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

Citation: *R. G. v Canada Employment Insurance Commission*, 2018 SST 1356

Tribunal File Number: GE-18-1854

BETWEEN:

R. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: August 23, 2018 and September 10, 2018

DATE OF DECISION: September 19, 2018

Canada

DECISION

[1] The appeal is allowed. The Commission has not proven, on a balance of probabilities, that the Appellant's non-disciplinary suspension from employment without pay was due to his own misconduct.

OVERVIEW

[2] The Appellant was assigned to home without pay by his employer, X, effective January 22, 2018, after being charged with possession and distribution of child pornography. The Appellant's union grieved the assignment to home without pay as a violation of the Collective Agreement governing the employment; and the Appellant denied the charges and was granted bail. The Appellant applied for regular employment insurance benefits (EI benefits), but the Respondent, the Canada Employment Insurance Commission (Commission) disqualified him from receipt of benefits because it concluded he "lost his employment" as a result of his own misconduct. The Appellant argued that he hadn't been convicted of anything, and that his leave from employment wasn't disciplinary in nature, but imposed to allow the employer to investigate the situation. The Commission maintained the original disqualification on his claim, and the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The hearing commenced on August 23, 2018, but was adjourned in order to allow the Appellant to obtain and file additional documents and evidence in support of his submissions. These materials were filed (GD7) and circulated to the Commission, who advised it had no additional representations in response. The hearing then resumed and concluded on September 10, 2018. Additional documents were submitted by the Appellant at the hearing (GD8) and these too were circulated to the Commission, who again advised it had no additional representations in response.

ISSUE

[4] Is the Appellant disqualified from receipt of EI benefits because he was assigned to leave without pay by his employer due to conduct that constitutes misconduct for purposes of section 30 of the *Employment Insurance Act* (EI Act)?

ANALYSIS

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

[6] Section 30 of the EI Act provides that a claimant is disqualified from receiving EI benefits if the claimant has lost or been suspended from their employment as a result of misconduct.

[7] The onus is on the Commission to prove that the Appellant, on a balance of probabilities, was suspended from his employment due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[8] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act has been established by the jurisprudence from courts and administrative bodies that have considered section 30 of the EI Act and enunciated guiding principles whihc are to be considered in the circumstances of each case.

[9] In order to prove misconduct, it must be shown that the claimant behaved in a way other than they should have and that the claimant 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 claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to the 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 claimant's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

[10] As set out by the Federal Court of Appeal in *Macdonald A-152-96*, the Tribunal must determine the real cause of the claimant's separation from employment and whether it amounts to misconduct for purposes of section 30 of the EI Act.

Issue 1: What is the conduct that led to the Appellant's suspension from his employment on January 19, 2018?

[11] The first step in the process is for the Tribunal to determine why the Appellant was suspended from his employment on January 19, 2018.

[12] The only evidence from the employer is the Record of Employment (ROE) at GD3-22, which indicates the Appellant worked as an elementary teacher from September 25, 2006 to January 19, 2018, and gives the reason for issuing the ROE as "Other", with "Comments" in Box 18 set out as "Leave – Suspension".

[13] It is most unfortunate that the employer never bothered to respond to the Commission's calls or correspondence at any point during its initial inquiries or the reconsideration process (see GD3-25, GD3-30, letter at GD3-31, and GD3-34).

[14] At the hearing, the Appellant provided two pieces of correspondence from the employer which shed light on what "Leave – Suspension" actually means, namely:

a) Letter dated **January 3, 2018** from the employer to the Appellant (GD8-4), which advised he was "assigned to home with full pay and benefits" until further notice "as a result of a Waterloo Regional Police investigation", but expected to be available to X during regular working hours; and

b) Letter dated **January 12, 2018** from the employer to the Appellant (GD8-3), which noted the Appellant's former assignment to home with full pay and benefits "as a result of your arrest and subsequent police investigation"; and advised it was unable to identify alternative duties that "may satisfy the parameters identified in your bail conditions" and, accordingly, changed the Appellant's status to "assigned to home without pay".

   This employer also wrote (at GD8-3):

> "This ***suspension of pay*** is not disciplinary, but is intended to allow [X] to examine the issues thoroughly and to determine appropriate action." (emphasis added)

[15] The Appellant testified that he has not heard anything further from the employer since the letter dated January 12, 2018.

[16] On the basis of the employer's letters and the Appellant's testimony, the Tribunal concludes that the words "Leave – Suspension" in the Comments box on the ROE reflect the fact that the Appellant was placed on leave and his pay was suspended for non-disciplinary reasons.

[17] On January 24, 2018, the Appellant's union grieved the employer's decision to assign the Appellant to home without pay beginning January 22, 2018 as arbitrary, discriminatory and a violation of the governing collective agreement, and sought an order reinstating the Appellant's salary, benefits and other entitlements, including retroactive salary and benefit payments (GD7).

