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

Citation: *B.'s General Cleaning, Import v. Canada Employment Insurance Commission,* 2016 SSTGDEI 159

Tribunal File Number: GE-15-3475

BETWEEN:

B.'s General Cleaning, Import

Appellant

and

Canada Employment Insurance Commission

Respondent

and

F. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Day

HEARD ON: October 28, 2016

DATE OF DECISION: December 30, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant attended the hearing of this appeal (the employer's appeal) via teleconference. The Appellant was represented by B. A. (Mr. A.), who identified himself as the owner of B.'s General Cleaning, Imported Goods & Consulting Ltd. (B.'s General Cleaning), the former employer of the Added Party, F. P. (the Claimant). Mr. B. A. confirmed that he was appearing without the employer's representative and wished to proceed with the hearing on his own.

[2] On December 1, 2015, the Social Security Tribunal of Canada (Tribunal) found that the Claimant had a direct interest in the employer's appeal and added the Claimant as a party to the appeal. Notice of that decision, together with a copy of the appeal docket and a request to provide submissions by January 8, 2016 was sent to the Claimant by Xpresspost mail (with a signature required on delivery) on December 1, 2015 to the address X – 21 X X, X, Alberta. However, the package was returned to the Tribunal on December 15, 2015, with the reason it was not delivered identified thereon as "Moved/Unknown". The Tribunal's administrative staff tried to contact the Claimant by telephone on December 15, 2015 without success, and then left a voicemail message for the Claimant requesting he contact the Tribunal to confirm his mailing address.

[3] On December 16, 2015, the package was re-sent to the Claimant at the same address via regular mail (no signature required). It was returned to the Tribunal on January 5, 2016, again marked "Moved/Unknown". The Tribunal's administrative staff again tried to contact the Claimant by telephone (without success) and again left a voicemail message for the Claimant (which went unreturned). The Tribunal's administrative staff noted that the voicemail message did not include a recorded greeting or any other identification that the voicemail box for the phone number provided did, indeed, belong to the Claimant.

[4] The Tribunal Member (Member) assigned to this appeal then reviewed the reconsideration file (GD3) and found an Email address for the Claimant (GD3-69 and GD3-96 to GD3-99) and discovered that the mailing address on the Claimant's initial application for

employment insurance benefits and subsequently utilized by the Appellant (see GD3-4, GD3-69 and GD3-96 to GD3-99) was actually X – 1 X X, X, Alberta (not X – 21 X X). The Member instructed the Tribunal's administrative staff to try to contact the Claimant via his Email address and by mail to the correct address utilized by the Claimant.

[5] The Claimant did not respond to the Email sent to him.

[6] On January 26, 2016, the package identified in paragraph 2 above was sent to the Claimant by Xpresspost mail (with a signature required on delivery) to the correct address utilized by the Appellant, namely X – 1 X X, X, Alberta. A new deadline of February 29, 2016 was set for the Appellant to file his responding submissions, if any. However, the package was returned to the Tribunal on February 25, 2016 marked "Unclaimed".

[7] Between February 29, 2016 and March 9, 2016, the Tribunal's administrative staff again tried to contact the Claimant by both telephone and by Email (without any success) and again left a voicemail message for the Claimant (which went unreturned).

[8] On March 16, 2016, the Member set a date for the hearing of the employer's appeal (July 27, 2016), and instructed the Tribunal's administrative staff to continue to try to reach the Claimant. A Notice of Hearing (NOH) was sent to the Claimant by Xpresspost mail (signature required on delivery) to X – 1 X X, X, Alberta. However, the NOH was returned to the Tribunal on April 28, 2016 marked "Unclaimed".

[9] The Member then attempted to convene a Pre-hearing Case Conference to discuss the service issue with the Appellant and his representative, but the Appellant's representative had retired and the Appellant required time to retain a new representative. During this process, Mr. B. A. contacted the Tribunal and reported that the Claimant had "packed up and left for the Philippines".

[10] On May 25, 2016, the Appellant's new representative advised that, due to the wildfire crisis in X during the spring and summer of 2016, the Appellant would not be available for a Pre-hearing Case Conference for "a few months". On that basis, the hearing scheduled for July 27, 2016 was adjourned *sine die*. A Notice of Adjournment was sent to Claimant on May 31, 2016 by Xpresspost mail (signature required on delivery) and by regular mail (no signature

required) to X – 1 X X, X, Alberta. However, the Xpresspost was returned to the Tribunal marked "not delivered due to extreme weather conditions at this location", and the regular mail was returned to the Tribunal on July 5, 2016 marked "RTS", which is a common short form for "Return to Sender".

[11] The Member held a Pre-Hearing Case Conference by teleconference with the Appellant on September 19, 2016 to discuss service issues *vis-a-vis* the Claimant and the scheduling of the employer's appeal. The teleconference was recorded and a summary of the Pre-Hearing Case Conference was sent to all parties by Xpresspost on September 19, 2016. The summary sent to the Claimant at X – 1 X X, X, Alberta was returned to the Tribunal on October 6, 2016 marked "RTS". The Tribunal's administrative staff again tried to contact the Claimant by both telephone and Email, without any success. On October 11, 2016, the Tribunal staff was able to confirm that the phone number on file for the Claimant had been re-assigned to another individual and, therefore, no further voicemail messages were left for the Claimant at that number.

