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

Citation: *D. R. v Canada Employment Insurance Commission*, 2019 SST 956

Tribunal File Number: GE-19-2497

BETWEEN:

D. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: August 22, 2019

DATE OF DECISION: August 27, 2019

Canada

DECISION

[1] The Commission has proven that the Claimant lost his job because of misconduct. This means that the Claimant is disqualified from being paid benefits.[1]

OVERVIEW

[2] The Claimant lost his job as the general manager of a car dealership. The Claimant's employer said that he was suspended, then was dismissed because he had damaged a car on a competing dealership's lot in a neighbouring city, by "keying" the vehicle (the incident). While the Claimant does not dispute that this happened, he says that it is an inadequate reason why the employer dismissed him. The Claimant says that the dismissal was an improper response to the incident, as the employer (as well as the Commission) did not properly investigate the circumstances, presumed him to be not credible and to be guilty, and ignored his stellar record with the employer.

[3] The Commission considered the following evidence at the time of its reconsideration decision. The Claimant had been charged with the criminal offence of mischief over $5,000.00. There had been local media coverage of the incident, which named the Claimant, the dealership he worked for, and the dealership where the damage had occurred. The Claimant's application for employment insurance (EI) benefits did admit that he was involved in the alleged offence. The employer stated that he dismissed the Claimant for the alleged act, after he was charged with the offence. The employer stated a number of reasons to support the dismissal. His reputation was severely damaged. Customers were still having severe concerns about his judgment. The car manufacturer had lost confidence in his judgment. It would be difficult for the Claimant to run the dealership on a daily basis after this incident, or to deal with human resource issues within the dealership. There were concerns in the industry about the Claimant. It would have been impossible for him to attend conferences. The Commission interviewed the Claimant about the Employer's statements, then found the Claimant not to be credible.

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[1] Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct, and disqualified him from being paid employment insurance (EI) benefits.

ISSUE

[5] Did the Claimant lose his job because of misconduct? To determine this, I will first decide the reason why the Claimant lost his job.

ANALYSIS

Why did the Claimant lose his job?

[6] The Claimant lost his job because he caused damage to a competing dealership's vehicle.

[7] The Claimant and the Commission do not agree on the reason why the Claimant lost his job. The Commission says that the reason given by the employer is the real reason for the dismissal. The employer outlined the reasons supporting the dismissal due to the incident, as set out above.

[8] The Claimant disagrees, and says that the real reason why he lost his job is because the employer did not take into account all the circumstances of his employment, and overreacted to his 30 seconds of bad judgment. The employer should not have dismissed him in all those circumstances.

[9] The claimant testified that he did key one car at the competing dealership. He pled guilty to the offence of mischief to private property under $5,000.00, and was sentenced. He made a written apology to the other dealership for his action, and offered to buy the car, or pay for the repair. He did pay for the repair in June 2019. He also attended counselling to deal with why he did key the car.

[10] The Claimant relied on a number of positive circumstances in support of this position. The owner of the employer corporation was a hands-off person who left the operation of the business to his staff. In the six years of his employment, the Claimant had taken the dealership from a low point of the car manufacturer taking proceedings to revoke the employer's franchise,

to the dealership being one of the top 10 dealerships in Ontario. During his time as general manager, he had a good relationship with the staff. There was little staff turnover while he was general manager, as compared to the situation after he was dismissed. In the Claimant's view, this incident was not a trust issue. Various people in the industry he has spoken to after the incident have not lost trust in him. There was no harm to the employer, and no loss to its business or impact on its staff.

