation did occur and that they made him come back to work and made him work the weekend even knowing what they knew. The fact F. R. is denying it, he doesn't know why and he doesn't believe the IT guy, because you can't just change it.

[39] The Director of Operations stated that he personally didn't see the pictures but F. R. saw them, J. M. said he seen them and then another staff member came forward stating he too had seen them. He stated the female coworker didn't make a statement because she was satisfied with the termination of the Appellant and that the pictures had been deleted off his phone.

[40] The Director of Operations stated that meeting to terminate the Appellant occurred on July 7th and F. R. would have spoken with the Appellant a day or two after the 30th.

[41] The Appellant stated that he only had two conversations with F. R., once on the 26th of June when he called in sick and that he disclosed he was having issues with and then at the meeting on July 7th.

[42] The Appellant stated he had the conversation with A. S., when she shoved him into her office. She verbally attacked him. She asked did you show pictures of the coworker, he said he did but it was not inappropriate, it was off company time and only between him and J. M. She then asked him to work overtime on July 1st after she gave him shit, and knowing he was under the influence of alcohol.

[43] The Appellant stated in his meeting with A. S. that she told him she was going to have to tell the Director of Operations about the picture but she still made him work overtime on the July 4th weekend.

[44] The Director of Operations disagreed and stated that he knew July 1st or 2nd was when F. R. had a meeting with the Appellant.

[45] The Director of Operations stated that he never personally saw the picture.

[46] Legal counsel stated that in the conversation he had with the Director of Operations, he felt that the Appellant was a promising new employee, he was 4 months in his position and he wasn't thinking ill, other than this judgment. He stated the Director of Operations was in distress, so he advised him that if he made himself clear of the facts, termination was warranted and that he should satisfy himself of the pictures and that they are destroyed. His understanding is there was a meeting where F. R. made the Appellant scroll through his phone and delete the four or so pictures. The Director of Operations was on the other side of the table so he didn't actually see the pictures, but in the context it was apparent.

[47] The Tribunal asked if there was any disciplinary processes in place and legal counsel stated that the advice he gave was that this was a situation that the genie was out of the bottle, and you couldn't put it back in the bottle as this was case of sexual harassment, abuse of women, human rights, it would be toxic to the culture of the environment. This was not a situation that would warrant a discipline process it was the straw that broke the camel's back.

[48] The Appellant stated that he and the female coworker still talk, they are still friends. He stated he finds it very concerning that she didn't provide a statement and that he was a victim of gossip. He stated that when he disclosed that he had an alcohol problem, F. R. chose to not disclose to his employer but rather disclose the situation that he had a relationship with another coworker. That is why he has a human rights complaint.

[49] The Appellant confirmed that he was terminated on July 7th and he met with the Director of Operations and the employer on August 6th regarding the overtime.

[50] The Director of Operations stated that he determined that they needed at least one manager to see the pictures which was F. R., A. S. didn't see the pictures.

[51] The Appellant stated that the pictures he deleted were not even of him and the coworker. They were just pictures off Facebook.

[52] The Appellant stated the one picture he showed J. M. was a selfie of him and the coworker in a public place.

[53] The Director of Operations stated that the Appellant was not a victim of gossip; he was given the opportunity to explain during the meeting however he blamed everyone else and took no responsibility. He stated he wanted to do make the sure the interest of their employee was protected and they requested him to delete the pictures and once that was done they were satisfied and they proceeded with the termination.

[54] The Director of Operations stated they do try and retain employees but they found this was a situation where they felt they had no choice.

[55] The Director of Operations stated that they did not ask the female coworker for a statement because they tried to minimize her involvement. He stated the female coworker was satisfied with the deletion of the pictures and the Appellant being terminated. Legal counsel stated that in the benefit of hindsight, the female coworker decided to leave the company which speaks to the level of discomfort she experienced.

[56] The Appellant stated that the reason the female coworker told him she left was because the employer was trying to build a case against him and she didn't want to be a part of it.

[57] The Director of Operations stated that the decision was a tough one, it was his decision, he had no knowledge of substance issues, and that the two other people didn't know either, if they did know they would have offered treatment.