[12] At the Pre-Hearing Case Conference, the Member advised Mr. B. A. that the Claimant had been added as a party to the employer's appeal, but that the Tribunal had not been able to serve notice of that fact, or any other step in the proceedings to date, upon the Claimant. Mr. B. A. stated: "This is because Mr. F. P. has left Canada." Mr. B. A. further stated that he wanted this appeal to proceed "regardless" because he (Mr. B. A.) has been waiting a long time to be heard. The Member and Mr. B. A. agreed to a hearing date of October 28, 2016. An NOH was sent to the Claimant by Xpresspost mail (signature required on delivery) to X – 1 X X, X, Alberta on September 19, 2016. However, the NOH was returned to the Tribunal on October 17, 2016 marked "Unclaimed".

[13] Needless to say, the Added Party did not attend the hearing of the appeal.

[14] There is ample evidence that the Tribunal's administrative staff made every reasonable effort to contact the Claimant and have, in fact, exhausted all avenues available to it to do so. The Tribunal must balance the need to be satisfied that all parties to an appeal have received notice of the hearing with the right of an Appellant to have their appeal heard in a timely manner and not be left hanging indefinitely. The Tribunal finds that the balancing favours the

Appellant in the present case. The Tribunal further finds that, in the absence of the ability to locate the Claimant, the Appellant's appeal would otherwise be in abeyance indefinitely through no fault of the Appellant. The Tribunal is satisfied that all reasonable attempts have been made to locate the Appellant and give him notice of these proceedings. The Tribunal further finds that the circumstances in this case qualify as "special circumstances" within the meaning of paragraph 3(1)(b) of the *Social Security Tribunal Regulations*, and therefore varies the requirement under subsection 12(1) of the *Social Security Tribunal Regulations* that the Tribunal be satisfied that the Added Party received notice of the hearing prior to proceeding with the hearing.

[15] The Tribunal is supported in its analysis by paragraph 3(1)(a) of the *Social Security Tribunal Regulations*, which provides that the Tribunal ***must*** conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. The Tribunal, therefore, elected to proceed with the hearing of the appeal in the absence of the Added Party.

INTRODUCTION

[16] On July 28, 2015, the Claimant applied for regular employment insurance benefits (EI benefits). On his application, the Claimant indicated he was dismissed on July 20, 2015 from his job with B.'s General Cleaning because the employer accused him of helping other employees to bring an employment standards case against the employer. On August 28, 2015, the Respondent, the Canada Employment Insurance Commission (Commission), approved the Claimant's reason for separation from employment and he was able to establish a benefit period effective July 26, 2015.

[17] On September 25, 2015, the employer requested the Commission reconsider its decision, claiming that the Claimant was terminated for promoting groundless litigation and complaints from other employees in breach of his duty of loyalty and good faith to the employer. On September 30, 2015, the Commission maintained its original decision.

[18] On October 28, 2015, the employer appealed to the General Division of the Social Security Tribunal of Canada (Tribunal).

[19] The hearing was held on October 28, 2016 by teleconference because credibility may be a prevailing issue, the Appellant was represented and the form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[20] Whether the Claimant should be disqualified from receipt of EI benefits because he lost his employment due to his own misconduct.

EVIDENCE

[21] The Claimant made an initial application for EI benefits on July 28, 2015 (GD3-3 to GD3-17), in which he advised that he was dismissed by his employer, B.'s General Cleaning, on July 20, 2015. On the "Questionnaire: Fired (Dismissed)" completed as part of his application (GD3-9 to GD3-11), the Claimant described the incident of misconduct that resulted in his dismissal as follows:

> "From 2007 up to the present my employer have been abusing all TFWs employed in the company some of the major charges among many others are selling of LMO, non-refund of airfare tickets, non payment of correct wages and statutory pay, non-payment of overtime pay and verbal abused to employees. When I arrived in Canada, after 3 months all illegal activities and hidden regulatory violations committed by my employer have came to my knowledge and a group of TFWs approached me to help them filing a case. Since in a cleaning company majority of them are not that of high level in education, I secretly help them and discussed to them their rights and the possible consequences if they will be going to pursue filing a complaints. Filing was done last November 2014 and only this July 17, the warrant was issued to my employer. Employment Standards Office and some investigator from the government conducted an audit and found out that he was guilty of the charges imposed against him. As such, the government, required him to settle all amount owed not only to the complainants but to the whole employees covered by their audit. With that, one of the employee told him that it is me assisting on their complaints, he terminated my employment and file a case in court with some of the accusations based only on hearsay. The employment standards Officer where I helped to expedite and discover all illegal and violations committed have advised me to seek legal aid since I don't have money to pay for a legal counsel and to represent me in court and by this Wednesday I can hear an update on the review of the case. Furthermore, I will be submitting a detailed charges and explanation as to the nature and extent why my employment have been terminated in hard copies and I will provide also all proof of violations and illegal activities that my employer is doing. I will personally submit it in Service Canada X Office." (GD3-9)

[22] The same day, the Appellant filed 86 pages of supporting materials with his local Service Canada office (GD3-20 to GD3-106). This documentation included copies of the following items:

(a) the Claimant's Work Permit, Working VISA and pages from his passport (GD3-22 to GD3-25);

(b) the Claimant's 2-year Employment Contract (signed December 12, 2012) and the positive Labour Market Opinion in support of the offer of employment (issued July 12, 2013) (GD3-26 to GD3-33);

(c) the termination letter dated July 20, 2015, which reads as follows:

