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

[TRANSLATION]

Citation: *S. L. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 34

Tribunal File Number: GE-15-3153

BETWEEN:

S. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

DATE OF HEARING: February 16, 2016

DATE OF DECISION: March 4, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, S. L., was present at the telephone hearing (teleconference) on February 16, 2016. He was represented by Gaël Morin-Greene of the partnership firm Ouellet Nadon et Associés, Counsel.

INTRODUCTION

[2] On April 23, 2015, the Appellant made a renewal claim for benefits that took effect on March 29, 2015. The Appellant explained that he was requesting "sickness benefits" (special benefits). The Appellant stated that he had worked for the Employer, Aliments Krispy Kernels Inc., from February 23, 2015 to March 30, 2015 inclusive, and had stopped working for that employer because of a dismissal or suspension (Exhibits GD3-3 to GD3-17).

[3] On June 29, 2015, the Respondent, the Canada Employment Insurance Commission (the "Commission"), notified the Appellant that he was not entitled to regular employment insurance benefits as of March 29, 2015 because he had stopped working for the Employer, Aliments Krispy Kernels Inc., on March 23, 2015 because of his misconduct (Exhibit GD3-23).

[4] On July 21, 2015, the Appellant filed a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-24 and GD3-25).

[5] On August 28, 2015, the Commission notified the Appellant that it was upholding its decision in his case dated June 29, 2015 (Exhibits GD3-29 and GD3-30).

[6] On August 28, 2015, the Commission notified the Employer that it was upholding its decision in the Appellant's case dated June 29, 2015 (Exhibits GD3-31 and GD3-32).

[7] On October 2, 2015, the Appellant, represented by Denis Vigneault of the Centrale des syndicats démocratiques (CSD), filed a Notice of Appeal to the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (Exhibits GD2-1 to GD2-7).

[8] On October 7, 2015, the Tribunal informed the Employer, Aliments Krispy Kernels Inc., that if it wanted to become an “added party” in this case, it would have to file a request to that effect by October 22, 2015(Exhibits GD5-1 and GD5-2). The Employer did not respond to the offer.

[9] On February 1, 2016, Gaël Morin-Greene notified the Tribunal that he would be appearing in the Appellant’s case (Exhibits GD6-1 to GD6-3).

[10] This appeal was heard by teleconference for the following reason:

a) The fact that the Appellant will be the only party attending the hearing.

b) The fact that the Appellant or other parties are represented.

c) This method of proceeding meets the requirement of the *Social Security Tribunal Regulations* that the Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit (Exhibits GD1-1 to GD1-4).

ISSUE

[11] The Tribunal must determine if the Appellant lost his employment because of his misconduct under sections 29 and 30 of the *Employment Insurance Act* (“the Act”).

THE LAW

[12] The provisions on misconduct are set out in sections 29 and 30 of the Act.

[13] Paragraphs 29(*a*) and (*b*) of the Act provide as follows with regard to “disqualification” from receiving employment insurance benefits or “disentitlement” to such benefits:

> . . . 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; . . .

[14] Subsection 30(1) of the Act states the following about “disqualification” for “misconduct” or “leaving without just cause”:

> . . . 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.

[15] Subsection 30(2) of the Act states the following about the “length of disqualification”:

> . . . 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

[16] The evidence in the file is as follows:

a) A record of employment dated April 21, 2015 indicates that the Appellant worked for the Employer, Aliments Krispy Kernels Inc., from February 23, 2015 to March 30, 2015 inclusive and that he stopped working for that employer because he was dismissed (Code M – Dismissal) (Exhibit GD3-18).

b) On June 25, 2015, the Employer sent the Commission a copy of the letter of dismissal addressed to the Appellant and dated April 2, 2015 (Exhibit GD3-20). In that letter, the Employer explains that the Appellant had been absent from work since March 24, 2015. It mentions that it had not been notified of the absence since March 30, 2015 and that the absence was still “unauthorized”. The Employer informs to the Appellant that, under clause 8.07 of the collective agreement in effect, he was losing his seniority and his employment as of April 2, 2015 (Exhibit GD3-20).

