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

Citation: *Museumpros Art Services Inc. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 131

Tribunal File Number: GE-16-130

BETWEEN:

Museumpros Art Services Inc.

Employer

and

Canada Employment Insurance Commission

Respondent

and

K. L.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: July 13, 2016

DATE OF DECISION: October 13, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Employer (Employer), Museumpros Art Services was represented at the teleconference by the owner of the company, Mr. M. M.

The Added Party (Claimant), Ms. K. L. also attended the hearing by teleconference and her husband, Mr. J. O., acted as an observer.

The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

INTRODUCTION

[1] On August 12, 2015, the Claimant made an initial claim for employment insurance regular benefits after having been dismissed by the Employer because she was engaged in non-work related activities using the Employer's computer while on duty.

[2] On September 10, 2015, the Commission allowed the Claimant's application for benefits because it determined that the Claimant did not lose her employment due to her own misconduct. On October 13, 2015, the Employer requested that the Commission reconsider its decision however; on December 9, 2015, the Commission maintained its decision.

[3] On January 8, 2016, the Employer appealed to the General Division of the Social Security Tribunal (Tribunal) and on March 2, 2016, the Tribunal added the Claimant as a party to this appeal (GD8).

[4] The hearing was held by teleconference given the information in the file, including the need for additional information, the form of hearing respected the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit and the Claimant would prefer not to be in the Employer's presence.

ISSUE

[5] The Member must decide whether the Claimant lost her employment by reason of her own misconduct and whether an indefinite disqualification should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

THE LAW

[6] Section 29 of the EI Act stipulates that for the purposes of sections 30 to 33,

> (a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period;
>
> (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.

[7] Subsection 30(1) of the EI Act stipulates that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

> (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[8] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

[9] On August 12, 2015, the Claimant made an initial claim for employment insurance regular benefits after having been dismissed by the Employer because she used the company computer for personal reasons including, applying to other jobs. She indicated that there is no policy in place forbidding use of the computer for personal reasons on her lunch or breaks. She was not provided with a warning, reprimanded or provided the opportunity to discuss the issue. She worked in a hostile environment and that’s why she was looking elsewhere for a job before leaving (GD3-3 to GD3-15).

[10] The Record of Employment (ROE) confirms that the Claimant was dismissed on August 11, 2015 (GD3-16).

[11] On September 10, 2015, the Commission was unable to contact the Employer. It allowed the Claimant's application for benefits and determined that the Claimant did not lose her employment due to her own misconduct (GD3-17 and GD3-18).

[12] On October 13, 2015, the Employer requested that the Commission reconsider its decision indicating that he had evidence that the Claimant was actively engaged in conducting business with a former employer during work hours. The evidence consists of quotes and invoices for the sale and shipping of artwork to clients that are not those of the Employer. Plus, a budget spreadsheet shows set up costs and operational expenses for an art services company that would be engaged in the exact same business as the Employer. The Claimant was doing this for her former employer whom she also arranged to do a site-visit of the Employer's facility with 5 other people. The Employer interpreted this to be an excuse "to case the joint as part of their market research". The Employer believes that the Claimant's conduct was incompatible with her duties and was prejudicial to his business (GD3-19 to GD3-21).

[13] To the Commission the Employer stated that he did not fire the Claimant for looking for other employment. He stated that he dismissed her for working with her former employer, who was also a client of theirs, to develop a budget for a new storage facility, and she was engaged in shipping and invoicing the former employer. He confirmed that he did not provide the Claimant with a termination letter. He did not have a computer usage policy but notes that the Claimant spent company time and resources to create a competing business which violates a social contract and she should have known that this was not right. He confirmed that the Claimant does not have a contract and they do not a non-competition agreement (GD3-23 and GD3-24). The Employer confirmed that the Claimant did not have a set lunch or break time (GD3-28). He stated that breaks usually occurred at 11 am and lunch was flexible around 1 to 2 pm. He stated that it wouldn't make sense that she would be on break at 9:00 am or 5:00 pm (GD3-79).

[14] The Claimant stated to the Commission that she was shown a copy of a budget, invoices and quotes for the sale and shipping of artwork and multiple copies of her resume that she had used to apply for other jobs. She confirmed that she did not have a contract nor had she signed

anything regarding computer use for personal purposes. The Claimant stated that she did not have set breaks or lunch times. She ate at her desk and used the computer at lunch. The Claimant admitted to the Commission that she took 2 to 3 min. to review and/or draw up invoices for her former employer who was not computer literate and who only sold art but did not ship it. The former employer would sometimes use the Employer to ship documents (GD3-26).

