[TRANSLATION]

Citation: *M. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 133

Appeal No.: GE-14-400

BETWEEN:

M. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Normand Morin
HEARING DATE:	October 14, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

[1] The Appellant, M. G., attended the hearing held in Thetford Mines (Quebec), (Service Canada Centre), on October 14, 2014. He was also represented by counsel Karine Arseneault-Sirois from the Thetford Mines legal aid office (Côtes, Gardner, Arseneault-Sirois – Barristers and Solicitors – General Law Practice), and by Renée Leblanc, advocacy consultant with the organization L'A-Droit de Chaudière-Appalaches.

DECISION

[2] The Social Security Tribunal of Canada (the Tribunal) concludes that the Appellant did not lose his employment as a result of his misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (the Act).

INTRODUCTION

[3] On September 17, 2013, the Appellant filed an initial claim for benefits effective September 8, 2013. The Appellant stated that he worked as a forklift operator for the employer Récupération Frontenac Inc. from March 18, 2013, to September 2, 2013, inclusively, and that he stopped working for this employer because he was dismissed or suspended (Exhibits GD3-2 to GD3-16).

[4] On October 29, 2013, the Canada Employment Insurance Commission (the Commission) informed the Appellant that he was not entitled to receive regular Employment Insurance benefits as of September 8, 2013, because he had stopped working for the employer Récupération Frontenac Inc. on September 2, 2013, by reason of his misconduct (Exhibits GD3-23 and GD3-24).

[5] On November 15, 2013, the Appellant filed a Request for Reconsideration of an Employment Insurance (EI) Decision (Exhibits GD3-25 to GD3-28). On December 13, 2013, the Commission informed the Appellant that it was upholding the decision of October 29, 2013, in his case involving the loss of his employment because of his misconduct (Exhibit GD3-30).

[6] On January 8, 2014, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-7).

[7] On April 30, 2014, the Tribunal informed the Appellant that his appeal seemed to have been filed more than 30 days after the date on which the reconsideration decision had been communicated to him by the Commission. The Tribunal also informed the Appellant that, because his appeal seemed to have been filed late, he had to request, no later than May 30, 2014, an extension of time to file the Notice of Appeal (Exhibits GD2B-1 and GD2B-2).

[8] On May 26, 2014, Renée Leblanc, the Appellant's representative, filed the background on the steps taken by the Appellant to obtain Employment Insurance benefits (Exhibits GD5-1 to GD5-10).

[9] In an interlocutory decision handed down on July 11, 2014, the Tribunal granted the Appellant an extension for filing an appeal with the Tribunal's General Division (Exhibits GD6-1, GD6-2, GD7-1 to GD7-10).

[10] On July 17, 2014, the Tribunal informed the employer, Récupération Frontenac Inc., that, if it wanted to be an added party in this case, it had to file a request to that effect no later than July 31, 2014 (Exhibits GD8-1 and GD8-2). The employer did not follow up on that request.

[11] On September 22, 2014, counsel Karine Arseneault-Sirois informed the Tribunal that she was representing the Appellant (Exhibits GD8-1 and GD8-2 [Exhibits GD9-1 and GD9-2]). On September 23, 2014, the Tribunal informed the Appellant and his representative, Karine Arseneault-Sirois, that it had received the duly completed Authorization to Disclose form indicating that the Appellant was now represented (Exhibits GD10-1 and GD10-2).

TYPE OF HEARING

[12] The hearing was conducted in person for the reasons set out in the Notice of Hearing dated September 11, 2014 (Exhibits GD1-1 to GD1-3).

ISSUE

[13] The Tribunal must determine whether the Appellant lost his employment as a result of his misconduct within the meaning of sections 29 and 30 of the Act.

APPLICABLE LAW

[14] The provisions on misconduct can be found in sections 29 and 30 of the Act.

[15] With respect to a "disqualification" or a "disentitlement" from receiving Employment Insurance benefits, paragraphs 29(*a*) and 29(*b*) of the Act state that:

> **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...

[16] With respect to a "disqualification" for reasons of "misconduct" or "voluntary leaving without just cause", subsection 30(1) of the Act provides that:

> **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.

[17] With respect to the "length of disqualification", subsection 30(2) of the Act states that:

> (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.

