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

[TRANSLATION]

Citation: *G. C. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 73

Tribunal File Number: GE-13-399

BETWEEN:

G. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

City of X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

DATE OF HEARING: April 19, 2016

DATE OF DECISION: June 3, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The hearing initially scheduled on February 13, 2014 was postponed. A new hearing date was set for April 19, 2016.

[2] The Appellant, G. C., attended the hearing in person in Quebec City, Quebec, on April 19, 2016.

[3] The employer, the City of (Municipality of X), added party to the case, was absent from the hearing.

INTRODUCTION

[4] On February 26, 2013, the Appellant filed a renewal claim for benefits effective February 17, 2013. The Appellant reported that he had worked for the employer, City of X, from January 14, 2008 to February 15, 2013 inclusive, and that he had stopped working for that employer because of a dismissal or suspension (Exhibits GD3-3 to GD3-17).

[5] On April 2, 2013, the Respondent, the *Canada Employment Insurance Commission*, (the "Commission") informed the employer that it had approved the reason for the Appellant's separation from employment after determining that he had not lost his job by reason of misconduct (Exhibit GD3-26).

[6] On April 23, 2013, the Employer, represented by Counsel Laval Dallaire of the firm Gagné Letarte, SENCRL Avocats, filed a Request for Reconsideration of an Employment Insurance decision to challenge the Commission`s decision in the Appellant's case, on April 2, 2013 (Exhibits GD3-27 and GD3-28).

[7] On June 17, 2013, the Commission notified the Appellant that it could no longer pay him regular Employment Insurance benefits, starting on June 9, 2013, because he had lost his job on February 15, 2013 by reason of misconduct (Exhibit GD3-44).

[8] On June 18, 2013, the Commission notified the Municipality of X that regular Employment Insurance benefits would no longer be paid to the Appellant, effective June 9, 2013,

because the reason for his separation from employment was misconduct, within the meaning of the *Employment Insurance Act* (the "Act") (Exhibits GD3-45 and GD3-46).

[9] On July 8, 2013, the Appellant made a Request for Reconsideration of an Employment Insurance (EI) decision (Exhibits GD2-1 to GD2-4).

[10] On July 9, 2013, the Commission informed the Appellant that if he wanted to appeal the decision it had reached following a Request for Reconsideration, he would have to file the appeal directly with the Social Security Tribunal of Canada (the "Tribunal"), (Exhibit GD2-1).

[11] On August 26, 2013, the Tribunal informed the Appellant that it had received his Notice of Appeal. The Tribunal stated that although the Appellant had used the form "Request for Reconsideration of an Employment Insurance Decision" to file his notice of appeal, rather than the form "Notice of Appeal – General Division – Employment Insurance Section," or a similar form, the Tribunal had processed the application as though it were a regular appeal before the Tribunal (Exhibits GD2-1 to GD2-4).

[12] On August 26, 2013, the Tribunal informed the employer that if it wanted to be included in the case as an added party, it would have to file the appropriate request with the Tribunal no later than September 10, 2013.

[13] On September 5, 2013, the employer's representative informed the Tribunal of the employer's interest in acting as an added party in this case. The representative pointed out that the employer had decided to dismiss the Appellant and was able to explain the reasons for the dismissal (Exhibits GD5-1 and GD5-2).

[14] On October 3, 2013, the Tribunal informed the employer that it had been included as a party to the appeal and would have to file any documents or written submissions before November 1, 2013.

[15] On November 22, 2013, the Tribunal informed the employer`s representative that it would have to submit all documents or written submissions before December 20, 2013 (Exhibit GD9-1).

[16] On January 19, 2016, the Appellant's representative, Counsel Bernard Mailloux, of the firm Poudrier, Bradet Avocats S. E. N. C., informed the Tribunal that his contract to represent the Appellant had ended (Exhibits GD13-1 to GD13-5).

[17] This appeal was heard in person for the following reasons:

a) The complexity of the issue under appeal;

b) The information in the file, including the nature of the missing information and the need for clarification, specifically regarding the circumstances that led to the Appellant's dismissal; and

c) The fact that the parties had representation (Appellant and employer), (Exhibits GD1-1 and GD1- 2).

ISSUE

[18] The Tribunal must determine whether the Appellant lost his employment because of his misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* ("the Act").

THE LAW

[19] The provisions on misconduct are set out in sections 29 and 30 of the Act.

[20] Paragraphs 29(a) and (b) of the Act provide as follows with regard to "disqualification" from receiving employment insurance benefits or "disentitlement" to such benefits:

> […] For the purposes of sections 30 to 33: (a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period; (b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers […].