c) On August 25, 2015, the Employer stated that no meeting had been scheduled between the Appellant and the person in charge of human resources. The Employer explained that the Appellant often received telephone calls to discuss personal matters during his work hours (e.g., discussions with lawyers). The Employer explained that no sanction was planned with respect to the Appellant for matters related to violence in the workplace. The Employer stated that it dismissed the Appellant on April 2, 2015 following three days of absence by him on March 30, 31 and April 1, 2015 without providing a reason for those absences. The Employer explained that clause 8.07 of the collective agreement states that after three days of absence, an employee must provide a reason for those absences through medical evidence. The Employer pointed out that the Appellant had previously been absent for medical reasons and knew the rules related to this situation. According to the Employer, the Appellant had talked for years about not having his health insurance card. The Employer stated that the Appellant is known for being disorganized and that he has a significant record of absenteeism and being late. The Employer indicated that the Appellant had many disciplinary notices in his file. The Employer stated that the reason for the Appellant's dismissal was the lack of medical evidence after three days of not reporting to work (Exhibit GD3-28).

d) On February 14, 2016, the Appellant's representative sent the Tribunal a copy of the following documents:

   i. "Certificat de dépôt – Travail Québec" [certificate of filing – Labour Quebec] (collective agreement) (Exhibit GD7-2);

   ii. Extract from the collective agreement covering 2013 to2018" (Exhibits GD7-3 to GD7-7). Clause 8.07 of the collective agreement to which the Appellant was subject states that: [Translation] "An employee shall lose his seniority and his employment in the following cases: . . . (f) If the employee is absent for a period of three consecutive work days without providing notice or without authorization, except in situations of *force majeur*." (Exhibit GD7-7);

iii. The Appellant’s telephone statement from Bell, dated April 8, 2015 (billing date). This document shows that the Appellant contacted his employer on three occasions on Tuesday, March 24, 2015 and once on Thursday, March 26, 2015 (Exhibits GD7-8 and GD7-9);

iv. Medical certificate (“psychological illnesses”) issued by the SSQ – Groupe financier, dated May 19, 2015 and indicating that the Appellant was on a work stoppage during the following periods: September 22, 2014 to October 19, 2014, October 20, 2014 to November 20, 2014, November 25, 2014 to December 22, 2014, December 28, 2014 to January 11, 2015 and January 29, 2015 to February 15, 2015 (Exhibit GD7-10).

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

a) The Appellant explained that he had worked as an electrician-mechanic for the Employer, Aliments Krispy Kernels Inc., since 2000.

b) The Appellant stated that he was absent from work during part of the day on March 23, 2015 during his shift (3:00 p.m. to 11:00 p.m.) for medical reasons. He explained that he was then absent, without interruption, from March 24, 2015 (the first full day of absence) to when he was dismissed on April 2, 2015. The Appellant stated that he had received his letter of dismissal, by bailiff, on April 2, 2015 (Exhibit GD3-20).

c) The Appellant stated that he had notified his employer on Tuesday, March 24, 2015 that he would be absent from work for medical reasons. He indicated that he had made three telephone calls that day and had left messages to report his absence. The Appellant clarified that he communicated with the production coordinator, the maintenance coordinator and the mechanical engineer, one after the other, by leaving them a message in their respective voicemail to report his absence. The Appellant stated that he had reported his absence about 30 minutes before the start of his shift on March 24, 2015. He reported communicating with the Employer again (production coordinator) on Thursday, March 26, 2015, to inform the Employer that he was still sick and would be

absent from work for an indeterminate period. The Appellant specified that he had told the production coordinator on that date that he would be meeting with his doctor and would provide medical evidence. He indicated that the coordinator told him that that was fine (Exhibits GD3-22, GD3-26, GD3-27, GD7- 8 and GD7-9).

d) The Appellant explained that he met with a doctor in early April 2015 but had not asked him for a medical certificate because he had already been dismissed on April 2, 2015 (Exhibits GD3-20 and GD3-22). He indicated that he had filled out a document for his insurance (Exhibit GD7-10).