EVIDENCE

[18] The evidence in the docket is as follows:

a) A Record of Employment dated September 10, 2013, shows that the Appellant worked as a day labourer for the employer Récupération Frontenac Inc. from March 18, 2013, to September 2, 2013, inclusively, and that he stopped working for this employer because of a dismissal (Code M – Dismissal; Exhibit GD3-17);

b) On October 24, 2013, the employer Récupération Frontenac Inc. stated that the Appellant had showed a lack of respect toward two managers (he swore at the Coordinator of Operations and the Director of Human Resources). The employer stated that there had been a meeting with the Appellant the previous week for insubordination and that he had received warnings for [translation] "episodes of time theft". The employer explained that the Appellant was not required as part of his duties to get off his forklift or to stop to pick up objects while he was emptying bins. The employer explained that the company's policy, which the Appellant had signed, prohibited employees from taking anything from the sorting line. The employer stated that it did not accept the Appellant's aggressive attitude and foul language when he was asked to explain what he had done. The employer pointed out that there had already been meetings with the Appellant about this on May 7 and 9, 2013. The employer explained that the case workers at the Centre Le Havre in Thetford Mines were always notified when the employer had a meeting with the Appellant. The employer also mentioned that R. G., the person responsible for the Service Externe de Main-d'œuvre Chaudière-Appalaches (SEMO Chaudière-Appalaches), attended the meeting on September 3, 2013, where the Appellant was told that he was being dismissed (Exhibits GD3-18 and GD3-21);

c) In his Notice of Appeal filed on January 8, 2014, the Appellant submitted a copy of the following documents:

   i. Letter from the Commission des normes du travail [Quebec labour standards board] dated December 2, 2013, indicating that a mediation meeting was held between the Appellant and the employer on December 18, 2013, concerning the Appellant's dismissal (Exhibit GD2-6);

   ii. Letter from Service Canada addressed to the Appellant and dated January 13, 2014, indicating that this body did not have the authority to accept and process his appeal because it fell under the responsibility of the Social Security Tribunal (Exhibit GD2-7; Exhibits GD2-1 to GD2-7).

[19] The evidence presented at the hearing is as follows:

a) The Appellant provided his work history with the employer Récupération Frontenac Inc. and restated the circumstances leading to his dismissal. He explained that he began working for this employer on November 26, 2001. He pointed out that it is a clothing and textile recycling business (recycling sorting centre) that works under contract for the Montreal company Certex. He said that Récupération Frontenac Inc. has a total of about one hundred employees, sixty or so of whom are government-funded because these are jobs for people with functional limitations (Exhibits GD3-19 and GD3-20);

b) He explained that, before being hired by Récupération Frontenac Inc., he was first referred to the Service Externe de Main-d'œuvre Chaudière-Appalaches (SEMO Chaudière-Appalaches), which then referred him to this employer, as is the case for most of the company's employees. He explained that, when he was hired, an agreement with SEMO was signed, the employer was told about his physical and intellectual condition, and those aspects were discussed at the hiring interview. He explained that his employer also had access to his medical file. He described himself as a person with an intellectual disability and explained that he suffers from back

problems. He said that his physical limitations prevent him from overexerting himself physically;

c) He explained that he signed a five-year contract with the employer Récupération Frontenac Inc. He pointed out that he worked for three years under that contract as a forklift operator out on the plant floor. He pointed out that he did that job from about 2001 to 2004. He indicated that he then worked as a press operator from 2004 to 2012-2013. He said that he was unable to work for seven months in 2012 and that he was no longer able to work as a press operator after undergoing surgery;

d) He indicated that, when he returned to work, he was assigned a new foreman, L. B. He said that he went back to his job as a forklift operator. He explained that he alternated, working as a forklift operator for one week then operating equipment such as Caterpillars or Kubotas the following week (Exhibits GD3-27 and GD3-28);

e) Counsel Karine Arseneault-Sirois, the Appellant's representative, submitted a copy of the following documents:

   i. Letter of dismissal addressed to the Appellant, dated September 3, 2013 (Exhibits GD11-1 and GD11-2);

   ii. Warning letter addressed to the Appellant, dated January 20, 2011 (Exhibit GD11-3).