> "The company is terminating you today July 18, 2015 effective immediately. The reasons for termination are for cause. However, find enclosed a cheque for 1 week's wage and additional 1 week the days you didn't work in the amount of $1680.00 and the vacation pay $1854.58 the total amount of $3534/58 minus the government applicable taxes pursuant to the Employment Standards Act legislation. As well, the company will abide by the terms of your

employment contract and all federal legislation and will defray your return airfair to the Philippines." (GD3-35);

(d) letter dated July 20, 2015 to Claimant re: service of enclosed Statement of Claim for "breach of trust, breach of fiduciary duty, theft, trespass, defamation, conspiracy, negligent misstatement and interference with" the employer's "contracts of employment with its employees, et al."; and re: demand for return of all company property, including all USB drives, computers and corporate data wherever and however stored (GD3-37);

(e) the Statement of Claim filed on July 17, 2015 in the Alberta Court of Queen's Bench by B.'s General Cleaning and Mr. B. A. as against the Claimant GD3-38 to GD3-43);

(f) an unfiled Statement of Defense/Notice to the Plaintiffs from the Claimant (GD3-44 to GD3-55);

(g) a 35-page "Summary of Complaints" prepared by the Claimant on July 21, 2015 (GD3-61 to GD3-99), including a list of 12 complainants (including the Claimant) and their personal contact information (GD3-96); and

(h) a "Summary of Possible Charges to be filed to my employer (58 counts)" prepared by the Claimant on July 28, 2015 (GD3-100 to GD3-106).

[23] A Record of Employment (ROE) was provided by the employer which indicated the Claimant had accumulated 1,888 hours of insurable employment and gave the reason for separation on July 20, 2015 as "Dismissal" (GD3-18).

[24] On August 19, 2015, an agent of the Commission spoke with Mr. B. A. regarding the Claimant's termination and documented the telephone conversation in a Supplementary Record of Claim (GD3-107). The agent noted Mr. B. A.'s statements as follows:

(a) that the Claimant was terminated for leaking confidential information and conspiring his own employees against him.

(b) that the Claimant was disclosing personal company information to other employees.

(c) that the Claimant was hired as an accountant and had access to private information such as payroll, contracts and financial information, and was telling other employees how much the employer was making for different contracts and that they (the employees) should be paid more.

(d) that the Claimant tried to get all of the employees together to sue the employer for not paying overtime properly, even though the employer paid the overtime stipulated in their employment contracts.

(e) that the Claimant took intellectual property from the employer and transferred it to a USB, which the employer believes is still in the Claimant's possession.

(f) that the employer believes the Claimant was the mastermind behind a Labour Standards complaint in April, which the employer has appealed.

[25] On August 21, 2015, the Commission received documents from the employer (GD3-108 to GD-124), including copies of statements from various employees supporting Mr. B. A.'s information.

[26] The agent spoke with Mr. B. A. again on August 24, 2015 and documented their conversation in a Supplementary Record of Claim (GD3-125). The agent noted Mr. B. A.'s statement that the Claimant is an accountant and everything he sees in the course of his employment is confidential.

[27] On August 25, 2015, the employer faxed an additional document to the Commission, namely a further supporting statement from the Cleaning Supervisor at B.'s General Cleaning (GD3-126 to GD3-127).

[28] On August 27, 2015, the agent spoke with the Claimant about his termination and documented their conversation in a Supplementary Record of Claim (GD3-128 to GD3-129). The agent noted the Claimant's statements as follows:

(a) that he was dismissed because the employer accused him of being a mastermind and trying to rally the employees against the employer.

(b) that the employer was not following the provincial labour laws and the Claimant tried to bring these concerns to the employer's attention many times, but was brushed off, so when he found the employer was unwilling to change, he took the case to Employment Standards.

(c) that he does not have the USB key, which he stated was in the employer's possession.

(d) that he is an accountant, and even though there was no confidentiality clause in his employment contract, he knows better than to leak confidential information to others. The only information he released was to Labour Standards with the approval of the employees involved.

(e) that with respect to the supporting statement provided by the employer at GD3-128 to GD3-129, he did tell the employee in question that other supervisors make more than you and they should be responsible for the training, but did not tell that employee any specific details.

(f) that he submitted a complaint to Labour Standards in November 2014 and filed another complaint in January 2015 and again when he was terminated in July 2015. The Claimant said the employer was audited in March 2015 and the results came out on July 17, 2015, with the employer issued a warrant and notice that he had to pay all 34 employees the proper amount for their statutory pay, generality pay, vacation pay and overtime pay. The employer didn't pay anyone and filed an appeal.

(g) that he has never been warned and was very surprised by his termination upon arrival at work on July 20, 2015.

(h) that he always told the employer to correct his ways and change his procedures, but the employer never followed it.

[29] On August 28, 2015, the Commission wrote to the employer and advised it had approved the Claimant's claim for employment insurance benefits (GD3-130).

[30] On September 25, 2015, the Commission received a request for reconsideration from counsel for the employer (GD3-131 to GD3-142). The reconsideration request included a further copy of the Statement of Claim against the Claimant that was filed in the Alberta Court of Queen's Bench on July 17, 2015, and a covering letter in which the employer's counsel concluded:

> "In essence, when this Employer has been actively harmed by a concerted and baseless effort to cultivate litigation against that employer, misconduct can be said to exist. The prima facie evidence of misconduct are the facts constituting the Statement of Claim; the mere filing of a defence to a Statement of Claim ought not to reverse or extinguish the probability that it is more likely than not that the employer has been harmed by the actions of a rogue employee." (GD3-132)

[31] On September 30, 2015, a different agent of the Commission spoke to the employer's counsel about the request for reconsideration (see Supplementary Record of Claim at GD3-144) and made the following notation:

> "I explained to Mr. S. that his statement in his letter that it would be wrong to give the claimant the benefit of the doubt is contradiction to the EI Act princpals *(sic).* I said based on the facts I reviewed the claimant had a reasonable explanation for the allegations against him and refuted that he had acted in a wilful manner."