[21] Subsection 30(1) of the Act states the following about "disqualification" for "misconduct" or "leaving without just cause":

> […]A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any

> employment without just cause, unless: a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[22] Subsection 30(2) of the Act states the following about the "length of disqualification":

> […] The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

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

a) A record of employment, dated September 18, 2012, states that the Appellant worked as "Director of Public Works" for the employer Municipality of X, from January 14, 2008 to September 10, 2012, inclusive, and that he stopped working for this employer because of illness or injury (Code D – illness or injury), (Exhibit GD3-20);

b) A record of employment, dated February 19, 2013, indicates that the Appellant worked for the Employer, the Municipality of X as "Director of Public Works," from January 14, 2013 to February 15, 2013 inclusive, and that he stopped working for this employer because of a dismissal (Code M - Dismissal), Exhibit GD3-21);

c) On May 23, 2013, the employer's representative, Counsel Laval Dallaire, provided the Commission with a copy of the following documents:

   i. Pay slip for S. M. (city employee), for the period from July 8, 2012 to July 21, 2012. This document shows that the employee worked 40 regular hours and 1.75 hours of overtime in the period shown, and that 40 hours of vacation time were also entered during this period (Exhibit GD3-34);

   ii. Pay slip for J. D. (city employee), for the period from July 8, 2012 to July 21, 2012. This document shows that the employee worked 80 regular hours of work and 2.25 overtime hours in the period shown (Exhibit GD3-35);

iii. Legal opinion submitted by the employer's representative to the Municipality of X (city council), dated February 14, 2013, concerning violations alleged against the Appellant (Director of Public Works). In this document, the representative says that the Appellant asked two blue-collar workers under his authority to perform work at his home during their work hours, even though these employees were being paid by the municipality. In his opinion, the Appellant's actions constituted serious grounds for immediately terminating his employment (Exhibits GD3-36 and GD3-37).

[24] The following evidence was presented at the hearing:

a) The Appellant gave an overview of his employment history with the employer, City of X, and explained the circumstances that had led to his dismissal. He said that the city had hired him in 2007 as Assistant Director of Public Works, and he started working in about mid-January 2008. The Appellant said that his immediate superior at the time was C. C., Acting Director of Public Works. He said he occupied the office of the Director of Public Works, A. S. who was on leave at the time. He was later appointed to the position of Director of Public Works in May 2008. The Appellant said he received a letter of praise from G. B., then executive director of the city. He underscored that this letter mentioned that he had exceeded expectations and was a loyal, trustworthy person (Exhibits GD14-5 to GD14-9). The Appellant said that the executive director had been dismissed by the city. He said that the city's lawyer (director of legal services –counsel for the city), S. D., had also been dismissed;

b) He explained that he took over from the Director of Public Works, Mr. A. S. At the time, he said that no punch card system (time cards) was in use. The Appellant said he introduced the punch card system because of a time-theft problem. He said that some employees were banking hours and he was not aware of the situation in the beginning. He said that one employee came to see him in his office to ask for a week off. He said that on submitting his request, this employee asked him to lift up the manual calendar on his desk. The Appellant explained that when he lifted up the calendar, he discovered that there were [translation]"secret banks [of hours] with names, times, […]" He said

that he went to see the executive director, Mr. G. B. about the matter, showing him the bank of hours in question. The Appellant said he was then told by the executive director that employees had banked hours. After asking how he was to go about paying the employees, the Appellant said that the executive director told him to make sure the matter was concealed from the city accountant (financial services), that he could simply have the employees concerned fill out a timesheet stating they had worked, even if they had not. He said that it was a parallel system of banked hours, used as a basis for filling out the timesheets, making it appear that employees had worked certain days even if they had not. He said this was time granted secretly, and that the banks were kept a secret. He explained that employees were covered by collective agreement provisions that prevented them from working more than 40 hours a week. As a result of this system, he said that employees who had racked up overtime hours could use their hours to take leave, and during such days of leave, they were considered to have worked even though they had not. He explained that he had used this banked time system, since it had already been started, as a means of using up the time banked by the employees concerned. The Appellant underscored that he had received confirmation of this "strategy" from the executive director. He explained that after finalizing the use of this banked time, no later than 2009, he introduced a punch card system (based on 15-minute time periods). He explained that a new collective agreement had been negotiated (Exhibits GD3-23, GD3-24);

c) The Appellant said that he had been renovating his home (July 2012) and received an offer from a City employee, S. M., to help him finish the renovation work. The Appellant said he was going through a rough time following his girlfriend's abortion, and that Mr. S. M. had offered to lend him a hand to help him through the problems he was facing. The Appellant said he was on leave for medical reasons from September 10, 2012 to January 21, 2013 (Exhibits GD3-23 andGD3-24). He said that Mr. S. M. had asked whether it would be all right for another employee. J. D., to come and help out with the work to be done as well. The Appellant said that both of these people had decided of their own volition to take vacation days in order to come work on his home, using the banked time allocated to them by the city. He said he accepted the offer