SUBMISSIONS OF THE PARTIES

[20] The Appellant and the Appellant's representatives made the following submissions and arguments:

a) The Appellant said that he was unjustly dismissed and that his employer wanted to force him to resign from his position. He stated that his employer accused him of committing an act of violence or behaving inappropriately (Exhibits GD3-27, GD3-28 and GD2-4);

b) He stated that, with the arrival of L. B. in 2012 as foreman, the work atmosphere changed and that things were not good. He explained that he felt pushed by his employer to do his work and that he was asked to do it faster and faster (e.g., emptying containers). He stated that the foreman singled him out as the person who did not do their work well and that he was the only one criticized this way. He explained that he had the impression that his superiors were putting undue pressure on him to force him to resign from his position and that he continually felt as though they were watching his every move (Exhibits GD2-4, GD3-27 and GD3-28). He said that he was called into Mr. L. B.'s office because he had forgotten to do a few tasks and that he was reprimanded. He indicated that he was rarely called to take part in group meetings with the other operators. He explained that he also had some meetings with Mr. L. B., J. B. (human resources) and A. S. (general manager). He stated that some of those meetings were [translation] "over nothing" (Exhibits GD3-27 and GD3-28). He pointed out, by way of example, that the employer had criticized him for forgetting to pick up pieces of wood on the ground, even though the container was already full. He said that he had not refused to do some of the tasks mentioned by the employer, but that he had not had the time to do them. He explained that, when he returned to work after his sick leave (March 2013), he was required, as part of his duties, to pick up objects from the ground to keep the floor clean;

c) He explained that, on August 22, 2013, he was called into the office of his superiors (the employer) and questioned about objects on his forklift and asked what he was doing with them (Exhibits GD3-27 and GD3-28). He indicated that he met there with Ms. J. B. and Mr. L. B., a meeting that resulted in his dismissal (Exhibits GD11-1 and GD11-2). He pointed out that, when he was called in by Mr. L. B., Mr. L. B. told him that he was shocked. He stated that, at the meeting, he was immediately questioned for about six or seven minutes about what he was doing with certain objects, such as a pair of scissors and a screwdriver that he had picked up off the floor. He indicated that, at the meeting, Mr. L. B. [translation] "laughed mockingly" when he was questioning him, showing him the objects one by one, making him feel ridiculed (Exhibit GD2-4). He indicated that he said that he was not a thief and that

Mr. L. B. did not appreciate that answer. He said that Mr. L. B. then slapped his hand on the table and that this reaction frustrated him. He said that he then got up, himself banged his fist on the table and then swore, which led to the accusation of misconduct. He stated that he swore at Mr. L. B. and said [translation] "I didn't steal your things" (Exhibit GD3-29). He stated that his superiors asked him [translation] "crazy questions" about the objects he picked up. He explained that those questions were [translation] "abusive" because, in his view, they were trying to criticize him for nothing. He explained that he lost control because he always felt watched and thought that the employer was trying to find fault with him or force him to leave (Exhibits GD3-19 and GD3-20, GD3-28 and GD3-29);

d) He explained that, at the meeting with his employer on September 3, 2013, after his holidays, he learned that he was being dismissed (Exhibits GD3-21, GD11-1 and GD11-2). He stated that, during the meeting of 15 to 20 minutes, he did not have a chance to explain himself to the people in attendance at the time, namely, J. B. and R. G. from SEMO Chaudière-Appalaches. He explained that Mr. R. G. [translation] "did not do much" at the meeting. He said that he thought that Mr. R. G. would have defended him more at that time (Exhibits GD3-21, GD11-1 and GD11-2);

e) He said that he had been doing his work for 12 years and that he was able to pick objects up off the floor, put them on the forklift and then use them. He maintained that he was never warned not to do so. He stated that he only learned at a mediation meeting on December 18, 2013, between him and his employer as part of a complaint process before the Commission des normes du travail, that he was formally prohibited from having things on the forklift. He indicated that he then wondered why he had never been disciplined or suspended for that reason (Exhibits GD3-27, GD3-28 and GD2-4);

f) He expressed his disagreement with the employer's statement that, under company policy, employees were not to take anything from the sorting line (Exhibit GD3-21). He explained that he did not work on the sorting line because it was not on the same floor as his work floor, which was the plant floor, but one floor above. He stated that