[18] The Appellant testified as follows:

- His union recommended bypassing the mediation phase of the grievance procedure and proceeding directly to arbitration. An arbitration hearing is scheduled to take place on April 1, 2019.
- In the meantime, he is disputing the employer's interpretation of his bail conditions and has asked his union to "action" the possibility of him working at the employer's head office in a non-teaching capacity, doing clerical work, research, curriculum development, or some other administrative role.
- He is also vigorously defending the criminal charges against him, and his trial is scheduled to start on March 6, 2019.
- He vehemently denies ever possessing or distributing child pornography. He believes an unknown third party "hacker" used his IP address to post inappropriate images and a video online. Someone complained, and the police obtained a warrant to search his electronic devices and found 3-7 images and 1 video, which led to the charges against him. However, he is in the process of retaining an expert to prove that a third party

hacked his IP address and placed the images and video in question in “temporary folders” without his knowledge.

[19] There is no evidence before the Tribunal that the Appellant himself ever actually possessed and/or distributed child pornography. While he has indeed been charged with these very serious and highly reprehensible offences, he has not been convicted of them and vehemently denies any knowledge of the images and video found on his computer.

[20] What’s more, the employer has provided no evidence whatsoever as to its investigation into the Appellant’s arrest or any conclusions it may have reached as to the Appellant’s alleged conduct.

[21] There isn’t even sufficiently detailed information available to make a finding as to what – specifically – the Appellant is alleged to have personally done in order to merit the charges against him. This is clear from the employer’s letter of January 12, 2018 which advised he was being placed on a non-disciplinary leave to “allow [X] to examine the issues thoroughly and to determine appropriate action” (GD8-3).

[22] For all of these reasons, the Tribunal finds the Appellant was placed on a non-disciplinary leave without pay because he was charged with possession and distribution of child pornography and the employer wished to examine the issues and determine the appropriate action, but was unable to find a suitable role for him in the interim because of his bail conditions.

Issue 2: Does that conduct constitute “misconduct” for purposes of the EI Act?

[23] Being charged with a criminal offence does not equate to having committed the criminal offence. This is true regardless of how heinous the offence may be.

[24] While the Tribunal believes possession and distribution of child pornography to be abhorrent crimes and strongly condemns such acts, there are only the ***unproven allegations*** in the charges themselves to support that the Appellant engaged in such conduct. As such, the fact of the charges must be considered in light of the presumption of innocence enshrined in section

11(d) of the Canadian *Charter of Rights and Freedoms* - and balanced against the Appellant's testimony that he is innocent of the charges and the victim of an unknown computer hacker.

[25] The Federal Court of Appeal considered a similar fact scenario in *Meunier A-130-96*, where a claimant was suspended without pay pending criminal charges of sexual assault. In *Meunier, supra*, the court found the Commission failed to discharge the burden of proving the claimant's misconduct:

> "In order to establish misconduct such as is penalized by section 28 (now section 30 of the EI Act), and the connection between that misconduct and the employment, it is not sufficient to note that criminal charges have been laid which have not been proven at the time of the separation from employment, and to rely on speculation by the employer without doing any other verification. The consequences of loss of employment by reason of misconduct are serious. The Commission, and the board of referees and the umpire, cannot be allowed to be satisfied with the sole and unverified account of the facts given by the employer concerning actions that, at the time the employer makes its decision, are merely unproved allegations. Certainly, the Commission will be more easily able to discharge its burden if the employer made its decision, for example, after the preliminary inquiry had been held and, *a fortiori*, if it made the decision after the trial."

[26] In the present case, although X declined to respond to any of the Commission's inquiries, there is no disputing the fact that the Appellant was placed on a leave without pay on the basis of unproven allegations. As such, he comes squarely within the analysis of *Meunier, supra* - and all the more so because the employer itself has classified the suspension of pay as non-disciplinary (GD8-3).

[27] The Commission relies on the Federal Court of Appeal's decision in *Canada (AG) v. Larivee, 2007 FCA 312* as support for the proposition that the Commission need not show the claimant was convicted of a charge against him in order to establish that he had committed an act which constituted misconduct (GD4-5). However, while the court in *Larivee* did indeed agree with the Commission that a conviction was not necessary to prove misconduct, it nonetheless found that the Commission had failed to satisfy the onus of proving that the claimant's actions constituted misconduct because it based its decision on vague, hearsay admissions by the claimant where the case had not proceeded to trial and there was no proof of guilt – **and** because there was no evidence from the Commission as **to the impugned actions themselves**. The

Larviee case actually supports the Appellant's position, especially since in the Appellant's case there aren't even any vague admissions for the Commission to rely on.

[28] The Federal Court of Appeal has held that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not merely on speculation and suppositions, and that it is for the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. There must be sufficiently detailed evidence before the Tribunal for it to determine how the employee behaved and to judge whether the behavior was misconduct: *Joseph v C.E.I.C A-636-85*.