In response to the counsel's question as to whether the agent had read the evidence against the Claimant, the agent noted:

> "I said most of it was allegations, and the statements by others were refuted by the claimant. I again stated we gave the claimant the benefit of the doubt."

[32] On September 30, 2015, the Commission maintained its original decision of August 8, 2015 approving the Claimant's reason for separation because misconduct had not been proven (GD3-146 to GD3-147).

[33] The employer's appeal materials (GD2) contain some 232 pages of documents, including the following items not previously provided to the Commission:

(a) the Statutory Declaration of G. P., sworn on October 20, 2015 and filed in the employer's action against the Claimant (GD2-18 to GD2-21);

(b) the 174-page forensic computer analysis and report by Mocato, dated October 20, 2015 (GD2-23 to GD2-196) (also filed in the employer's action against the Claimant)

(c) the affidavit of Mr. B. A., sworn October 20, 2015 and filed in the employer's action against the Claimant (GD2-197 to GD2-223)

(d) unfiled affidavits sworn by three (3) other employees of B.'s General Cleaning (GD2-224 to GD2-232)

<u>At the Hearing</u>

[34] Mr. B. A. testified at length about his own background and how he came to Canada as a political refugee from Somalia, studied at NAIT, worked as a hotel manager and then "worked day and night" to build his own business, B.'s General Cleaning, "from zero".

[35] Mr. B. A. further testified about why he now participates in the Temporary Foreign Worker (TFW) program, and stated "I know what these people are going through and, as long as they are good, honest workers, I want to help them and help them to bring their families to Canada."

[36] With respect to the Claimant, Mr. B. A. testified as follows:

(a) the Claimant was "an accountant, working in a bank 6-7 days/week" in the Philippines, and wanted to come to Canada. Mr. B. A. applied under the TFW program to bring both the Claimant and his wife to Canada;

(b) the Claimant began working for B.'s General Cleaning as a bookkeeper/ accountant in June 2014 and, from the outset, Mr. B. A. trusted the Claimant completely, placing him in charge of "everything financial" at B.'s General Cleaning;

(c) Mr. B. A. provides his TFW employees with "staff housing" in either a condo or a mobile home in X, but the Claimant told Mr. B. A. that he was "educated" and "begged" to stay with Mr. B. A., insisting he would not stay with the other TFW employees;

(d) Mr. B. A. agreed to allow the Claimant to reside with him and his family;

(e) Mr. B. A. treated the Claimant "like family". Mr. B. A. allowed the Claimant to stay in his home for the first 3 months "rent free", and then the Claimant paid him $300/month thereafter as "rent". However, the Claimant "never paid a cent for food" and even had the use of Mr. B. A.'s personal computer at home;

(f) Mr. B. A. was frequently away from X, travelling to X and elsewhere for business. He trusted the Claimant, who "was telling me he was doing all sorts of things to help me with all the paperwork and the legislation". Mr. B. A. stated:

> "I was so impressed with him!"

(g) Mr. B. A. did not know that the Claimant had another address that he used for purposes of his dealings with the Labour Standards authorities, namely X (see Forensic Report, GD2-35);

(h) Mr. B. A. did not know that only one month after being hired, the Claimant "began to conspire against me" as is "evident from the Forensic Report";

(i) From the "very beginning" of the Claimant's employment at B.'s General Cleaning, he kept asking Mr. B. A. "Why do you pay these people so much money?" Mr. B. A. stated:

> "F. P. told me to pay them salary, but he told the employees and the Labour authorities that they should have been paid hourly. Then people started asking me for extra hours and I didn't understand why. F. P. misled me, saying they were probably trying to bank hours for vacation."

(j) He did not know that the Claimant was "setting me up" and that he was "passing all sorts of information to my customers, to other employees and Labour authorities". Mr. B. A. stated:

> "F. P. told other employees they were being paid less than people below them. I started to see that some workers were not happy, but I didn't understand why."

[37] With respect to why he fired the Claimant on July 20, 2015, Mr. B. A. testified as follows:

(a) "By this time, individuals had been coming forward to me" with complaints about the Claimant, and "some of my customers told me that

F. P. was trying to get them to switch their business" to a company that was run by one of the Claimant's "Filipino friends". Mr. B. A. was also aware that "private information" had been passed to the Claimant's Filipino friend because Mr. B. A. was notified that the friend was soliciting existing customers and offering to charge them less than B.'s General Cleaning was charging them;

(b) As well, Mr. B. A.'s "own staff" were telling him of problems caused by the Claimant passing confidential information around the workplace.

(c) The Claimant was "off sick" in June 2015, and Mr. B. A. called him and asked for the password to the company computer that the Claimant worked on and which had all of the company's financial information on it, including payroll, receivables and remittances. Mr. B. A. stated:

> "F. P. told me he 'couldn't remember' the password for the computer he used every day!"

Then the Claimant delayed giving Mr. B. A. the password until the Claimant arrived in the office and accessed his computer independently.