he did not take objects from the sorting line, but that he picked them up off the ground as he often did because they fell (Exhibit GD3-22). He stated that his foreman encouraged him to do so for safety reasons (Exhibit GD2-4). He pointed out that the company rules were given to him at the time he was hired. The rules prohibited employees from fighting, stealing and smoking, among other things. He indicated that he was later informed orally about the changes made to these rules;

g) He stated that he had never had warnings, suspensions or his behaviour criticized by his employer. He explained that the only suspension he had received in the last 12 years was a 10-day suspension in January 2011 for speaking to someone, while laughing and calling him names (Exhibits GD3-27 and GD3-28 and GD11-3);

h) He explained that he was registered with the organization Centre Le Havre of Thetford Mines, which provides support for people with mental health issues in their workplace. He said that he worked with two of the organization's case workers (Exhibits GD3-19 and GD3-20). He mentioned that he had been depressed in recent years and had been treated by a doctor and a psychiatrist. He explained that he had approached a CLSC (Centre local de services communautaires: local community services centre) about his problems with aggressive behaviour. He stated that the social worker who had worked with him at the CLSC had concluded that he did not have a problem with aggressive behaviour and that a file was not opened for him. He explained that he [translation] "did not snap at people over nothing", but that when people put undue pressure on him and reprimanded him without giving him a chance to give his version of the facts, he felt that it was very unfair and that he could then become less patient with his superiors (Exhibits GD3-27 and GD3-28);

i) He indicated that he had not heard about the event reported by the employer that the employer had had a meeting with him for insubordination and that he had received warnings for [translation] "episodes of time theft" (Exhibit GD3-18);

j) He submitted that he did not commit misconduct that could justify his dismissal. He indicated that he filed a complaint with the Commission des normes du travail about

his dismissal. He stated that he was the victim of harassment by his employer (Exhibits GD3-22, GD3-27, GD3-28 and GD2-4);

k) Counsel Karine Arseneault-Sirois, the Appellant's representative, argued that the Appellant's situation was special because he was hired through the organization SEMO Chaudière-Appalaches as a result of his functional and intellectual limitations, and hired by a company that was subsidized under a government program designed to support people with mental health issues or disabilities;

l) She submitted that the circumstances surrounding the Appellant's dismissal should be handled in a special and flexible manner because of the Appellant's functional and intellectual limitations. She argued that the Appellant, who is intellectually disabled, felt provoked by the remarks of his superior, Mr. L. B.;

m) The representative argued that the Appellant had carried out his work for over 12 years without receiving warnings from his employer about objects that he was picking up off the ground. She stated that, after receiving a warning from his employer in 2011, the Appellant had gone to a CLSC (local community services centre) in an effort to manage his behaviour and that he had therefore done what had been requested of him to comply with the employer's requirements (Exhibit GD11-3);

n) The representative argued that, when the Appellant returned to work in 2012 and 2013, it was not going well beforehand and the situation subsequently worsened;

o) She submitted that the Appellant had attended individual meetings with his employer that were intimidating. She pointed out that the Appellant had had a meeting with his employer without having a chance to be accompanied by someone whom he could trust, which had been the case in 2011 but not at the meeting of August 22, 2013, which subsequently led to his dismissal. The representative argued that the Appellant should have been offered the opportunity to be accompanied when he met with the employer on August 22, 2013. She stated that people with mental health issues

should be accompanied in such situations and that the meeting in which the Appellant took part should not have been held in the way it was on August 22, 2013;

p) The representative submitted that the Appellant did not know that he was prohibited from taking objects he found on the ground. She pointed out that the Appellant was not supposed to leave anything on the ground and that he picked up the things he found on the ground. She submitted that the Appellant should have been warned about this, and not dismissed;

q) The representative argued that the Appellant worked in a company which had expanded and that he was under enormous pressure from his employer. She pointed out that his limitations had not been respected and that there had been a [translation] "possible provocation" by his foreman. She submitted that the Appellant behaved the way he did because he felt that he was being mocked, and that he had not been warned about not picking up objects that he found on the ground. She pointed out that the foreman had never given the Appellant a warning about this. She pointed out that the Appellant had in the past been called on to provide care for other employees and that he is a trustful person;

r) She pointed out that the employer did not give the Appellant a written copy of the rules and that the employer did not take account of the fact that it had employees who belonged to a special client group and that it should have applied a higher standard of due diligence and warned the Appellant that his behaviour was not appropriate;

s) Renée Leblanc, the Appellant's representative, explained that she supported the Appellant in his complaint process with the Commission des normes du travail. To explain the pressure that the Appellant said he was feeling when carrying out his work, the representative stated that, after the company Récupération Frontenac Inc. was restructured, the volume of recyclable material processed by the company increased from 5,000 cubic metres to about 30,000 cubic metres per year. She pointed out that the Appellant had been required to take sick leave and that he had requested that the number of hours he was able to work be respected.