[15] Regarding the documentary evidence provided by the Employer, the Claimant stated that did not create the budget and organizational chart that were sent to her. She was doing research for her own knowledge because she questioned how the Employer stored art and was doing research on how much it would cost for art storage and vaults. When asked to explain why it said "S. was looking into this" and if it referred to her former employer, the Claimant stated to that it was coincidence because the person who sent it to her was also named S. and she does not work for her former employer (GD3-78). Regarding the email from her former employer that went to the Employer about leasing a building/space, the Claimant wasn't sure why it was sent to that email address. The Claimant stated that she quickly opened and reviewed invoices for her former employer and looked at her personal taxes but did not spend hours on them. She was always at her desk, rarely went out, took lunch at her desk and sometimes took a break around 4:00 to get something to eat. There were no policies about breaks or what they could do on the computers (GD3-76).

[16] On December 9, 2015, the Commission maintained its decision noting that the Employer has not met the onus of showing that the Claimant was aware that her actions could lead to dismissal. Although it was evident that the Claimant downloaded documents that were not related to his business, she had never been told that she wasn't allowed to use the computer for personal activities on her own time. Because there were no set break times, it cannot be concluded that she engaged in personal activities during company time. Also due to a lack of a computer usage policy prohibiting personal email or downloading documents to the computer, and no warnings, misconduct was not shown (GD3-79 and GD3-81 to GD3-84).

Documentary evidence from the Employer

[17] Copies of screenshots taken of the Claimant's computer showing a capital expense budget (equipment, supplies, construction, vaults, salaries, insurances, etc.) and organizational

chart to set up an art storage and shipping facility/business or "Art Services Company" for the Claimant's former employer named therein (GD3-32 to GD3-39).

[18] Copy of an email from the Claimant's former employer to the Employer regarding the former employer's search to lease a large (15,000 sq. ft.) building/space - submitted to provide credence to the budget document and organizational chart; there is no reason why she would send this to the Employer (GD3-40).

[19] Copies of screenshots from the Claimant's computer showing her buying event tickets at 9:14 am and other job search and personal activities at around the same time in the morning, noon and 3:00 pm - submitted to show her personal activities were not limited to her morning breaks and lunch (GD3-41 to GD3-54 and GD3-60, GD3-61 and GD3-66 to GD3-71).

[20] Copies of screenshots showing invoices and estimates for her former employer's client(s) including one in Australia conducted at various times of the day (GD3-55 to GD3-59 and GD3- 62 to GD3-65 and GD3-72 to GD3-75).

[21] The Employer provided copies of timesheets for the weeks of August 25 to September 5, 2014, November 15 to 28, 2014, January 10, 2015 to February 6, 2015 and March 21, 2015 to April 3, 2015, May 16 to May 29, 2015. The timesheets show that for most days the Claimant did not take lunch and she generally worked 9:00 am to 5:30 pm (GD2-5 to GD2-10).

Testimonies at the hearing

[22] The Employer testified that the evidence shows that the Claimant used company time and resources to deliberately engage in activities with her previous employer to start a new business/company in direct competition with his company. He stated that this former employer is a 'storage client' of theirs, that is, she stored artwork at their facility ever since she closed her own business. The Employer notes that the evidence shows that the Claimant was researching and putting together a business plan for her former employer noting the former employer's name under 'insurance', the organizational chart for such a company and the email from a real estate agent sourcing warehouse space. The Claimant also arranged for this former employer to tour his warehouse with 5 other financial people to 'case the joint' and to see how everything works. He then received a copy of the email from this former employer's real estate agent and finance person sourcing out a warehouse for her (GD3-40). This evidence shows that the

Claimant was engaged in ‘espionage’ to set up a competing storage business betraying his trust. He stated that looking at the weather forecast using company resources is forgivable but looking over documents that are prejudicial to the employer and submitting that she doesn’t know what a budget spreadsheet or organization chart is, is preposterous.

[23] The Claimant testified that she did not create the documents sent to her by her former employer and she denies the Employer’s allegations. She stated that the email from the real estate agent does not show what her former employer was doing and she doesn’t know.

[24] The Employer testified that the screenshots (GD3-41 to GD3-43and GD3-71) show that the Claimant was engaged in personal activities at all hours of the working day. Exhibits GD3-72 to GD3-75 show that the Claimant was engaged in activities that had nothing to do with her employment/employer. They are her former employer’s invoice and estimate to another person, not a client of the Employer.