because the two employees would be on vacation during the two days in question (Exhibits GD3-23, GD3-24 and GD3-38);

d) He said that the days on which the city employees had worked on his home were Wednesday, July 11, 2012 and Thursday, July 12, 2012, not July 12 and 13, 2012, as he had previously told the Commission on April 2, 2013 (Exhibits GD3-23 and GD3-24). The Appellant stated that the employees concerned did not perform work on his home during their work hours, as the employer claims, since they were on vacation during the two days in question (July 11 and 12, 2012). He explained that these employees had been using a bank of hours, like that one that existed until 2009, that had been reinstated by the executive director (Mr. G. B.). He said that an agreement had been reached with the executive director to use the same approach as the one used in the past, which he had revived for two employees in particular. The Appellant said that these two employees had worked for the employer on Monday, July 9, 2012 and Tuesday, July 10, 2012 (Exhibits GD3-23, GD3-24 and GD3-38);

e) The Appellant explained that one of the two employees concerned, S. M., was a non-permanent and non-unionized employee. As such, he said this employee was entitled to benefits (ex.: 4% vacation pay). The Appellant said that when this person became a permanent employee, he continued to receive a payment representing 4% of his salary for about a year. This created a salary overpayment, since he had been paid too much. He explained that after the new collective agreement took effect, the employer owed him a certain amount of money, despite the overpayment made to him (4% of his salary). He said that the city then took back the amount of the overpayment made to this employee, and came to see him about this matter. The Appellant explained that he referred the employee in question to the executive director, who reached an agreement with the employee. The Appellant said that under this agreement, the city recovered the amount of the overpayment (deduction of amount), but in return, the executive director would credit him 198 hours in a secret time bank. The Appellant explained that under this agreement, the employee would therefore be able to punch his time card on the days he was taking a holiday, as though he were at work. He said that, in this way, the executive director led the city accountant to believe that that she had done an excellent

job in recovering the amounts owed by the employee in question. The Appellant said that when this employee came to see him to explain about the agreement he had reached with the executive director, he went back to see the executive director to verify the nature of their secret arrangement. The Appellant said that the executive director confirmed the nature of the agreement and explained what he had decided in this employee's case, telling him, [translation] "[…] look, I'm doing this, […] this is how it works […] and I'm your direct superior […] this is the agreement I reached." The Appellant said that the employee in question was an acquaintance of his and they had an affinity, and that he had been given an order from his direct supervisor to follow the agreement reached. He said he followed the terms of the agreement. The Appellant explained that he therefore initialed this employee's time cards to confirm that he had worked days that he had not worked (Exhibits GD3-23, GD3-24 and GD3-38);

f) In the case of the other employee involved, J. D., the Appellant explained that he had started working for the employer about a week and a half before he was officially hired, in about December 2011 or early 2012, and that he had therefore banked about 50 hours of work for which he had not been paid. The Appellant explained that the same banked hours procedure was applied in his case as well. He said that when this employee wanted to take a day off, he could punch his time card to indicate that he had worked even though he had not, and then take the time as vacation. He said that the two employees in question had used these banked hours when they worked on his home (Exhibits GD3-23, GD3-24 and GD3-38);

g) He said that the time cards and "punch cards" (sheets of time credited) of the employees in question showed that they had worked the entire week of July 8 to 14, 2012, when in fact they had not. He said that based on these documents, one of the employees, Mr. J. D., had reported working as follows: Monday, July 9, 2012 (work at city hall), Tuesday, July 10, 2012 (concrete curb), Wednesday, July 11, 2012 and Thursday, July 12, 2012 (fence and parking lot), Friday, July 13, 2012 (asphalt), (Exhibits GD14-1 and GD14-2). He said that the employee had completed this document so that the employer could pay him, even though he had not worked all of the days listed. The Appellant said that on Wednesday, July 11, 2012 and Thursday, July 12, 2012, Mr. J. D. had performed

work at his home and that on Friday, July 13, 2012, he was on vacation. He said that in Mr. S. M.'s case, he was on vacation (40 regular hours). The employee had signed his timesheet but left it blank. The Appellant mentioned that he completed this employee's timesheet at the request of the accountant, entering the same information that Mr. J. D. had given since the two employees always worked together (Exhibits GD3-23, GD3-24, GD3-38,GD14-3 and GD14-4);

h) He said that on Friday, July 13, 2012, the two employees in question had not worked at his home. The Appellant said that one of them, Mr. S. M., had gone to Lake George in the United States on Friday, July 13, 2012 and that on the same day, the other employee, Mr. J. D., was at home having a pool installed. The Appellant said that these two employees had been paid by the City for the day of July 13, 2012, although they had not worked that day. The Appellant underscored that the banked hours system was accepted when the employees were someplace other than his home, but not accepted when they were working at his home (Exhibits GD3-23, GD3-24 and GD3-38);