[21] The Commission made the following submissions and arguments:

a) Subsection 30(2) of the Act provides for an indefinite disqualification if it is determined that a claimant lost an employment because of his or her misconduct. It explained that, to constitute misconduct within the meaning of section 30 of the Act, the act complained of must be wilful or deliberate or so reckless as to approach willfulness. It pointed out that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-4);

b) It determined that the event that provoked the dismissal took place during the meeting at which the Appellant lost his control, which he did not deny. It pointed out that the Appellant swore at his foreman (Exhibits GD3-19, GD3-22 and GD3-29; Exhibit GD4-4);

c) In its estimation, the act complained of was the immediate cause of the Appellant's dismissal and it constitutes misconduct within the meaning of the Act because physical or verbal aggression cannot be tolerated in the workplace (Exhibit GD4-4);

d) It pointed out that the Appellant had admitted swearing at his employer and that that was the cause of his dismissal (Exhibit GD4-5);

e) It submitted that, although the behaviour complained of was the result of the Appellant's uncontrolled anger, this was incompatible with an employer/employee relationship. It explained that, although the Appellant alleged not to have received warnings about the prohibition of putting things on the forklift, that was not the immediate cause of the dismissal. The Commission pointed out that, had it not been for his verbal aggression, the Appellant would have kept his employment (Exhibit GD4-5).

ANALYSIS

[22] Although the term "misconduct" is not defined in the Act, the case law says in ***Tucker* (A-381-85)**:

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

[23] In this decision (***Tucker,* A-381-85**), the Federal Court of Appeal (the Court) restated the remarks of Reed J. of the Court to the effect that:

> ... Dishonesty aside, the courts seem to be prepared to accept that employees are human; they may get ill and be unable to fulfill their obligations and they may make mistakes under pressure or through inexperience... Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent...

[24] In ***McKay-Eden* (A-402-96)**, the Court made the following statement:

> In our view, for conduct to be considered "misconduct" under the *Unemployment Insurance Act*, it must be wilful or so reckless as to approach wilfulness.

[25] In ***Mishibinijima* (2007 FCA 36)**, the Court stated the following:

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

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

misconduct and the claimant's employment. The misconduct must therefore constitute a breach of a duty that is express or implied in the contract of employment (***Lemire*, 2010 FCA 314**).

[27] The decisions in ***Cartier* (A-168-00)** and ***MacDonald* (A-152-96)** confirmed the principle, established in ***Namaro* (A-834-82)**, that it must also be established that the misconduct was the reason for the claimant's dismissal.

[28] The Court has reasserted the principle that the burden of proof rests with the employer or the Commission to show that the claimant lost his or her job as a result of his or her misconduct (***Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485**).

[29] Determining whether an employee's conduct that results in the loss of that person's employment constitutes misconduct is a question of fact to be decided based on the circumstances of each case.

[30] In the case here, the Appellant's actions, that is, using profane language with his employer when he was being asked what he was doing with objects he had found on the ground, do not constitute misconduct within the meaning of the Act.

[31] The Tribunal considers that the evidence presented and the Appellant's credible testimony at the hearing gave a full, detailed account of the events that led to his dismissal. The Tribunal also notes the special context in which the Appellant was working.

[32] Given his state of mind during his meeting with the employer on August 22, 2013, the Appellant was able to react inappropriately, under [translation] "the influence of stress", which cost him his employment, without it constituting misconduct within the meaning of the Act (***Tucker*, A-381-85**).