(d) Mr. B. A. was already very concerned about the Claimant's conduct based on the information from his customers and the complaints from staff, and had been gathering information about what the Claimant "was up to". The incident with the computer password was the "last straw". Mr. B. A. retained a lawyer and provided all of the information he had collected to his lawyer, who then prepared and filed a Statement of Claim against the Claimant in the Court of Queen's Bench on July 17, 2015. It was "obvious" that the Claimant "didn't want me to see what he was doing" and that his actions were damaging to the business. Mr. B. A. decided to fire the Claimant and proceed with the litigation;

(e) Mr. B. A. then sent the Claimant's company computer and cell phone for "forensic analysis", which was "very expensive". Mr. B. A. stated that the forensic expert was able to prepare the "Forensic Report" (see Statutory

Declaration of forensic examiner at GD2-18 to GD2-22 and Report at GD2-23 to GD2-196) "even though F. P. had deleted everything";

[38] With respect to the "Labour Standards" issue, Mr. B. A. testified as follows:

(a) the Claimant did not tell the Commission the truth about what happened with the "Labour Standards authorities";

(b) from the Forensic Report, it is clear that the Claimant passed information to the "labour authorities" starting back in October 2014;

(c) "Labour Standards" never conducted an audit. Rather, they ordered B.'s General Cleaning to do a "self-assessment" for "the entire staff roster" and the result was "we were told what we had to fix". Mr. B. A. stated:

> "I had a lawyer and we paid where mistakes were made. I had to attend the Labour Standards course and now I know what I have to do. I personally attended the classes and now I treat the rules like a bible. It was a learning process and I'm grateful for it. I now keep all records for 6 years, not just 6 months. I never denied the company made mistakes. I learned from this.
>
> But F. P. was the one who put the rules and procedures in place and he never told me we were doing anything wrong. Then he told the employees how they could get some money off of his set-up. I trusted him. He lived in my house and told me it was so he could help me all the time, but he was setting me up to fail.
>
> Labour Standards didn't even do an audit. They let us do a self-assessment. There was no fine, no reprimand."

[39] With respect to the lawsuit brought against the Claimant, Mr. B. A. testified as follows:

(a) the Claimant eventually hired a lawyer to defend the law suit against him;

(b) as part of the litigation process, the Claimant's lawyer was provided with a copy of the Forensic Report.

(c) through his lawyer, "F. P. admitted his wrongdoing and offered to settle by going home to the Philippines at his own expense", which Mr. B. A. explained as the Claimant effectively offering to relieve Mr. B. A. of his obligations under the employment contract and the TFW program – which is contrary to the TFW program itself. Mr. B. A. declined that offer and continued with the litigation, but the Claimant "disappeared" after that and never even showed up in court the day of the trial. Mr. B. A. stated:

> "F. P. passed my own information and my vendor's information to a competitor company run by a Philippino friend of his, and took that information for his own personal use when he transferred it to a private cell phone. If this is allowed, there is no such thing as misconduct when it comes to EI benefits."

SUBMISSIONS

[40] The Appellant submitted that:

(a) the affidavit of G. P. and the forensic computer analysis and report by Mocato Inc. are conclusive evidence that the Claimant took proprietary corporate data and private employee information and misused that information outside the context of normal and routine business purposes;

(b) the additional affidavits sworn by the three other employees are evidence that the Claimant did so in an attempt to damage the employer's reputation;

(c) the Claimant's conduct constitutes misconduct for purposes of the *Employment Insurance Act* (EI Act) and the employer was actively harmed by the Claimant's efforts to cultivate and induce litigation against the employer; and

(d) the Commission failed to give appropriate weight to the evidence of breach of the Claimant's duty of loyalty and good faith, and gave inappropriate weight to unsworn evidence from the Claimant.

[41] The Commission submitted that:

(a) the Claimant denies all allegations made by the employer and has provided a credible explanation to the employer's allegations, which while "impressively written in legal wording, amount to nothing more than extensive allegation", therefore the benefit of the doubt is given to the Claimant;

(b) the third party statements by other employees, as obtained by the employer, lack credibility because the employer is in a position of power;

(c) the Claimant admits to talking to other employees, but within the auspices of complying with provincial Labour Law. It was not the Claimant's intent to conspire against the employer. He was merely doing what he thought was right and it cannot be said he acted wilfully or maliciously. The Claimant's actions are not considered wilful, deliberate or reckless to the extent of misconduct;

(d) the allegations of theft of the USB drive have not been proven;

(e) there was no confidentiality clause in the employment contract and the Claimant did not sign anything that states he is not to disclose any company information to anyone;

(f) the allegations of defamation and slander appear to be post-dismissal; and

(g) submitting an Employment Standards complaint was a reasonable option for the Claimant and that alone would not be considered misconduct.

ANALYSIS

[42] The relevant legislative provisions are reproduced in the Annex to this decision.

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

[44] Where the employer is the Appellant (as in the present case), the onus is on the employer to establish, on a balance of probabilities, that the loss of employment by the

Claimant was due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*). To discharge that onus, the Tribunal must be satisfied that the misconduct was the reason for the dismissal and not the excuse for it, which necessitates a factual determination after weighing all of the evidence: *Bartone A-369-88; Davlut A-241-82*.

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

What is the conduct that led to the Appellant's dismissal?

[46] The Claimant stated he was dismissed because the employer accused him of trying to rally the employees against the employer (GD3-128). The Claimant denies the accusation, but in his application for EI benefits, stated that he "secretly helped" a group of TFW employees to pursue labour standards complaints against B.'s General Cleaning, and that he "helped" the employment standards officer "to expedite and discover all illegal and violations committed" by the employer (GD3-9). The Tribunal further notes that, in conversation with the Commission's agent, the Appellant stated that it was ***he*** who submitted the first complaint to Labour Standards in November 2014 and that he filed another complaint against the employer in January 2015 and again after he was terminated in July 2015 (GD3-128 to GD3-129).