i) He said that his home is located behind the city garage. He said that when the two employees in question were working at his home, they did not try to hide, and even had lunch with city employees. He said that nothing about the work performed by the two employees in question was done in secret (Exhibit GD3-38);

j) The Appellant explained that although the employer had said that the pay slips showed the employees in question had worked the week of July 8 to 12, 2012, they were not working for the city on the days that they performed work in his home (Exhibits GD3-34 and GD3-35). He said there were two weeks in the summer of 2012 when the employees in question were on vacation. Concerning Mr. S. M.'s pay slip, the Appellant mentioned that he might have been on vacation at home during the period from July 8, 2012 to July 21, 2012, (Exhibits GD3-23, GD3-24, GD3-34, GD3-35 and GD3-38);

k) The Appellant stated that the two employees in question had testified during a preliminary investigation performed in connection with a criminal proceeding, targeting him, and had explained that the banked time system had been put in place by the city;

l) He explained that he had started having differences of opinion with the executive director, Mr. G. B., on a range of topics concerning city government (ex., creation of selection panels to analyze submissions from engineering firms). He said that the director gave instructions to selection panel members about the choice of engineering firms before the submitted bids were analyzed, and was therefore tipping the scales from the start. He said that he later informed the executive director that he no longer wanted to get involved in all that because it seemed unprofessional. He said that the executive director harassed him from 2012 to 2013, when he tried to extricate himself from his ploy and refused to get involved in his machinations (Exhibits GD3-11, GD3-23 and GD3-24);

m) He said that his relationship with Mr. G. B. was less smooth, and said he had told the Appellant that when he was hired he thought of him more as a "field guy" not an "office guy." He said that before he was fired, the executive director wanted to make him assistant director or foreman again, to allow someone else to take over as Director of Public Works. The Appellant said that he controlled about 70% of the city's budget through his position as Director of Public Works, managed about 26 employees and was responsible for managing real estate developments in the city (Exhibits GD3-11, GD3-23 and GD3-24);

n) The Appellant said that while he was on medical leave (from September 10, 2012 to January 21, 2013), the executive director met with the two employees concerned several times. He stated that the executive director had plotted to blame him for falsifying the employees' time sheets. When he met with the executive director, on February 13, 2013, the Appellant told him that if someone had done something crooked, it was him, the executive director. The Appellant said that the director had told him he did not have the balls to go over his head, and sent him back to his office. He explained that after returning to his office, as he was writing a letter to the Mayor of the city, his computer turned off and he no longer had access to anything. He went back to see him (Exhibits GD3-11, GD3-23 and GD3-24);

o) He then told him he had received a letter from a bailiff (letter of suspension dated February 13, 2013) informing him that he was suspended from work without pay for two days, February 13 and 14, 2013 (Exhibits GD14-11 and GD14-12);

p) The Appellant stated that he then challenged the suspension and contact the UPAC (permanent anti-corruption unit) to tell them his story (Exhibits GD3-11, GD3-23 and GD3-24);

q) He explained that he was then dismissed before he was given an opportunity to present his version of the facts to members of city council. He underscored that the city had held special meetings to approve his two-day suspension and ratify his subsequent dismissal (letter of termination dated February 15, 2013), (Exhibits GD14-13 to GD14-15);

r) He said he never received a verbal or written warning from his employer. He said that city council had underscored that his performance had exceeded expectations and he had thus climbed up through the salary levels in addition to receiving certain unsolicited perks (ex.: Montreal Canadiens hockey club seats, installation of items on his property). The Appellant said he decided that enough was enough;

s) The Appellant said he did not bank hours. He said that the city foreman operated using a banked time system, and that other employees had "punch cards" with him. He explained that he was bound by the banked time system used by the executive director and city foreman. The Appellant said that the director [financial services] had said that even after his dismissal, the banked time system continued to be used;

t) He explained that he had filed a complaint with the labour relations committee (CRT), to challenge his dismissal, but the case had not yet been heard because he was also facing criminal charges. He explained that a preliminary investigation had been conducted in February 2015, and that a trial date was to be set following the investigation. The Appellant said he expected to obtain a trial date for March 9, 2016, but did not because of a change in the Crown Attorney. He said that an appearance had also been scheduled on May 3, 2016 for an orientation session, to meet the new attorney

assigned to the case and set a trial date, in order to have the opportunity to defend his case (Exhibits GD3-11, GD3-23 and GD3-24);

u) The Appellant mentioned that he had held talks with the Mayor of the city (employer), W. D., and spoke with her on March 18, 2016. The Appellant said he was informed that the employer would not be represented at the hearing before the Tribunal on April 19, 2016. He said that Counsel Laval Dallaire was no longer representing the employer in this case, and was no longer under contract to the city.