[58] The Appellant stated that the conversation with F. R. did occur and that F. R. knew he had an alcohol problem.

[59] Legal counsel stated that this represents an interesting subject matter, and he hopes the EI legislation is up to the 21st century when it comes to electronic data and the human rights of women and men.

SUBMISSIONS

[60] The Appellant submitted that:

a) He does not deny showing one coworker on picture of himself with a female coworker but disputes the fact it was inappropriate;

b) He believes the employer made the request for reconsideration in retaliation because the Appellant went to the Labour Board to obtain his overtime;

c) There were no company policies in place and that the picture was on his personal phone and done off company property and not on company time;

d) He believed he and J. M. were bonding when they exchanged photos of their girlfriends; and

e) He never distributed any photos what so ever as initially alleged by his employer, who subsequently changed his story.

[61] The Director of Operations along with his legal counsel submitted that:

a) The Appellant's actions constituted a zero tolerance misconduct of high risk behavior in the context of our concern for coworker safety in this workplace setting;

b) There was a fundamental breach of the standard of conduct the Appellant owed his coworkers;

c) The Appellant's actions were seriously detrimental to the work place environment;

d) Constituted a breach of his coworkers privacy rights and a breach of trust;

e) The Appellants actions have been materially harmful and well-being of the coworker whose image was displayed as well as to others and the incident is causing adverse job related consequences;

f) The Director of Operations stated that the Appellant was not a victim of gossip; he was given the opportunity to explain during the meeting however he blamed everyone else and took no responsibility. He stated he wanted to do make sure the interest of their

employee was protected and they requested him to delete the pictures and once that was done they were satisfied and proceeded with the termination; and

g) Legal counsel stated that this represents an interesting subject matter, and he hopes the EI legislation is up to the 21st century when it comes to electronic data and the human rights of women and men.

[62] The Respondent submitted that:

a) Credibility will be given to the employer in this case as have provided witness statements of the events. The Appellant gave conflicting information regarding the number of pictures he showed, first it was pictures and then he changed to just one picture. He stated he showed the picture on break outside of work, he then stated he showed the picture at his car, parked in front of his work before his shift. The Appellant is found to be less credible as he has changed his story and provided conflicting statements;

b) In this case, the conflicting evidence is not equally balance. The Appellant admits to sharing a picture with one coworker, however according to him it was just a normal picture of him and his girlfriend in public. He denies sharing it with anyone else, or that there was more than one photo;

c) On the other hand, the employer has provided four separate witness statements which clearly state the Appellant was showing inappropriate images of female coworker. Furthermore two of these statements are written statements from two of the program managers which indicate the Appellant admitted to them that he had shared pictures;

d) The initial explanation provided by the Appellant, is that all four witnesses are ganging upon him to get rid of him, yet the Appellant has not pursued any damages for wrongful dismissal. The Appellant also alleges the real reason for dismissal is that he had disclosed a drug and alcohol problem to his employer prior to being dismissed. The employer denies having previous knowledge of this issue despite the Appellant's submission of text messages between himself and the employer. The text messages are lacking pertinent information and do not support the Appellant's allegations; and

e) In this case, the allegations made by the employer were supported by witness statements. In light of this evidence, the Commission maintains that it is reasonable to conclude that the Appellant was responsible for the actions of which he has been accused.

ANALYSIS

[63] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost he employment due to his own misconduct.

[64] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as willful misconduct, where the claimant knew or ought to have known that her misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemire*, 2012 FCA 314).

[65] The Tribunal must first identify if the alleged act constituted misconduct and if the Appellant's conduct complained of was the cause of the dismissal and not merely an excuse for dismissal (*Davlut v. Canada (A.G)*, A-241-82).

[66] In this case, the Tribunal finds the Appellant was accused of a breach of conduct however unless there is significant evidence to prove the acts were willful or reckless as to approach willfulness can misconduct be determined. The Tribunal does not find that there is sufficient evidence to support the Appellant's actions were willful and of such negligence that he knew or ought to have known his actions would cause him to lose his employment.