[47] Mr. B. A. advised the Commission that the Claimant was terminated on July 20, 2015 for having leaked confidential information belonging to the employer and for conspiring with other employees against the employer (GD3-107). Mr. B. A. testified at the hearing that the particulars of the Claimant's actions are as set out in the employer's Statement of Claim against the Claimant (GD2-12 to GD2-17), as well as the Statutory Declaration of the forensic examiner who examined the work computers and Smartphones used by the Claimant during

the course of his employment (GD2-18 to GD2-22) and the resulting Forensic Report (GD2-23 to GD2-196), as well as Mr. B. A.'s own sworn affidavit filed in the employer's law suit against the Claimant (GD2-197 to GD2-223) and the affidavits sworn by three (3) of the Claimant's co-workers (GD2-224 to GD2-232). Mr. B. A. further testified at the hearing as to the complaints and information he received from his own customers and staff, and about the final incident whereby the Claimant refused to provide the password to the computer the Claimant worked on every day, thereby denying Mr. B. A. – the owner of the business - access to the company's financial information.

[48] The Claimant told the Commission's agent that he tried to bring his concerns about the employer's alleged breaches of provincial labour laws to the employer's attention many times, but was brushed off, so when he found the employer was unwilling to change, he took the case to Employment Standards (GD3-128 to GD3-129). However, aside from such bald statements (there is another at GD3-11 in the Application for EI benefits), there is no evidence whatsoever that the Claimant made any effort to alert the employer to any compliance issues or to put any procedures in place to correct the alleged violations. The Tribunal finds this quite troubling considering the voluminous documentary evidence the Claimant provided to the Commission with respect to individual complaints against the employer. It is clear the Claimant was very organized and documented the alleged violations extensively, and yet he apparently never documented any of his alleged efforts to alert the employer and/or resolve this issue directly with the employer. The Tribunal notes that some form of reporting to the employer, with comparative calculations and an analysis of potential repayments, would likely have been the first steps undertaken by a newly hired bookkeeper/accountant who had discovered payroll irregularities, yet there is no evidence the Appellant took any such steps. Nor is there any evidence that the Claimant recommended the employer go to the authorities on a voluntary disclosure basis or to request any form of audit or assistance from the authorities in confirming compliance.

[49] The Tribunal is also troubled by the fact that the Appellant only started to work at B.'s General Cleaning on June 19, 2014, and yet he was able to prepare and file a complaint to Labour Standards for alleged wage and overtime violations in November 2014 (a mere five (5) months later) and again in January 2015. This despite the fact that, by his own admission

on his application for EI benefits, Mr. B. A.'s "live-in partner" handled the payroll until March 2015 and that March 2015 was "the only time I handled fully the payroll ***and came to my attention all the hidden computation and manipulation to the payroll preparation***"(GD3--11) (emphasis added).

[50] By contrast, the employer has been consistent that it relied upon the Claimant in such matters and that neither the Claimant, nor any of the individual employee complainants ever spoke to the employer to discuss their concerns or a resolution prior to filing complaints against the employer with the labour authorities (see the Statement of Claim provided to the Commission, as well as the affidavit of Mr. B. A. at GD2-197 to GD2-198 and testimony of Mr. B. A.).

[51] Then there is the detailed and compelling evidence of the forensic examiner in the Statutory Declaration and the Forensic Report itself. While the report is dated October 20, 2015, the analysis undertaken and reported on in the Forensic Report covers the entire period of the Claimant's employment from his start on June 19, 2014 up to his termination on July 20, 2015. It contains an in-depth forensic analysis of the work computers and Smartphones used by the Claimant during the course of his employment, and conclusively demonstrates the following:

(a) that the Claimant started as early as October 2014 to identify potential claimants and prepare the complaints against the employer;

(b) that the Claimant used a paper document scanner to scan documents to the complainant files he created on his work computer;

(c) that the Claimant considered himself a potential complainant, but used a different address for his own complainant information file and not the address where he was actually living at the time (which was in Mr. B. A.'s home);

(d) that he deleted these files on or about March 10, 2015 – prior to the receipt on March 31, 2015 of the first Notice of nine (9) employment standards complaints issued to B.'s General Cleaning by Alberta Jobs, Skills, Training and Labour Ministry;

(e) that following receipt of that first notice of employment standard complaints, the Claimant took an active role in responding to the investigating Labour Standards Officer ***on behalf of the employer***, exchanging over 100 Emails with the said Officer, often over weekends and after business hours;

(f) that the Claimant was in possession of employment contracts for individuals employed by B.'s General Cleaning between December 12, 2012 to November 8, 2013, which period pre-dates the Claimant's own employment at B.'s General Cleaning (starting on June 19, 2014);

(g) that the Claimant was in possession of payroll and timesheet documents ranging from March 12, 2014 to September 26, 2014, which period pre-dates the Claimant's assumption of payroll duties at B.'s General Cleaning (starting on March 6, 2015);

(h) that the Claimant was in possession of receipts ranging from July 10, 2011 to April 29, 2014, which period pre-dates the Claimant's own employment at B.'s General Cleaning (starting on June 19, 2014);

(i) that the files mentioned in paragraphs (f), (g), and (h) above were deleted on or about March 10, 2015 – prior to the receipt on March 31, 2015 of the first Notice of employment standards complaints issued to B.'s General Cleaning by Alberta Jobs, Skills, Training and Labour Ministry;

(j) that the Claimant exported company-related information (including the names of existing and prospective company clients and details of the employer's service contracts) to private email addresses belonging to him on January 30, 2015, May 11, 2015 and May 13, 2015, and that he did so outside the administration and awareness of the employer; and

(k) that a key application for the communication of company business (Viber) was removed from the Claimant's smartphone and re-set without the knowledge of the employer.