[11] The Claimant also testified in response to the employer's reasons in support of dismissal. Overall, the employer had rushed to judgment. That the employer's reputation had been severely damaged was not supported by any evidence, including a statement from the car manufacturer. A written statement from the manufacturer, made while the Claimant was suspended in January 2019, stated that it took the safety and security of property very seriously, that it could not comment further as the matter was under investigation, and that the employee in question had been suspended. The claimant testified that the generic statement about safety and security of property did not support the employer. In any event, that statement was made with insufficient information. The employer's claim that customers were still having severe concerns about his judgment was not supported by any evidence, and contradicted by the Claimant's conversations with staff at the dealership up to the present. The Claimant maintained contact with staff and with other dealerships after his dismissal. He spoke to the top salesperson at the employer's dealership over the months since his dismissal. In his last conversation with her, about a week before the hearing, she said that she had not heard any concerns about him or about the dealership as a result of his action. The employer's claim that the car manufacturer had lost confidence in the employer's judgment was not supported by any evidence, not even the manufacturer's statement referred to above. Similarly, the claim that it would be difficult for the Claimant to run the dealership on a daily basis after this incident, or to deal with human resource issues within the dealership, was unsupported by any evidence. The Claimant testified that he had a good relationship with staff while working at the dealership, and had maintained a good relationship with several of them after he left. That fact contradicted the employer's claim. The Claimant did not know what the employer meant by its claim that there were concerns in the industry about him. The Claimant testified that he has, since his dismissal, been in negotiation with the owner of three auto dealerships in the Toronto area, to become the general manager of a new dealership that the owner may be opening. That owner is aware of the incident and the

charge involving the Claimant. Nevertheless, that owner, knowing the Claimant's reputation and abilities, is willing to hire him. That contradicts the employer's statement about concerns in the industry. The employer's claim that it would have been impossible for the Claimant to attend conferences is again unsupported by evidence. The employer has never contacted the Claimant following the suspension and termination, despite his efforts to contact the employer. The only communication following termination was a letter from the employer's lawyer about severance of the employment, but it did not contain any details that supported the employer's reasons for dismissal.

[12] I have for the most part accepted the affirmed testimony of the Claimant. There were some minor issues. His testimony that the employer lost no business is unsupported by other evidence. Lack of other supporting evidence is the deficiency he most often points out in the employer's evidence. While the Claimant does not have the onus of proving that there was no misconduct, it would have been helpful to have some evidence in support of his claim, for example, evidence from his conversations with the employer's top salesperson. His testimony that there was no impact on the employer's staff may be contradicted by his testimony that there has been increased staff turnover after his dismissal.

[13] However, the matter to be decided here is, what was the real reason for the Claimant's dismissal from his employment. The employer stated clearly to the Commission that he fired the Claimant after he was charged, and for the alleged act committed. The Claimant has presented no evidence to contradict that, and in his testimony, could give no other reason than the keying incident for his dismissal. His evidence was focused on giving reasons why the employer should not have dismissed him, not on showing that there may have been, or was, some other reason the employer had for dismissal, but which was being hidden by the employer behind the incident. The Claimant's testimony about his positive work performance and results, and about his ongoing social relationship with the owner of the employer, do not support a finding of some ulterior reason for dismissing the Claimant. To the contrary, that testimony points to the incident being so significant to the employer that it would overcome the previously positive relationship between the Claimant and the employer. The incident and resulting criminal charge against the Claimant, and the media coverage identifying the Claimant and both dealerships, support the incident being the reason for the dismissal. As a result of these considerations, I find that the

employer did dismiss the Claimant for his act of damaging a car at a competing dealership by keying it.

[14] This conclusion is consistent with court decisions interpreting the issue of misconduct. It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.[2] The issue is not whether the employer was guilty of misconduct by engaging in unjust dismissal; rather, the question is whether the applicant was guilty of misconduct[3]. The Claimant's evidence reviewed above is focused on whether the dismissal was justified, or whether the employer was guilty of misconduct by engaging in unjust dismissal. I must therefore focus on whether the Claimant has been guilty of misconduct.

Is the reason for the Claimant's dismissal misconduct under the law?

[15] The reason for the dismissal constitutes misconduct under the law.