PARTIES' ARGUMENTS

[25] The Appellant made the following observations and submissions:

a) He contended that he was wrongfully dismissed (Exhibits GD3-11, GD3-23 and GD3-24);

b) The Appellant pointed out that there was no "bending of rules" since the two employees in question, friends of his, were on vacation at the time that the work was done on his home, and he was on vacation. He said that it was false to claim that these employees had been working in his home on July 12 and 13, 2012. The Appellant said he had never "punched in" the two employees concerned because he was also on vacation the week of July 8 to 14, 2012 (Exhibits GD3-23 and GD3- 24 and GD3-38);

c) He said that when he returned to work after his medical leave (September 10, 2012 to January 21, 2013), the executive director told him he was not a guy who belonged in an office but in the field, and that the Appellant disgusted him. He explained that he had been ridiculed in front of everyone present at a department management meeting on February 11, 2013, when the executive director called him "incompetent" (Exhibits GD3-23 and GD3-24 and GD3-38);

d) The Appellant explained that he met with his employer on February 13, 2013, for "non-compliance" with his employment contract and told him to stop intimidating him. He said he had asked the executive director, [translation] "to stop disrespecting him and intimidating him in front of his colleagues" (Exhibit GD3-23). The Appellant said he

also told the executive director he was going to reveal the facts of the collusion and management's actions to the Permanent Anti-corruption Unit (UPAC) if he persisted in trying to blame him for actions that were the executive director's sole responsibility (Exhibit GD3-11). He said that the conversation then "climbed a notch," and both of them "lost it" (Exhibits GD3-11, GD3-23 and GD3-24);

e) The Appellant said that the executive director lost his temper on February 13, 2013 when the Appellant told him he had filed a corruption complaint against him. He said that the complaint was unrelated to the dismissal, and concerned developers and engineers. The Appellant said that the executive director had never shown him the time cards of the employees concerned; it was a Sûreté du Québec police officer who showed them to him, and the cards bore his initials, but had not been punched. He said that the two employees did not receive vacation pay for the week of July 9 to 13, 2012, but regular pay, because they used banked time (Exhibit GD3-38);

f) The Appellant said he filed a complaint for psychological harassment and wrongful dismissal (Exhibit GD3-38);

g) He pointed out that if he felt guilty about anything, he would have "taken his medicine" and would not have appeared at the hearing;

h) The Appellant said that the employer had presented his case to the city clerk, and that she had determined, as he had, that he had done nothing wrong. He underscored that the employer believed his version of the facts:

i) In submissions to the Commission, on May 27, 2013 and June 7, 2013, the Appellant's representative, Counsel Louis Ratté, stated that a "lieu time system" had been established at the request of the executive director, Mr. G. B. (Exhibit GD3- 39), whereby employees had to make arrangements with the Appellant to take their leave. He said that extra time worked was not paid in money, but taken in leave. The representative said that when an employee worked over and above the scheduled hours, the employee would take lieu time. He contended that the pay stubs of the employees concerned "do not show that the time sheets had been falsified" (Exhibit GD3-41) and

that these documents “meant nothing” (Exhibit GD3- 39), (Exhibits GD3-39, GD3-41 and GD3-43).

[26] The Respondent (the Commission) made the following submissions and arguments:

a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that a claimant lost an employment because of his or her own misconduct. The Commission noted that, for the alleged act to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate or so reckless as to approach willfulness. It stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibits GD4-5 and GD4-6);

b) The Commission decided that the employer’s allegations that the Appellant had had two city labourers who reported to him work on his home during work shifts paid by the municipality, and had falsified their time sheets, were credible. In its estimation, these allegations were corroborated by evidence and the discovery of the offences had led to the Appellant’s dismissal (Exhibit GD4-6);

c) The Commission contended that Appellant did not successfully prove that the blue-collar employees worked in his home during their vacation time, and were not paid by the City. On the contrary, it underscored that the evidence on the record shows that the Appellant had authorized the hours worked in his home by blue-collar city workers and, like the employer, it considered that none of the Appellant’s explanations could justify the fact that he was personally benefitting from this labour at the city’s expense (Exhibit GD4-6);

d) The Commission assessed that the facts alleged against the Appellant constituted misconduct within the meaning of the Act because they violated the rules of his employment contract, and constituted a serious violation that had damaged the relationship of trust. According to the Commission, the Appellant could reasonably expect that discovery of the violations might result in his dismissal (Exhibit GD4-6);

e) It argued that the violations ran counter to the reliability required of the duties of the Appellant’s position. The Commission underscored that acting in a manner that

seriously affects or breaks the relationship of trust with the employer constitutes misconduct, and that the jurisprudence is consistent on this point (Exhibit GD4-6).