[67] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[68] The employer presents the argument that the Appellant's actions constituted a zero tolerance misconduct of high risk behavior in the context of our concern for coworker safety in this workplace setting. There was a fundamental breach of the standard of conduct the Appellant owed his coworkers. The Appellant's actions were seriously detrimental to the work place environment and they constituted a breach of his coworker's privacy rights and a breach of trust. Further the Appellants actions have been materially harmful and well-being of the coworker whose image was displayed as well as to others and the incident is causing adverse job related consequences.

[69] The Appellant presents the argument that there were no company policies in place and that the picture was on his personal phone and done off company property and not on company time. He stated he was in a relationship with the female coworker at the time and that the picture he showed the other coworker was of the two of them in a public place. He didn't believe he was doing anything wrong or it would have caused him to lose his job.

[70] The Tribunal finds from the employer's oral evidence substantiates the Appellant's testimony that there were no polices in place and that the Appellant had only received an offer of employment and required to sign a confidentially clause upon hire. The legal counsel stated that this is a small company; subsequently they have put in policy. There was no written policy on respect in the workplace; however it should just be common sense with the nature of the work being done. The employment agreement entails work performance it doesn't deal specially with conduct, integrity, harassment. This falls in respect to common sense, human rights and respect for women.

[71] The Tribunal finds that although there would be an assumption that common sense should prevail, the facts are clear that the company did not have any polices in place to address inappropriate behavior, harassment or workplace health and safety, therefore there is no evidence to support that the Appellant would have known showing a picture or pictures from his personal phone and not on work time would violate a company policy because it didn't exist. The Tribunal finds that fact that the incident was also not brought to anyone attention by the coworker that initially saw the photo for over three weeks demonstrates that the situation was one that would have violated the expected behavior of employees.

[72] As Justice Nadon wrote in (*Mishibinijima v. Canada* 2007 FCA 36), there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[73] The Tribunal finds from the employers argument that the Appellant's actions breached a zero tolerance policy, which again a policy that Appellant was not aware of, and the Appellant's actions were seriously detrimental to the work place environment and they constituted a breach of his coworker's privacy rights and a breach of trust. However the actions of the employer following being made aware of the alleged inappropriate picture or pictures cannot substantiate this argument that they actually considered the situation was of such as it did not warrant immediate action. The facts are clear the employer waited a week before terminating the Appellant. The evidence clearly supports that the Appellant was also allowed to continue working during this time.

[74] Further the Tribunal asked if there was any disciplinary processes in place and legal counsel stated that the advice he gave was that this was a situation that the genie was out of the bottle, and you couldn't put it back in the bottle as this was case of sexual harassment, abuse of women, human rights, it would be toxic to the culture of the environment. This was not a situation that would warrant a discipline process it was the straw that broke the camel's back.

[75] The Tribunal finds that facts that the Appellant was still allowed to remain working, which included the Appellant attending a large staff meeting on July 2, 2015 cannot support this was a case of sexual harassment, abuse of women and human rights and that it was toxic to the environment or that the other staff had an issue with the Appellant.

[76] Legal counsel stated that in the conversation he had with the Director of Operations, he felt that the Appellant was a promising new employee, he was 4 months in his position and he wasn't thinking ill, other than this judgment. He stated the Director of Operations was in distress, so he advised him that if he made himself clear of the facts, termination was warranted and that he should satisfy himself of the pictures and that they are destroyed. His understanding is there was a meeting where F. R. made the Appellant scroll through his phone and delete the four or so

pictures. The Director of Operations was on the other side of the table so he didn't actually see the pictures, but in the context it was apparent.

[77] The Tribunal finds the evidence provided during the hearing that the employer believed the Appellant to be a promising employee and that dismissing the Appellant was a hard decision however the fact that he satisfied himself with hearsay statements and the fact he himself never verified the picture to be inappropriate questions again the severity of the Appellants actions as alleged in the statements provided by legal counsel. The Tribunal finds it would have been reasonable for the employer to actually see the picture in order to satisfy that the pictures were inappropriate and makes his decision easier on an employee he felt was promising.