PARTIES' ARGUMENTS

[18] The Appellant and his representative made the following observations and submissions:

a) The Appellant explained that he had been dismissed because of his absences from work, despite the fact that he had notified his employer to that effect. He indicated that he knew that he had to provide a medical certificate (doctor's note) if he was absent three or more consecutive days and he knew the Employer's policy in that regard. The Appellant stated that he had explained to the Employer that he had been unable to consult a doctor on March 23, 24 or 25, 2015 and that he was unable to provide a medical certificate because his health insurance card had expired. The Appellant specified that he did not have a family doctor. He indicated that he had gone to the emergency of a health institution and had been told that he had to first have his health card. He was unable to see a doctor at that time. The Appellant stated that he had no proof that he was unable to work for medical reasons but that he was "burned out". He mentioned that he had already been suspended for two days for being absent on March 12, 2015 and having informed the Employer shortly after the start of his shift (Exhibits GD3-3 to GD3-17, GD3-22, GD3-26 and GD3-27).

b) He indicated that a grievance had been filed by the union that represents him in order to contest his dismissal. He stated that he wanted his job back (Exhibits GD2-3, GD3-3 to GD3-17, GD3-26 and GD3-27).

c) The Appellant stated that he had experienced harassment in his workplace and had filed a complaint to that effect with his union. He indicated that he had had enough of the harassment at work and, consequently, had left his employment. The Appellant mentioned that his employer was accusing him of violence and that he wanted to preserve the integrity of his record. According to the Appellant, his dismissal had been disguised as a voluntary leaving (Exhibits GD3-3 to GD3-17, GD3-22 and GD3-24).

d) Gaël Morin-Greene, the Appellant's representative, argued that in matters of misconduct, the burden of proof lies on the Commission or the employer, as the case may be.

e) He underscored that in a case of misconduct, there must be a mental aspect showing that the alleged act was wilful. He pointed out that 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" (***Tucker*, A-381-85**) (Exhibits GD8-3 and GD8-4).

f) He argued that the explanation given by the Commission that under the Employer's policy, the Appellant [Translation] "must provide a medical note" on the third day of absence was incorrect (Exhibit GD4-1). The representative explained that, in his claim for benefits, the Appellant stated that the Employer had a policy regarding absences and that under that policy, he was required to provide a medical note for his third day of absence, but that he had not been able to do so because he did not have his health card at that time in order to make a medical appointment (Exhibit GD3-9). The representative pointed out that, in his claim for benefits, the Appellant had not stated that, under the Employer's policy, he necessarily had to provide medical evidence after three days of absence. He specified that the collective agreement does not stipulate that an employee who is absent for a period of three or more days must provide medical evidence and that the Appellant thought that he had "obeyed the letter" (Exhibit GD7-7). The representative explained that clause 8.07 of the collective agreement stated that: [Translation] "An employee shall lose his seniority and his employment in the following cases: . . . (f) If the employee is absent for a period of three consecutive work

days without providing notice or without authorization, except in situations of *force majeur*" (Exhibit GD7-7). The representative argued that the Appellant had notified his employer of his absence for medical reasons and that he would provide evidence to that effect, in accordance with the applicable provisions of the collective agreement. He underscored that the Employer, after having been notified of the Appellant's absence, had not asked him to provide such evidence but had decided to dismiss him.

g) The representative submitted that contrary to what the Employer said, the collective agreement does not state that an employee who has been absent for three or more days must provide a reason for his absence by providing medical evidence to that effect (Exhibit GD3-28). The representative pointed out that this rule is the same for all employees and that the Employer had never asked the Appellant to provide, by a specific date, medical evidence for his absence (***R. M. v. Canada Employment Insurance Commission*, 2014 SST GDEI 52**) (Exhibits GD8-9 to GD8-27).