[33] According to the Appellant's testimony, which was not contradicted, at that meeting he was immediately questioned by his foreman about what he was planning to do with the objects he had found on the ground in the course of his work and placed on his forklift. Although possibly inappropriate and objectionable, the Appellant's reaction was also in response to a sudden, intimidating gesture by the foreman. The foreman was first to slap the

table. Then, the Appellant also hit the table, in addition to swearing at the foreman. The Appellant explained that he did so because he felt ridiculed by the questioning about what he was doing with those objects, as they were being presented to him one by one. The Appellant also pointed out that, to call him into the meeting, the foreman had told him that he was angry and that he wanted to meet with him.

[34] In the Tribunal's view, the questioning to which the Appellant was subjected provoked an emotional reaction that other people too may have had if they had been unfairly accused of actions regularly carried out as part of their work. This was an isolated, emotional act by the Appellant in response to a specific, one-time incident. His reaction was proportionate, in response to gestures made first by his foreman at the meeting of August 22, 2013.

[35] The employer knew about the Appellant's intellectual and physical condition as well as his functional limitations. This is a company that hires many people with such limitations. That reality should be better reflected in the management of the company's human resources, in particular when it comes to explaining certain special requirements to employees.

[36] Taking into account the special context in which they were carried out, the Tribunal is of the view that the Appellant's actions were not deliberate or intentional (***Mishibinijima,* 2007 FCA 36; *McKay-Eden,* A-402-96; *Tucker,* A-381-85**).

[37] The Tribunal does not accept the Commission's argument that the Appellant's actions leading to his dismissal constituted misconduct within the meaning of the Act [translation] "because physical or verbal aggression cannot be tolerated in the workplace" (Exhibit GD4-4). That statement completely ignores the gestures made first by his foreman to the Appellant at the meeting of August 22, 2013, and the special work environment in which the Appellant was working.

[38] The Appellant's reaction is also explained by the fact that the employer criticized him for doing something that he regularly did as part of his work. The Tribunal accepts the Appellant's statement that there were no specific directives from the employer prohibiting him from taking objects found on the ground and placing them on his forklift. The Appellant

clearly explained that he had never received warnings or disciplinary measures related to this in 12 years of experience.

[39] On the contrary, he could take such action and had even been encouraged to do so by his employer for safety reasons and to keep the work surface clean. The Appellant also explained that he had only learned about the existence of the prohibition at a mediation meeting in December 2013.

[40] The Appellant in fact rebutted the employer's argument that he was not authorized to take objects from the sorting line. He pointed out that he did not do his work on the sorting line, which is on the building's second floor, but in fact on the plant floor, the floor below. The employer also did not provide tangible evidence that the Appellant signed the company's policy providing for, in particular, this prohibition.

[41] According to the evidence in the docket and the Appellant's testimony, the Appellant complied with his employer's requirements following a suspension in 2011 for making inappropriate comments to a co-worker (Exhibit GD11-3). The Appellant went to a CLSC (local community services centre) to manage his behaviour. He explained that this effort led to a conclusion that he did not have a problem with aggressive behaviour and that a file was not opened for him (Exhibits GD3-27 and GD3-28).

[42] The Tribunal is of the opinion that, despite the Appellant's actions, the Appellant in no way sought to undermine the interests of his employer, show wilful or wanton disregard for the employer's interests, or manifest wrongful intent toward the employer (***Tucker,* A-381-85**). The Appellant's actions did not reflect any malicious intent on his part toward his employer.

[43] In the circumstances, the Tribunal is of the opinion that the Appellant had no way of knowing 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 (***Mishibinijima,* 2007 FCA 36**).

[44] The Tribunal restates that, in cases of misconduct, the burden of proof rests with the Commission or the employer (***Lepretre,* 2011 FCA 30, *Granstrom,* 2003 FCA 485**). In the

present case, the Tribunal considers that neither the Commission nor the employer has met the requirements they must fulfil.

[45] In short, the Tribunal considers that the Appellant was not dismissed because of his misconduct (***Cartier*, A-168-00; *MacDonald*, A-152-96; *Namaro*, A-834-82**).

[46] Consequently, the Commission's decision to disqualify the Appellant from receiving Employment Insurance benefits is not warranted in the circumstances.

[47] The Tribunal concludes that the appeal on this issue has merit.

CONCLUSION

[48] The appeal is allowed.

Normand Morin
Member, General Division

DATE OF REASONS: November 28, 2014