[27] The employer made the following submissions and arguments:

a) The employer (G. B., executive director) explained the Appellant was dismissed for falsifying the time cards of the two employees (labourers) in payment for working at the Appellant's home on July 12 and 13, 2012. He said that in January 2013, the Director of Finance noticed time card irregularities for the week of July 8 to 14, 2012, and she informed him accordingly. The employer explained that he met with the Appellant, on February 13, 2013 and at the meeting, the Appellant raised his voice to a threatening degree (executive director). It said that it suspended the Appellant for one day (February 13, 2013). The employer stated that on February 14, 2013, city council then approved a two-day suspension, on February 13 and 14, 2013, and later passed a motion for the Appellant's dismissal effective February 15, 2013 (Exhibit GD3-22);

b) The employer (G. B.) said he disagreed with the Appellant's version which referred to a time bank unknown to Financial Services. The employer said that he manages the work of municipal employees in accordance with the collective agreement, and is not permitted to bend its requirements. He said that the matter of the Appellant's salary was not the main topic discussed at the February 13, 2013 meeting. The employer said that the two employees concerned did not receive disciplinary sanctions but simply verbal warnings. The employer said that city council had to dismiss the Appellant, because it felt the relationship of trust had been broken (Exhibit GD3-25);

c) The employer's representative (Counsel Laval Dallaire) stated that the Appellant had been dismissed for falsifying time cards. He said that the Appellant had asked two city employees to work on his home during their salaried work hours. The representative said that this work had been done on July 12 and 13, 2012. He also said that the two employees in question worked for the city on Monday, July 9, 2012, Tuesday, July 10, 2012 and Wednesday, July 11, 2012. The representative said it was obvious that the two employees in question were not on vacation. He said that one of them, Mr. S. M., had been on vacation the following week, i.e., the week of July 15, 2012, and the other,

Mr. J. D., had not been on vacation during the week of July 8, 2012 or of July 15, 2012. The representative mentioned rumors concerning the fact that city employees performed work at the Appellant's home and that the work was paid for by the city. He said that the Appellant had been on medical leave during the period from August 18, 2012 to January 14, 2013. The representative explained that while the Appellant was absent, the executive director asked an employee, M. D. [Financial Services], in about October 2012, to pull the time cards of the two employees concerned. He said that time cards and punch cards are usually filled out by the employees. The representative explained that for the days of July 12 and 13, 2012, these two employees had punched their cards in the morning but not at the end of their work day, and the Appellant had initialed the time sheet, confirming the time that these employees left work. He said that the Appellant entered ¾ of an hour more than the usual time of departure, i.e., 4:00 p.m., on each of the days in question for these two employees. The representative said that the executive director had never called the Appellant incompetent. He explained that during the meeting on February 13, 2013, the executive director confronted the Appellant with the punch cards and said he had admitted to signing these cards and told the executive director that he would never be able to prove it. The representative said that the Appellant then lost his temper and threatened to complain to the UPAC (permanent anti-corruption unit). He said that the executive director had never lost his temper at this meeting. The representative said that the Appellant had been suspended for making threats, and that he had said, [translation] "I'm going to drag you through the mud." The representative explained that one of the employees, Mr. S. M., had been hired part-time and received a payment amounting to 4% vacation pay on each of his pays. He said that when the employee started working full time, the employer continued paying him his 4% in addition to vacation pay. The representative explained that when the employer realized this mistake, it reached an agreement with the employee to repay the overpayment, and the amount had been reimbursed in February 2012. He said that his employee had no banked time in July 2012. The representative stated that it was untrue that the executive director had entered an arrangement with this employee that when he took a week of vacation, he had to have someone fill out his time card without informing Financial services. He said that the Appellant's remarks that the other employee, Mr. J. D., had not been paid the first week

that he was hired were completely ridiculous, and that the employee had been paid as usual. The representative said that the two Employees in question had received only verbal warnings and had been notified that they could refuse to perform work that was not for the city. He said that the two employees in question reported to the Appellant. The representative said that the Appellant was the superior of these two employees and they were obliged to obey him. He said that the Appellant had told them he would arrange everything. The representative said that the employer had filed a criminal complaint and the proceedings were scheduled to begin on June 5, 2013. He contended that the Appellant was obviously dishonest and had intended to commit fraud. The representative said that the incident occurred while the foreman was on vacation, and that the Appellant would never have acted in such a manner if the foreman had been there. He specified that the Appellant lives 150-feet behind the municipal garage. The representative stated that before suspending an employee, the employer must seek a legal opinion from a law firm (Exhibits GD3-31 and GD3-32);