[29] The Tribunal has doubt about whether the Appellant possessed and distributed child pornography. The Appellant denies any knowledge of the images and video that led to the charges against him and, in today's world of internet data breaches, identity theft and cyber-crimes, has provided a plausible defence to those charges. As such, the Tribunal must be guided by the Federal Court of Appeal's rulings in *Joseph, (supra)* and *M.E.I. v. Bartone A-369-88,* and give the benefit of the doubt to the Appellant.

[30] The Tribunal also notes there is compelling evidence that the Appellant sought to preserve his remunerative employment while defending the charges against him. The first letter he received from X advised that the Appellant would be assigned to home with full pay and benefits and that the employer expected the Appellant to make himself available to the employer during regular working hours (GD8-4). Then X advised it was unable to find any alternative duties that complied with the Appellant's bail conditions and, therefore, was revising his status to "assigned to home without pay" – although the suspension of pay was non-disciplinary (GD8-3). The Appellant's union then grieved the suspension of pay (GD7-2 to GD7-3). The Appellant testified that he continued to request remunerative duties with his employer:

- He knows of other teachers who have been prevented from being in a classroom or otherwise around students on account of the breakout of a contagious disease (for example a pregnant teacher cannot be in a school where Fifth's Disease has broken out). In such cases, the teacher, is removed from the school and placed in X's office to do administrative tasks there, while continuing to receive their salary. He knows of one case

where a teacher was removed and put on alternative duties at X's office for over 3 months as a result of health issues.

- His employer has forced him into "an involuntary unpaid leave" and they are using his bail conditions to do so. But the bail conditions only prevent him from doing his regular job in the classroom.
- The Appellant has been seeking remunerative administrative work at the employer's head office since the suspension of his pay. But the employer told his union that they "couldn't guarantee a child-free work environment".
- That's not what his bail conditions require (see Recognizance of Bail at GD8-1 to GD8-2). They only say that he cannot be in the company of a minor. His lawyer explained to him that "in the company of" is different from "in the same place as". For example, if the Appellant goes to a Tim Horton's store and has a coffee – and a child comes into the store, the Appellant would not be in violation of his bail conditions simply by being there, nor would he be required to leave the Tim Horton's store. The Appellant would not be considered to be in the company of that minor customer.
- X could have paid him to work in another capacity doing administrative tasks, curriculum development, researching and preparing reports, and even basic accounting. In fact, the Appellant was scheduled to be interviewed by X for a position as an instructional coach for new teachers before he was charged. He could easily have worked on the coaching program and received his salary over the past 8 months.
- Although the employer's letter of January 12, 2018 says the suspension of pay is not disciplinary but "intended to allow [X] to examine the issues thoroughly and to determine appropriate action", no one from X has contacted him – or his lawyer – to make any enquiries or perform any type of investigation. It has now been 10 months since that letter was written and, to the best of his knowledge, X has done nothing about their own investigation into this matter.
- He believes his employer simply wants the whole thing to go away because of the nature of the charges against him, and is deliberately taking no steps until the criminal process has concluded.

- However, he has asked his union to clarify the bail conditions with the employer, and hopes this will open up the possibility of the Appellant working at X office while the criminal trial is pending, which is what he has been asking for all along.

[31] The Appellant submits that the employer simply does not want a teacher facing such charges doing remunerative work for it ***in any capacity***. The Tribunal agrees this is likely the true cause of the Appellant being put on leave without pay. The Tribunal also notes that this is beyond the Appellant's control, as he denies doing anything to warrant the charges against him and is doing everything he can to dispute those charges.

[32] While the employer may well have come to the conclusion that it was no longer in its interests to pay the Appellant while he was "assigned to home", it is not the role of the Tribunal to determine whether the steps taken by the employer were justified or were the appropriate sanction (*Caul 2006 FCA 251*), but rather whether the conduct in issue amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[33] The Tribunal has doubt as to whether the Appellant possessed and distributed child pornography and is also not satisfied that the Appellant's ***being charged*** with these criminal offences is "misconduct" within the meaning of the EI Act. For the reasons set out above, there is no evidence that conclusively points to willful or reckless behavior on the part of the Appellant which he knew or ought to have known could have resulted in him being placed on a non-disciplinary leave from employment without pay.

CONCLUSION

[34] The Tribunal finds that the Commission has not proven, on a balance of probabilities, that the Appellant was placed on leave from his employment at X without pay by reason of his own misconduct. The Tribunal therefore finds that the Appellant is ***not*** subject to disqualification from EI benefits pursuant to section 30 of the EI Act.

[35] The appeal is allowed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	August 23, 2018 and September 10, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. G., Appellant

ANNEX

THE LAW

Employment Insurance Act

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.

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.

Employment Insurance Regulations