[25] The Claimant testified that GD3-72 to GD3-75 are documents she proof-read for her former employer and stated “yes we are very close” - “that’s S.’s client” … “she sold a piece of art work and I proof-read it for her and made sure she did everything right - on my break”.

[26] The Employer testified that the timesheets (GD2-5 to GD2-10) show that the Claimant was claiming that she worked through her lunch so the alleged activities were not done on her own time. He confirmed that there were no scheduled breaks but typically there was a break between 10:00 - 11:30 am and lunch between 1:00 - 2:00 pm and the working day was 9:00 am - 5:30 pm. The Employer testified that he approved the timesheets on a biweekly basis.

[27] The Claimant testified that everyone worked through their lunch and there was no scheduled time or policy that she couldn’t use the computer for personal purposes, that is, to look at her emails. She stated that the screenshots are of her ‘downloads’ folder. She opened the documents for a few minutes from her email.

[28] The Claimant was asked whether she knew that she was not to use the company computers for personal use. She testified that there was no policy against it, she never signed anything and she had no warning.

[29] The Employer confirmed that he did not provide a termination letter and the Claimant was not provided with any warnings because she was dismissed the day they discovered the evidence.

SUBMISSIONS

[30] The Employer submitted that based on the time-dated documents on the Claimant's computer, it is evident that she was engaged in activities contrary to the interests of the Employer. She was actively engaging in conducting business with a former employer using company resources and time. The Employer submitted that he does not need to have a formal policy regarding the personal use of a company computer/asset by employees because it's reasonable to expect that it not be the case (GD2). What the Claimant was doing was in direct competition with the Employer and there is a social contract that she should have known her actions were inappropriate and in conflict with her employment/employer. By actively engaging in activities to start a new competing business is a betrayal of the employer's trust and contravenes why she was hired.

[31] The Commission submitted that the Claimant did not lose her employment by reason of her own misconduct because the Employer has not proven that the Claimant violated any policies or procedures relating to computer usage, or violating a non-competition agreement. Although the Employer has shown that the Claimant's activities were not always work related, there is nothing to support that the Claimant was performing these tasks while specifically ignoring her work or that she was guilty of 'espionage' in an effort to establish a competing business with her former employer. She did not have set breaks or lunches and she has provided a reasonable explanation for her computer usage while at work. Further, the Claimant was not warned or disciplined for any of the alleged behaviour so she would not have known that her continued actions would result in her dismissal.

[32] The Claimant submitted that there is no policy in place stating they are not allowed to use the computer for personal use. She had never been reprimanded or "written up" for anything prior to termination. She was dismissed without warning, explanation or opportunity to discuss. She admitted she used the computer for personal use on her lunch break and that she was searching for another job (GD3-8). The line between work time and personal time was not

a clear one. The Employer's accusations are vindictive and unfounded (GD7). The Claimant further submitted that her former employer was a client of the Employer and she was obligated to have contact with her. She did not produce the questionable documents, did not take any client files or proprietary information from the Employer and was not "in cahoots" with her former employer to create a competing business. The Claimant submitted that it is difficult to address the issue of the 'time stamps' on the computer as the time displays on the office computers were not synchronized and not necessarily accurate. Regarding the site visit by her former employer and others, the Claimant submitted that the Employer approved and was initially present for that visit and then recused himself demonstrating his trust in her and that he wasn't concerned about the number of people that were present (GD9).

ANALYSIS

[33] Section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by reason of his/her own misconduct.

[34] The Member recognizes that the legal test to be applied in cases of misconduct is whether the act under complaint was willful, or at least of such careless or negligent nature that one could determine that the employee willfully disregarded the effects his/her actions would have on job performance (McKay-Eden A-402-96, Tucker A-381-85). That is, the act that led to the dismissal was conscious, deliberate or intentional, where the claimant knew or ought to have known that his/her conduct was such as to impair the performance of the duties owed to his/her employer and that; as a result, dismissal was a real possibility (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[35] Further, the Member recognizes that the onus is on the Employer and the Commission to show that the Claimant, on a balance of probabilities, lost her employment due to her own misconduct (Larivee A-473-06), Falardeau A-396-85).