[52] The Tribunal finds both the affidavit sworn by Mr. B. A. on October 20, 2015 in response to the Forensic Report, and Mr. B. A.'s testimony at the hearing on the same subject, to be detailed, credible and compelling. It is clear Mr. B. A. never authorized or instructed the Claimant to access any corporate information pre-dating the Claimant's employment (or payroll responsibilities), nor did Mr. B. A. authorize the Claimant to send work-related information about employees, customers or clients (potential and existing) - to his personal email addresses. It is also clear that Mr. B. A. relied upon and, indeed, had every expectation that the Claimant would have first worked to resolve any employment standards issues with the employer directly prior to filing a complaint with the labour authorities behind the employer's back and, further, that the Claimant would have worked ***on the employer's behalf*** when preparing the employer's responses to the Labour Standards Officer, rather than responding with additional information to support the complaints the Claimant had actually prepared in the first place.

[53] It is noteworthy that the Claimant admits to offering unsolicited information to an employee about another employee who was making more money than he did (see GD3-128 to GD3-129). This admission lends credibility to the affidavits sworn by the three employees of B.'s General Cleaning (GD2-224 to GD2-232) detailing the Claimant's methods of soliciting employees to file complaints with the government instead of discussing them with Mr. B. A. directly, namely by providing them with information about others allegedly being paid more than they were or information about how much money the employer was making on a given job.

[54] The Commission submits that the Claimant's denial and explanation should be preferred over the "impressively written" allegations of the employer. The Tribunal does not agree. The Tribunal notes that the Claimant's denial and explanation, including the various summaries and charts he prepared in support of his initial application for EI benefits, are themselves merely unsubstantiated and uncorroborated (albeit well-organized) allegations. The Tribunal gives substantial weight to the sworn Statutory Declaration of the forensic examiner and the Forensic Report, and prefers the sworn affidavit evidence and testimony of Mr. B. A. to the unsworn statements by the Claimant.

[55] Considering the whole of the evidence, it is simply not credible that the Claimant was initially approached by a group of TFW employees to assist them with their complaints and

merely did what he thought was right. Nor is it credible that the Claimant filed the labour complaints because he wanted to assist the employer to come into compliance with the governing labour standards. There is simply too much animosity exhibited by the Claimant towards Mr. B. A. personally (see the screen shots and Emails uncovered in the Forensic Report, as well as the statements in the three (3) affidavits of the Claimant's co-workers) for the Tribunal to conclude that the Claimant was merely doing what he thought was right and acting within the auspices of complying with provincial labour laws. Rather, the evidence overwhelmingly supports a finding that the Claimant engaged in a concerted effort to solicit and organize employees to file labour complaints against the employer from virtually the outset of his employment as bookkeeper/accountant with B.'s General Cleaning, and that he accessed, utilized and disseminated confidential information belonging to the employer in order to do so. The evidence also supports a finding that the Claimant accessed, utilized and disseminated confidential customer information belonging to the employer for the purposes of diverting business away from the employer.

[56] The employer terminated the Claimant for this conduct on July 20, 2015 based on information and complaints from other employees and customers, as well as the suspicious behaviour of the Claimant himself (including the incident with the computer password). That additional evidence of the Claimant's conduct was subsequently obtained by the employer through a forensic analysis of the Claimant's work computers and Smartphones after his termination does not negate the Claimant's conduct, nor the fact that the employer had a growing awareness of that conduct and decided to terminate the Claimant on July 20, 2015 as a result.

[57] The Tribunal therefore finds that the Claimant lost his employment at B.'s General Cleaning because he engaged in a concerted effort to secretly solicit and organize employees to file labour complaints against the employer and utilized his position as bookkeeper/accountant to access and disseminated confidential information belonging to the employer in order to do so; and because he accessed, utilized and disseminated confidential customer information belonging to the employer for the purposes of diverting business away from the employer.

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

[58] Having found that the Appellant utilized his position as the company's bookkeeper/accountant to obtain confidential information and disseminate it to employees and others for the purposes of secretly filing numerous labour standards complaints against the employer and to divert business away from the employer, the Tribunal must now determine if that conduct is "misconduct" for purposes of the EI Act.

[59] The Tribunal considered that:

(a) the Claimant admitted he acted "secretly" to help TFW employees make labour complaints ***and*** to help the "employment standards Officer" to "expedite and discover" the alleged violations by the employer (GD3-9);

(b) there is a total lack of evidence demonstrating that the Claimant, who was the company's bookkeeper/accountant, provided any information, warnings or assistance to the employer in connection with the alleged payroll violations and/or compliance with the labour standards in issue; and

(c) the evidence from the forensic analysis of the Claimant's work computers and Smartphones (as detailed in paragraphs 51 and 52 above) amply demonstrates the great lengths to which the Claimant went (a) to obtain the employer's confidential information and (b) to cover his tracks after doing so.