d) In a legal opinion sent to the Tribunal, dated May 23, 2013, the employer's representative advanced the following information: [translation] " […] An investigation showed that on Thursday, July 12 and Friday, July 13, 2012, the Director of Public Works asked two blue-collar workers under his authority to perform work at his home. For two days, the employees in question worked at the home of the Director of Public Works, during their work hours, while they were being paid by the municipality. The Director of Public Works authorized the hours that these employees worked in his home on each of their punch cards, and the activities described ion the time sheets were dissimulated. Upon confronting him with the facts, the Director of Public Works admitted that the facts were true but tried to excuse them by mentioning a lieu time system under his management. No explanation by the Director of Public Works can justify that he personally benefited from this labour at the municipality's expense. This was a serious violation by the Director of Public Works who damaged the relationship of trust that must exist between the municipality and the Director of Public Works. At the least, he showed flagrantly poor judgement, indicating that the Director of Public Works is unable to perform his duties or lacks the competence to do so. In our opinion, these actions are

serious grounds for immediate termination of the Director of Public Works' employment […]." (Exhibits GD3-36 and GD3-37).

ANALYSIS

[28] Although the Act does not define the term "misconduct", the case law, in ***Tucker (*A-381-85**), indicates the following:

> [I]n order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance.

[29] In that decision (***Tucker,* A-381-85**), the Federal Court of Appeal (the "Court") recalled the words of Reed J.:

> Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent […].

[30] In ***Mishibinijima* (2007 FCA 36)**, the Court issued the following reminder:

> Thus, there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[31] In ***McKay-Eden* (A-402-96)**, the Court provided the following clarification: "In our view, for conduct to be considered "misconduct" under the ***Unemployment Insurance Act***, it must be wilful or so reckless as to approach wilfulness."

[32] The Court has defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the

claimant's loss of employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (***Lemire*, 2010 FCA 314)**.

[33] The decisions in ***Cartier* (A-168-00)** and ***MacDonald* (A-152-96)** confirm the principle established in ***Namaro* (A-834-82)** that it must also be established that the misconduct was the cause of the claimant's dismissal.

[34] The Court has reaffirmed the principle that the onus lies on the employer or the Commission to establish that the loss of employment by the claimant was because of the claimant's own misconduct (***Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

[35] For the alleged act to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate or so reckless as to approach wilfulness. There must also be a causal link between the misconduct and the dismissal.

[36] The determination that behaviour by the employee leading to the loss of employment constitutes misconduct is a question of fact to be settled based on the circumstances of each case.

[37] The acts alleged against the Appellant in this case, namely, that he completed the timesheets of two city employees to show they had worked for the city when in fact they had performed work at the Appellant's home, do not constitute misconduct within the meaning of the Act.

[38] In the letter of suspension sent to the Appellant and dated February 13, 2013, the employer (executive director) gave him the following explanation: [translation] "[…] I regret to inform you that you have been suspended, with pay. […] the serious information we discussed at a meeting this February 13, 2013, and the threatening and inappropriate comments you made to me [executive director] leave me with no alternative […]." (Exhibit GD14-11).

[39] Then, in a letter dated February 15, 2013, the employer informed the Appellant that the City of X council had held a special session on February 15, 2015 and adopted the following motion: [translation] "[…] Given the legal opinion of Gagné Letarte LLP, dated February 14, 2013; Given the alleged violations; It is moved […] that city council terminate the employment of the Director of Public Works as of this day […]" (Exhibits GD14-13 and GD14-14).

[40] The Appellant acknowledged that two city employees had performed work in his home on Wednesday, July 11, 2012 and Thursday, July 12, 2012. He also admitted to filling out time cards or sheets for these employees indicating that they had worked for the city during the two days in question, and on other days (ex.: Friday, July 13, 2012), when that was not the case.

Non-deliberate nature of acts complained of

[41] Taking into account the specific circumstances surrounding the acts of which the Appellant is accused, the Tribunal finds that such acts were not deliberate or wilful and cannot be considered misconduct within the meaning of the Act (***Mishibinijima,* 2007 FCA 36, *McKay-Eden*, A-402-96, *Tucker*, A-381-85**).

[42] The Tribunal finds that the Appellant's credible testimony during the hearing yielded a comprehensive and highly detailed picture of the events leading to his dismissal. The Appellant's testimony was detailed and free of contradictions. The Appellant gave various explanations concerning the existence and operation of a parallel banked time system existing in the employer's workplace. His testimony provided context for the acts he was alleged to have committed and that led to his dismissal.

[43] The Tribunal accepts as true the Appellant's explanation that the banked time system (banked hours) used by the employer, to allow employees to take days off in consideration of extra time they had worked previously, existed before the Appellant took up his duties and continued to operation while he filled his position as Director of Public Works.

[44] The Appellant's testimony, which has not been disputed, also shows that the parallel banked time system seems to have continued to operate even after his dismissal.