[78] The Respondent presents the argument that the credibility will be given to the employer in this case as he has provided witness statements of the events. The Appellant gave conflicting information regarding the number of pictures he showed, first it was pictures and then he changed to just one picture. He stated he showed the picture on break outside of work, he then stated he showed the picture at his car, parked in front of his work before his shift. The Appellant is found to be less credible as he has changed his story and provided conflicting statements. In this case, the conflicting evidence is not equally balanced. The Appellant admits to sharing a picture with one coworker, however according to him it was just a normal picture of him and his girlfriend in public. He denies sharing it with anyone else, or that there was more than one photo.

[79] The Respondent further argues that on the other hand, the employer has provided four separate witness statements which clearly state the Appellant was showing inappropriate images of female coworker. Furthermore two of these statements are written statements from two of the program managers which indicate the Appellant admitted to them that he had shared pictures.

[80] The Tribunal finds the Respondent made their decision based on the fact that the Appellant changed his story from saying pictures to picture which questioned his credibility, however the employer changed his story as well, from a statement that the Appellant distributed photos of the female coworker to displaying, which in the view of the Tribunal the actions of either would have two totally different outcomes.

[81] The Respondent presents the argument that the initial explanation provided by the Appellant, is that all four witnesses are ganging upon him to get rid of him, yet the Appellant has not pursued any damages for wrongful dismissal. The Appellant also alleges the real reason for dismissal is that he had disclosed a drug and alcohol problem to his employer prior to being dismissed. The employer denies having previous knowledge of this issue despite the Appellant's submission of text messages between himself and the employer. The text messages are lacking pertinent information and do not support the Appellant's allegations.

[82] The Respondent presents the argument that in this case, the allegations made by the employer were supported by witness statements. In light of this evidence, the Commission maintains that it is reasonable to conclude that the Appellant was responsible for the actions of which he has been accused.

[83] The Tribunal finds the evidence on the file and the oral evidence the Commission based its decision on hearsay information and that the Director of Operations testified that he too based his decision to terminate the Appellant based on the hearsay evidence that was provided to him. There is no evidence from J. M. who was the one that the Appellant admitted to showing a picture to, and the second statement by D. W., who stated he saw the pictures too was completely hearsay and only referenced once in that a second employee came forward. The Tribunal notes that all of the statements were written months after the termination and that there is no evidence to support the employer made any reference to these witnesses during the initial investigation by the Commission, or that these witnesses provided written statements during employers investigation of the incident at the time of the termination.

[84] The Appellant presents the argument that he has never denied the fact that he showed one coworker one picture of him with a female coworker but disputes the fact it was inappropriate. He believed he and J. M. were bonding when they exchanged photos of their girlfriends and he never distributed any photos what so ever as initially alleged by his employer, who subsequently changed his story.

[85] The Tribunal finds the Commission initially allowed the Appellant benefits based on the detailed description of the incident and circumstances that resulted in his dismissal. However following a request for reconsideration the Commission changed their decision based on witness

statements provided by the employer. As well determined that the Appellant statements were no longer credible as his original statements, he said pictures and subsequently change to stating it was one picture.

[86] The Tribunal finds from the evidence on the file, the Commission only spoke to one of the witnesses, F. R. and not to any of the other witnesses who supplied statements. The Tribunal finds there is no evidence to support that the alleged pictures were inappropriate, other than one other person besides the Appellant that actually saw the pictures. The Tribunal finds the fact that even the Director of Operations, who made the decision to terminate the Appellant for showing the photos, testified the he himself never saw the photos, but was satisfied from F. R.'s statements that the pictures were inappropriate.

[87] The Tribunal finds the Appellant provided documentary evidence of a text conversation that took place between the Appellant and F. R. prior to and following the employer becoming aware of the alleged inappropriate picture incident however the Respondent failed to investigate the documentary evidence but rather decided to ask one yes or no question on whether he had a text conversation with the Appellant. The Tribunal finds from the evidence on the file that the Respondent confirmed it was F. R.'s phone number on the text messages but still remained satisfied with F. R.'s statement. The Tribunal finds from the Commission statement on the file that the text messages are lacking pertinent information and do not support the claimant's allegations, however the evidence is clear the Commission failed to identify or obtain the pertinent information but rather preferred to ask one question and rely on F. R.'s denial the conversations ever took place.