[36] The Member notes that it must first be established that the Claimant's actions were the cause of her dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). In this case, it is undisputed evidence that the Claimant was dismissed from her employment on August 11, 2015. The Employer testified, and stated to the Commission, that the Claimant was dismissed because she was actively engaging in establishing a competing business with her

former employer that was contrary to the interests of his company, and she did so using company time and resources. The Employer stated to the Commission that although he could have warned or reprimanded the Claimant because she was looking for other employment while at work, he did not fire her for this reason (GD3-23). The Member therefore finds that the Claimant was terminated because she allegedly was assisting and engaging in what the Employer referred to as 'espionage' with her former employer to establish a competing business.

[37] The Member must consider the Claimant's actions at the time of dismissal and decide whether the Claimant committed the alleged acts and whether those actions amount to misconduct under the EI Act.

[38] The Member therefore first considered that in order for misconduct to exist, it must be established that the Claimant committed the alleged offence(s). In other words, did the Claimant engage in activities using the company computer that (a) were not work related and/or show that she was actively establishing a competing business with her former employer and (b) were any of these activities on company or personal (break/lunch) time?

[39] Firstly, it is undisputed evidence that the Claimant did use the company computer for personal activities including submitting applications to other jobs, reviewing/looking at her taxes, buying event tickets, etc. The documentary evidence shows that indeed such documents were downloaded from her personal email (GD3-41 to GD3-54 and GD3-60, GD3-61 and GD3-66 and GD3-71). The Member finds therefore, that the Claimant did conduct personal activities on her computer at work at various times in the day.

[40] The Employer however, confirmed that he did not dismiss her for this reason. He objected to the fact that the Claimant used a company computer to review documents for her former employer and dismissed her when he discovered that she had downloaded a capital expense budget and organizational chart for an art storage and shipping facility/business, or "Art Services Company". He concluded that the Claimant was researching and putting together a business plan for her former employer in order to start a new competing company. He also noted that for some unknown reason, he/company (not the Claimant) received an email from the former employer regarding her potential lease of a storage facility. He also testified that the Claimant arranged a tour of his facility with 5 other financial people to 'case the joint' and to

see how everything works. The Employer confirmed that the Claimant's former employer was also their client who used his company to store artwork.

[41] On the other hand, the Claimant does not deny reviewing documents for her former employer and in fact testified that she was "very close" to her former employer. She admitted that she did proof-read/reviewed invoices and estimates/quotes for her but she also noted that she did not create them and she spent only a few minutes looking at them. She stated the same to the Commission (GD3-19 to GD3-21 and GD3-26). The Claimant advised the Commission that she also did not create the capital expense budget and organizational chart sent to her by her former employer (GD3-78). She too testified that she does not know why her former employer would forward a copy of an email to the Employer from a real estate agent that was sourcing warehouse space for her. Regarding the tour, the Claimant submitted that the Employer approved the visit and did not indicate any concern at the time. She too confirmed that her former employer was a client of the Employer and added that she was obligated to have contact with her. The Claimant repeatedly denied that she was "in cahoots" with her former employer to create a competing business.

[42] The Member finds both parties equally credible and therefore placed equal weight to their testimonies and relied on the undisputed and documentary evidence. For instance, it is undisputed evidence that the Claimant, with the Employer's knowledge and approval, provided her former employer and 5 others with a tour of the Employer's facility. It is also undisputed evidence that the Claimant's former employer was also a 'storage client' of the Employer. The Member therefore finds that this evidence does not demonstrate that the Claimant was actively enabling her former employer to "case the joint" in order to find out how a warehouse operates. The Member also finds that the forwarded email from the former employer's real estate agent to a generic email of the Employer does not show that the Claimant had knowledge of her former employer's search for warehouse space. Further, the documentary evidence undisputedly shows that the Claimant downloaded and reviewed documents for her former employer. This evidence however does not support a finding that the Claimant created these documents, that she was putting together a business plan for/with her former employer. The Member acknowledges that, given the nature of the documents, the former employer may have been looking to establish a business again (having closed her own) however, the evidence that the Employer has put forth

does not show conclusively that the Claimant was “in cohoots” or that she was engaged in “espionage” with her former employer in order to set up a competing business to his own. The Member finds that although the Claimant did download and did reviewed documents emailed to her from her former employer, the evidence does not conclusively show that she was actively engaged in the establishment of a competing company to that of the Employer.