[16] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it approaches willfulness.[5] The Claimant does not have to have a wrongful intent for his behaviour to be misconduct under the law.[6]

[17] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility.[7]

[18] The Commission has to prove that it is more likely than not[8] that the Claimant lost his job because of misconduct.[9]

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[2] *Canada (Attorney General) v. Caul*, 2006 FCA 251.
[3] *Paradis v. Canada (A.G.)*, 2016 FC 1282.
[4] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] *Attorney General of Canada v Secours*, A-352-94.
[7] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] The Claimant has to prove this on a balance of probabilities which means it is more likely than not.
[9] *The Minister of Employment and Immigration v Bartone*, A-369-88.

[19] The Commission says that that there was misconduct because the Claimant breached the trust his employer had in him; his conduct caused the dismissal; his conduct was wilful; and he knew or ought to have known that his conduct could result in dismissal.

[20] The Claimant says that there was no misconduct because his act was not a breach of trust, since it caused no harm to the employer; he should not have been dismissed, as his single act did not warrant dismissal based on his past actions and performance for the employer; while he did not plan to key the car, he did in the moment key it, and not accidentally; he did not know that he might be dismissed for this act.

[21] I find that the Commission has proven that there was misconduct, because it has proven the four factors that establish misconduct for the purposes of the *Employment Insurance Act*. These are: (1) the Claimant knew or ought to have known that his conduct could impair the performance of his duties owed to the employer; (2) the breach causes the dismissal; (3) the conduct was wilful; and (4) the Claimant knew or ought to have known that as a result of his conduct dismissal was a real possibility.

[22] With respect to the impairment of duties owed to the employer, the Claimant testified that he did not view his act of keying the car as a breach of trust, as there was no harm to the employer, and no loss to the business or impact on the staff. He testified to his honesty and integrity, his admission of guilt, apology, repair of the damage and counselling. In addition, he testified that he had no written or verbal contract for his employment. The only document he had dealt with compensation. There was no agreement for his hours of work, job duties, or vacations. As a result of the absence of a contract, there was not a duty he did breach.

[23] The Claimant's submissions on this factor do not succeed. The issue here is not whether there was harm to the employer resulting from the Claimant's act. The issue is whether the Claimant knew or ought to have known that his conduct could impair the performance of his duties owed to the employer. The fact that there was no express agreement, written or verbal, about the Claimant's conduct when acting for the employer, or about his relationships with other dealerships, or about respecting the property of others, is not conclusive. Many duties in the employment field are implicit, that is, not expressly set out verbally or in writing. Smaller employers tend not to have written employment contracts or employee policies, or if they do,

such contracts or policies are brief. In this case we have an employer without a written contract for its most important employee. During the hearing, I gave the Claimant the example of an implicit duty: do not steal from the employer. He did not contest that example as an implicit duty. In this case, involving a retail business selling big-ticket items, public perception of the business is critical. A poor reputation can damage or sink the business. On the Claimant's evidence, his own actions at the dealership had improved its reputation to the top 10 in Ontario. He knew the importance of reputation. He knew the importance of his own actions to that reputation. I find that there was an implicit duty to the employer not to act in such a way as to negatively impact the employer's reputation, or to cause the employer to lose trust in its most important employee. He testified that he visited other dealerships on occasion when he was not working at the employer's dealership, to size up the competition. On the day of the incident, he was at the other dealership about 7:20am, not at night as the Commission claimed. Employees of the other dealership were already there. In his position as general manager of a dealership, he knew that vandalism of the other dealer's vehicles would create an expense item impacting on the profitability of that business. He also knew that such an action was vandalism, was wrong, and was unfair competition. He knew that he was there in his capacity of general manager of a competing dealership, and that his actions would reflect on that dealership. Those actions would also affect the trust the employer had in the Claimant. The impact of the Claimant's act can be assessed by reference to the media reports of the incident. The owner/general manager of the dealership where the incident occurred is quoted as saying that she had met the Claimant at a business function, sat beside him and talked to him for a day, and would never have thought he could do this. She is also quoted as saying that it made her sick that the Claimant was "someone in the auto world, where we're all a tight-knit family." The police are quoted in the media stating that something like this incident is not an accident, but a specific intent, so the charges were laid. Those comments, disseminated in the media, bring negative attention to the Claimant and to his employer. There lies the breach of an implicit duty to the employer, and the breach of trust. The media coverage by itself was damaging to the reputation of the employer.