[88] The Court confirmed the principle according to which the employer or the Commission has the burden of proving that the claimant lost their employment by reason of their own misconduct (*Lepretre,* 2011 FCA 30 (CanLII); *Granstrom*, 2003 FCA 485 (CanLII)).

[89] The Tribunal finds from the employers oral evidence he believes it was a picture, at least one that was inappropriate but there were others.

[90] The Tribunal is satisfied the Appellant's oral evidence that he showed one picture of he and the female coworker to one coworker that was not inappropriate is credible, and although there may have been other picture shown, they were not of the female coworker.

[91] The concept of misconduct is much broader. Since July 3, 1994, the benefit of the doubt as to the existence of misconduct must go to the claimant if evidence on both sides is equally balanced. Thus where there is doubt as to the claimant's alleged misconduct, it has not been proven that the claimant has lost his or her employment as a result of misconduct. In this case there is ample evidence of probability which should be resolved in the favor of the Appellant.

[92] The employer provided oral evidence that they did not ask the female coworker for a statement because they tried to minimize her involvement and he stated the female coworker was satisfied with the deletion of the pictures and the Appellant being terminated. Legal counsel stated that in the benefit of hindsight, the female coworker decided to leave the company which speaks to the level of discomfort she experienced.

[93] The Tribunal finds with the lack of evidence of the actual picture or pictures it cannot be substantiated if the pictures were inappropriate or not. The Tribunal finds the fact that there is also no evidence or even a witness statement from the female coworker questions again if the pictures were inappropriate or not. The Tribunal finds the lack of this evidence questions the seriousness of the incident as it related to the female worker. The Tribunal finds from the evidence on the file on two separate statements the female coworker was only asked if she had given the Appellant permission to show the picture or pictures. There is no evidence that the female coworker required further assistance whether legal or mentally to again substantiate the picture or pictures were inappropriate that caused her the extreme stress as indicated in the employer's evidence.

[94] The Tribunal finds that lack of evidence from the female coworker supports the Appellant oral evidence that he and the female coworker still talk and they are still friends. He stated he finds it very concerning that she didn't provide a statement to which the Tribunal agrees questions the fact if the picture was inappropriate.

[95] Legal counsel stated that this represents an interesting subject matter, and he hopes the EI legislation is up to the 21st century when it comes to electronic data and the human rights of women and men.

[96] The Tribunal is tasked with applying the legislation as it is written and determining whether the Appellant lost his employment due to his own misconduct. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[97] As cited in (*Canada (A.G.) v. Tucker* A-381-85), misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Willful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere “carelessness” does not meet the standard of willfulness required to support a finding of misconduct.

[98] In this case the Tribunal is not convinced that the Appellant’s misconduct has been established conclusively and that he should be deprived of benefits under the Act. The Tribunal acknowledges the Respondent has put forward reasons for the dismissal, but in this case the Tribunal does not find misconduct existed.

[99] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the claimant's dismissal from employment (*Macdonald* A-152-96).

[100] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[101] The Tribunal finds that an employer has the right to dismiss an employee with cause based on their conduct; however it is not equivalent to determine misconduct within the meaning of the Act. It is up to the Tribunal to determine whether alleged act constituted misconduct within the meaning the Act.

[102] The Tribunal finds that the Respondent has failed to discharge the burden of proving the Appellant's misconduct within the meaning of the Act. Therefore with the evidence before it, the Tribunal finds the Appellant should not be disqualified from benefits because his dismissal was not caused by his own misconduct (*Meunier v. Canada (A.G.)* A-130-96); and (*Choinier v. Canada (A.G.)* A-471-95).

CONCLUSION

[103] The appeal is allowed.

Teresa Jaenen

Member, General Division - Employment Insurance Section