[43] Secondly, the Member considered whether the Claimant engaged in these non-work related activities for her former employer during company time. The documentary evidence shows that the Claimant did download her resume and application forms at various times in the day and as early as 9:15 am (GD3-41, GD3-42 and GD3-45 to GD3-54). The timesheets show that the Claimant typically worked 9:00 am to 5:30 pm (GD2-5 to GD2-10). When the timesheets are cross referenced to when the Claimant downloaded non-work related documents, there were days that the Claimant claimed to have not taken a lunch yet downloaded these documents at various times in the morning or later in the afternoon on those same days. (The Claimant downloaded her resume at around noon on November 17, 2014 (GD3-48) however; she was not dismissed for working on her personal work). On only one occasion did the Claimant indicated that she did not take a lunch yet downloaded a document from her former employer at 1:00 pm (January 21, 2015, GD3-55). The Member finds however, that without set breaks and lunch, and without evidence of how long the Claimant spent looking at these non-work related documents, this evidence simply shows that the Claimant looked at these documents on days that she also did not take lunch. It does not refute the possibility that she looked at these documents for her employer on her breaks on the days she didn’t take lunch. The Member also noted that the Employer personally approved the timesheets on a biweekly basis. The Member finds therefore that this documentary evidence does not show that the Claimant was actively engaging in establishing a competing business with her former employer on company time.

[44] The Member therefore finds that the Employer has not met the onus of demonstrating that the Claimant committed the alleged offence for which she was dismissed.

Was there misconduct?

[45] In the alternative that the Claimant is found to have committed the alleged offence, in order for misconduct to exist, the Commission and the Employer must show that the act that led

to the dismissal was conscious, deliberate or intentional, where the Claimant knew that her conduct was such as to impair the performance of the duties owed to her employer and that dismissal was a real possibility. To show that the Claimant was dismissed due to her own misconduct, the Employer put forth the argument that he does not need to have a formal policy regarding personal use of a company computer because it's reasonable to expect that it not be the case (GD2). He further submitted that there's a social contract that she should have known that her actions (to establish a competing business using company resources and time) were inappropriate and in direct conflict with her employment/employer. The Claimant therefore, betrayed his trust and contravened/ impaired the performance of the duties owed to him. She should have known that she could be dismissed for such actions.

[46] On the other hand, the Claimant consistently denied all allegations of conspiring with her former employer to establish a competing business and, denied knowing that using the company computer for non-work related activities on her breaks and lunch could lead to her dismissal.

[47] The Commission agrees with the Employer that not all of the Claimant's activities on the company computer were work related however; it also agrees with the Claimant that in the absence of any warnings/discipline, policy regarding computer usage or even a non-competition agreement, the Employer has not shown that the Claimant (a) performed these tasks while specifically or consciously ignoring the work owed to her employer or that (b) she should have known that her continued actions would result in her dismissal.

[48] The Member understands the Employer's position however, agrees with the Commission that in order for the Claimant's actions to be considered misconduct under the EI Act, the Employer must show that the Claimant deliberated disregarded the effects that her actions would have on the duties owed to her employer and that dismissal was a real possibility. The Member understands Employer's position that the Claimant acted in direct conflict with his interests and in doing so, even in the absence of a written policy, she betrayed and violated a social contract. The Member however, also considered that the evidence did not support a finding that the Claimant was conspiring with her former employer to establish a competing business. The Member further agrees with the Commission that in the absence of clear a policy

or warnings, regarding personal use of the company computer during work hours, on their personal time (breaks/lunch) or not, the Claimant's explanation that she didn't know it was prohibited is reasonable. Further, the Member considered that even during these proceedings, the Employer was not clear as to what his expectations were regarding computer use, or rather, what is not acceptable use and when. He stated to the Commission (GD3-23), and testified at the hearing, that it would be acceptable if the Claimant used the company computer to check the weather or the news. He stated that he did not dismiss her for using the computer to job search and apply to other jobs (GD3-23). It wasn't until the time of dismissal, that he advised the Claimant that reviewing documents for her former employer using the company resources and time were not acceptable. The Member finds that the Claimant's and the Employer's understanding of what is acceptable personal use of a company computer, and when, is not the same. The Member finds therefore that a mental element of a willful and deliberate violation of the Employer's expectations or even a mutual/social contract is absent.

[49] The Member therefore finds that the Employer has not met the onus of demonstrating that the Claimant's actions that led to her dismissal were conscious and deliberate and that she knew or ought to have known that her conduct was such that dismissal was a real possibility.

[50] The Member finds that on a balance of probabilities, the Claimant did not lose her employment as result of her own misconduct on and an indefinite disqualification should not be imposed pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[51] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section