[60] The Tribunal finds that the Appellant acted deliberately when he obtained the employer's confidential information and disseminated it to employees and others for the purposes of secretly filing numerous labour standards complaints against the employer and to divert business away from the employer. The Tribunal further finds that the Appellant's conduct was highly reckless in the circumstances, and constitutes misconduct for the purposes of the EI Act. The Tribunal is supported in its analysis by the Federal Court's ruling that it is not necessary for there to be wrongful intent for behavior to amount to misconduct under the EI Act. It is sufficient that the act or omission complained of be made "willfully", i.e. consciously, deliberately or intentionally: *Caul 2006 FCA 251; Pearson 2006 FCA 199; Bellavance 2005 FCA 87, Johnson 2004 FCA 100; Secours A-352-94; and Tucker A-381-85*.

[61] The Tribunal must focus on the conduct of the Claimant to determine whether that conduct constitutes misconduct for purposes of the EI Act. The Tribunal must not be distracted by alleged breaches of employment standards, which have been held to be "irrelevant" with respect to justifying conduct which is deemed to be misconduct: *CUB 10729*. While an employee's right to lodge an employment standards complaint against his employer has been recognized (*CUB 24794*), the Tribunal notes that this case is distinguishable because it is ***not*** a case where the Claimant filed a complaint ***on his own behalf***. Although the Claimant listed himself in the materials provided to the Commission (see "Summary of Complaints" at GD3-96), the Forensic Report shows that the Claimant kept himself as a potential claimant and never actually submitted a complaint on his own behalf. This would explain why the Claimant was allowed to respond on behalf of the employer to the complaints that he, himself, had filed on behalf of the nine (9) employees listed in the Notice issued by Alberta Jobs, Skills, Training and Labour on March 31, 2015. While the Claimant may have submitted a complaint on his own behalf after his termination, it cannot be said that he was terminated because he lodged his own complaint. Indeed, the Tribunal finds that the present case comes within the rationale of *CUB 20623*, where the Umpire ruled that the Claimant's own actions in connection with a complaint "escalated the issue to such an extent as to be considered misconduct". The Tribunal finds that the Claimant's actions in the present case, namely the concerted effort by the Claimant to secretly solicit and organize employees to file labour complaints against the employer and the utilization of his position as bookkeeper/accountant to access and disseminated confidential information belonging to the employer in order to do so, escalated the issue to the extent that it is considered misconduct for purposes of the EI Act.

[62] The Tribunal is further supported in its analysis by the ample jurisprudence where misconduct has been found for acting contrary to an employer's interests, and around the importance of trust in the employer-employee relationship. The Tribunal quotes *CUB 58872*:

> "A breach of trust in the form of deceit or a lie on a substantive issue to an employer is, in my view, misconduct which, in this case, was regrettably visited with the consequences which results."

[63] Misconduct must constitute a breach of a duty that is express or implied in the employment contract: *Brisette A-1342-92*. In the present case, the Commission submits that the Claimant's actions were not misconduct because there was no confidentiality clause in the Claimant's employment contract and he did not sign anything that states he is not to disclose any company information to anyone. The Tribunal does not agree. Given the access that the Claimant had to the employer's financial information (including payroll remittances, customer lists and contract figures), the highly confidential nature of that information and the consequences and the risk to the employer if that information was disseminated to employees, customers and/or competitors, the Tribunal finds that there were implied duties of trust, loyalty and confidentiality in the Claimant's employment contract. The employer had a reasonable expectation that its newly hired bookkeeper/accountant (the Claimant) would keep all of its financial information confidential and would report any payroll irregularities to the employer and assist it in rectifying any issues prior to organizing the employees to file complaints with the labour authorities. The Tribunal has no hesitation in finding that the Claimant acted contrary to the employer's interests and, in his actions in utilizing his position as the company's bookkeeper/accountant to obtain confidential information and disseminate it to employees and others for the purposes of secretly filing numerous labour standards complaints against the employer and to divert business away from the employer, that he breached the duties of trust, loyalty and confidentiality he owed the employer.

[64] Furthermore, the Tribunal notes the Appellant's own statements to the Commission's agent that he is an accountant and, even though there was no confidentiality clause in his employment contract, he knows better than to leak confidential information to others (GD3-128 to GD3-129). Having found that the Claimant did, indeed, breach his duties to the employer, the Tribunal further finds that, as an accountant, the Claimant would have been well aware of his ethical obligations and duties, and certainly knew or ought to have known that he could have been dismissed from his employment for breaching those duties.

[65] In the present case, the Tribunal finds that the Appellant deliberately utilized his position as the company's bookkeeper/accountant to obtain confidential information and deliberately disseminated it to employees and others for the purposes of secretly filing numerous labour standards complaints against the employer and to divert business away from

the employer. The Tribunal therefore finds that the Appellant's conduct was willful. The Tribunal further finds that it clearly was not in the employer's interest, that it was a breach of trust that irreparably harmed the employer-employee relationship, and that the Appellant ought to have known that termination would be the usual consequence of these actions. The Tribunal therefore finds that the Appellant's conduct constitutes misconduct within the meaning of the EI Act.

CONCLUSION

[66] The Tribunal finds that the Claimant lost his employment at B.'s General Cleaning on July 20, 2015 by reason of his own misconduct. The Tribunal therefore finds that the Claimant is subject to an indefinite disqualification from EI benefits pursuant to section 30 of the EI Act.

[67] The appeal is allowed.

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

ANNEX

THE LAW

30 (1) 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.

(2) 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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

> **(a)** hours of insurable employment from that or any other employment before the employment was lost or left; and
>
> **(b)** hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

29 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;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.