[24] The law is clear: acting on the spur of the moment, then regretting and apologizing for that conduct, is of no relevance to whether the conduct constitutes misconduct[10]. The Claimant's

[10] *Canada (A.G.) v. Hastings*, 2007 FCA 372.

reference to 30 seconds of bad judgment does not assist him in assessing the existence of misconduct.

[25] With respect to the cause for dismissal, as found above, the Claimant's act of keying the vehicle was the cause of his dismissal.

[26] With respect to the act being wilful, the Claimant admitted at the hearing that, while the incident was not pre-planned, it was not accidental. The keying of the car was therefore wilful, as being conscious, deliberate or intentional. This conclusion is supported by the Claimant's guilty plea to the charge of mischief. The plea required the Claimant to admit to the court that he did the act of keying the car, and that he did it intentionally.

[27] With respect to foreseeing the likelihood of dismissal, the Claimant testified that he did not foresee being dismissed for the act based on his six years of exemplary service with the employer. When asked whether a reasonable person, including himself, ought to have known that dismissal might result from the incident, the Claimant offered two responses. First, in his view, if a top-performing employee committed a minor criminal act that had caused no physical harm to his employer, and the employee had paid compensation to rectify the wrong, he would not foresee being dismissed. Secondly, a reasonable person would look at the severity of the wrong, take into account that it was not a serious offence, that the Claimant had pleaded guilty but not been sentenced to jail, had compensated the victim, so that there was no financial harm to either dealership, and no physical harm to his employer. In those circumstances, a reasonable person would not foresee dismissal as a result.

[28] In both responses, the Claimant deals with the situation where the employee has committed a minor, or not serious, criminal offence, with minimal consequences to the employer and with admission to, and correction of, the wrong by the employee. What both responses overlook is that we are dealing with an act that is a criminal offence. More than that, it is an offence committed by the Claimant while he was acting as an employee of the employer, checking out the competition. Taking those two factors into account, a reasonable person (including the Claimant) ought to have known that dismissal was a likely outcome of the incident. The commission of a criminal offence is a breach of the criminal law. Such an offence is a serious matter, however "minor" the offence may be. The offender has violated those rules

designed to protect the safety and security of people and property. Those rules are backed by the most serious legal consequences: loss of liberty by being jailed or placed on probation; and loss of money through fines. Commission of an offence by a current employee always raises for the reasonable employer the question "Can I trust this person?" The answer to that question is most likely to be "no" when the offence is committed by the employee in the course of carrying out his employment duties. The employer is left with the questions, "What other illegal or unethical act might this employee do while he is carrying out his job duties? Can I trust him not to do something else?" Trust is a fragile thing. It is easily damaged, and only restored with difficulty, if ever. These considerations contradict the Claimant's assertion that the incident was not a breach of trust, and that he had caused no harm to his employer. The incident itself was a breach of trust. The breach of trust by itself harmed the employer, both in the negative media coverage, and in the loss of trust in the employer's most important employee, leading to his subsequent dismissal and loss of his valuable services. The Claimant ought to have foreseen that his dismissal was likely as a result of his keying the car, thereby committing the offence of mischief, when at the other dealership as the general manager of his employer.

CONCLUSION

[29] The appeal is dismissed. This means that the Claimant is disqualified from being paid EI benefits.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	August 22, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	D. R., Appellant