h) He argued that the evidence adduced by the Commission does not correspond in any way to a case of misconduct. The representative pointed out that the wording of clause 8.07 of the collective agreement does not show that if medical evidence is not provided for an absence of three or more days the employee concerned will be dismissed. He stated that the collective agreement does not provide for such a measure. The representative indicated that the Employer did not have a policy to that effect and that the Appellant's actions do not constitute misconduct, particularly since the Appellant notified his employer of his absence and said that he would provide it with medical evidence (***Lepretre*, A-246- 10**) (Exhibits GD8-5 and GD8-6).

i) The representative argued that the Appellant's case does not show any of the wilfulness associated with misconduct. He explained that to determine misconduct, there must be sufficiently detailed evidence to establish that the person's conduct was improper. The representative underscored that, in the Appellant's case, the evidence adduced by the Employer is instead vague and broad when it comes to invoking clause 8.07 of the collective agreement (***Joseph,* A-636-85**) (Exhibits GD8-7 and GD8-8).

j) He indicated that the evidence adduced relates to a number of work stoppages by the Appellant and that this was not the first time that he had been absent for medical reasons (Exhibit GD7-10).

k) The representative argued that the Appellant was unable to provide medical evidence for his absence from work as of March 24, 2015 because he had had a problem with his health insurance card. He stated that there was no clear evidence that the Appellant was required to provide the Employer with medical evidence regarding his absence from work, otherwise he would be dismissed. The representative explained that neither the Commission nor the Employer had provided evidence of any progressive increase in sanctions on this matter. He stated that there is no basis to conclude, on the balance of probabilities, that this was misconduct. According to the representative, under subsection 49(2) of the Act, the benefit of the doubt must be given to the Appellant. He argued that the Appellant's version of the facts is credible and that the Employer's complaint is not supported by the evidence, either by a policy in effect in the company whereby he was required to provide medical evidence for his absence, or by notice that the Employer could have sent him to that effect. The representative underscored that the Appellant offered to provide the Employer with a medical note. He stated that the Commission's analysis went much too far in its interpretation of the situation by stating that the Appellant knew that there was a clear policy and that he had to present medical evidence, despite the fact that the Appellant did not provide any such indication in his claim for benefits (Exhibits GD3-9 and GD4-4).

l) The representative argued that the Appellant had not been dismissed because of his misconduct.

[19] The Commission made the following observations and submissions:

a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that the claimant lost his employment because of his own misconduct. The Commission explained that, for the act complained of to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate or so reckless

as to approach wilfulness. It stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibits GD4-3 and GD4-4).

b) The Commission explained that the Appellant was dismissed because he was absent from work for three (3) consecutive days and had not provided medical evidence to justify his absences (Exhibits GD3-20 and GD3-28). It pointed out that the collective agreement clearly states that medical evidence is required after three (3) days of absence (Exhibit GD3-28). The Commission indicated that the Appellant admitted that he knew of the Employer's policy, had been aware of it and was aware that after three (3) days of absence he had to provide a reason for that absence through a medical note (Exhibits GD3-9 to GD3-12, GD3-22, GD3-26). It explained that the Appellant had been sick previously while with the Employer and thus knew the rules related to absences (Exhibit GD3-28). According to the Commission, the Appellant had the obligation to provide medical evidence after three (3) days of absence. It argued that, even though the Appellant had said that his health card was expired, there was nothing preventing him from seeing a doctor because he knew that his employment was at risk (Exhibit GD4-4).

c) It explained that by not providing medical evidence after a three-day absence, the Appellant's conduct had led directly to his dismissal and that he had only himself to blame. According to the Commission, the Appellant broke the relationship of trust that must exist between an employer and an employee (Exhibits GD4-4 and GD4-5).

d) The Commission claimed that the fact that the Appellant had not provided medical evidence after an absence of three (3) days constituted misconduct within the meaning of the Act because he should reasonably have known that he was exposing himself to dismissal because he knew the Employer's policy on absences. In its view, the Appellant acted wilfully and deliberately, which constitutes misconduct (Exhibit GD4-4).

e) The Commission concluded that the Appellant lost his employment because of his misconduct (Exhibit GD4-5).