[45] The Appellant's testimony shows that he responded to the request of his direct supervisor, the executive director of the city, to use the time bank allowing employees to take days off for which they would be paid as if they had worked these days, even if they had not.

[46] The evidence submitted also shows that in operating a parallel time bank, the Appellant was simply maintaining a common practice of the Employer to which he was bound. The

Appellant's testimony also shows that the city foreman used the same parallel banked time system.

[47] In these circumstances, the Tribunal finds that nothing in the evidence on record shows that the Appellant breached an express or implied obligation of his contract of employment (***Tucker,* A-381-85; *Lemire,* 2010 FCA 314**).

[48] The Tribunal is of the opinion that the Appellant took account of the standards of behaviour that the employer was entitled to expect of him (***Tucker,* A-381-85**).

[49] The Tribunal finds that the Appellant did not display wilful or wanton disregard of his employer's interest or manifest wrongful intent toward the employer (***Tucker,* A-381- 85**).

[50] The Tribunal considers it entirely plausible that the two city employees who performed renovation work at the Appellant's home on July 11 and 12, 2012, performed such work on days off work with their employer. The Tribunal considers it credible that these employees chose to use the vacation days granted to them to work at the Appellant's home.

[51] The Appellant also said that the employer credited work time to the two employees in question on July 13, 2012, even though neither of them worked for the city on that day.

[52] The legal opinion that the employer used to dismiss the Appellant states:

> [translation] […]An investigation showed that on Thursday, July 12 and Friday, July 13, 2012, the Director of Public Works asked two blue-collar employees who reported to him to perform work in his home. During these two days, the employees in question performed work at the home of the Director of Public Works, during their work hours, while they were being paid by the Municipality. (Exhibit GD3-36).

[53] The Tribunal underscores that despite the employer's investigation, neither of the two employees involved in this matter corroborated the employer's allegations. Neither of them said they had been expected to work for the employer on July 11 and 12, 2012 but were instead obliged to work at the Appellant's home, at his request and for his personal benefit. The employer simply mentioned that it had given the two employees in question a verbal warning.

[54] In these circumstances, the Tribunal considers that although he filled in their time sheets in accordance with the employer's request, the Appellant did not "falsify" the time sheets of the two employees concerned, as the employer argued (Exhibits GD3-31 and GD3-32). The Appellant therefore did not personally benefit from this labour at the city's expense, or at the taxpayers' cost.

[55] The Tribunal believes that the Appellant did not behave in any way contrary to the interests of his employer or of the taxpayers of the city that had hired him.

[56] The Tribunal considers that when the Appellant was dismissed, it was the employer's practice to use a parallel bank of time for employees. Under this system, city employees could save up time and later convert it to days off, in consideration for the extra time they worked.

[57] The existence of such a practice leads us to believe that although he managed a parallel banked time system available for employees to use, the Appellant did not behave in a reckless, negligent or wilful manner (***Tucker,* A-381-85**).

[58] The Tribunal also considers that the Appellant's dismissal proceeded before he had a chance to offer his version of the facts. The evidence shows that the employer relied on a legal opinion and that a motion was passed at a special session of the City of X council on February 15, 2013 approving the decision to terminate the Appellant's employment on the same day (Exhibits GD14-13 and GD14-14).

[59] The Appellant's testimony also shows that the employer now believes his version of the facts. The Appellant underscored that his case had been presented to the city clerk and she had determined he had done nothing wrong.

[60] The Tribunal believes that the acts alleged against the Appellant were not of such an extent that a person would normally expect them to lead to dismissal. The Appellant could not have known that his conduct was such that it would interfere with his obligations to his employer and that there was a real possibility he would be dismissed (***Tucker,* A-381-85*, Mishibinijima,* 2007 FCA 36**).

Evidence obtained by the Commission

[61] The Tribunal would point out that, in cases of misconduct, the onus of proof is on the Commission or the employer, as the case may be (***Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

[62] In the Tribunal's opinion, neither the Commission nor the employer discharged their onus of proof herein (***Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

Reason for dismissal

[63] In the Tribunal's opinion, the evidence submitted shows that the Appellant was not dismissed by reason of any wilful or deliberate act on his part (***Tucker*, A-381- 85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[64] The Tribunal finds that the acts alleged against the Appellant do not constitute misconduct within the meaning of the Act (***Tucker*, A-381-85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[65] On the jurisprudence cited earlier and the evidence presented, the Tribunal finds that the Appellant did not lose his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the Act (***Namaro*, A-834-82, *MacDonald*, A-152-96, *Cartier*, A-168-00)**.

[66] The Tribunal finds that the appeal on this issue has merit.

CONCLUSION

[67] The appeal is allowed.

Normand Morin
Member, General Division - Employment Insurance Section