ANALYSIS

[20] Although the Act does not define the term “misconduct”, the case law in ***Tucker* (A-381-85)** indicates the following:

> [I]n 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.

[21] In that decision (***Tucker*, A-381-85**), the Federal Court of Appeal (the “Court”) recalled the words of Reed J.:

> . . . 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 . . . .

[22] In ***Mishibinijima* (2007 FCA 36)**, the Court provided the following reminder:

> 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.

[23] In ***McKay-Eden* (A-402-96)**, the Court offered the following clarification: “In our view, for conduct to be considered "misconduct" under the *Unemployment Insurance Act*, it must be willful or so reckless as to approach willfulness.”

[24] The Court has defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct where the claimant knew or ought to have known that his 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 an express or implied duty resulting from the contract of employment (***Lemire*, 2010 FCA 314**).

[25] The decisions in ***Cartier*** **(A-168-00)** and ***MacDonald*** **(A-152-96)** confirm the principle established in ***Namaro*** **(A-834-82)** that it must also be established that the misconduct was the cause of the claimant's dismissal.

[26] The Court has reaffirmed the principle that the onus lies on the employer or the Commission to establish that the loss of employment by the claimant was because of the claimant's own misconduct (***Lepretre*****, 2011 FCA 30,** ***Granstrom*****, 2003 FCA 485**).

[27] For the act complained of to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate or so reckless as to approach wilfulness. There must also be a causal link between the misconduct and the dismissal.

[28] Determining whether an employee's conduct that results in the loss of his employment constitutes misconduct is a question of fact to be resolved on the basis of the circumstances of each case.

[29] In this case, the Appellant's alleged acts, that is, being absent from work for three or more consecutive days without providing a reason for his absences through medical evidence, does not constitute misconduct within the meaning of the Act.

[30] In the letter of dismissal sent to the Appellant and dated April 2, 2015, the Employer gave the Appellant the following explanation:

> [Translation] You have been absent from work since Tuesday, March 24, 2015. As of today, we note that this absence is still unauthorized. Moreover, you have not notified the Employer since March 30, 2015. . . . Consequently, given your prolonged absence, the lack of justification and the lack of notice, we have no choice, in accordance with clause 8.07 of your collective agreement, but to inform you that you have lost your seniority and your employment as of today. . . .

Non-deliberate nature of act complained of

[31] In taking into account the specific context in which the Appellant's alleged act was committed, the Tribunal finds that it was not deliberate or intentional (***Mishibinijima*****, 2007 FCA 36;** ***McKay-Eden*****, A-402-96;** ***Tucker*****, A-381-85**).

[32] The Appellant acknowledged being absent from work as of March 24, 2015 for an indeterminate period.

[33] The Tribunal finds that the Appellant's credible testimony during the hearing yielded a comprehensive and highly detailed picture of the events leading to his dismissal.

Notice given by Employer

[34] The Appellant provided a number of clarifications regarding the action he had taken to notify the Employer that he would be absent from work for an indeterminate period as of March 24, 2015.

[35] The Tribunal finds that nothing in the evidence in the file shows that the Appellant breached an express or implied duty of the contract of employment (***Tucker*, A-381-85; *Lemire*, 2010 FCA 314**).

[36] It is the Tribunal's view that the Appellant has not displayed wilful or wanton disregard for the interests of his employer or manifested wrongful intent towards it (***Tucker*, A-381- 85**).

[37] The Appellant's testimony, which was not disputed, shows that he notified his employer, as of March 24, 2015, that he would be absent. The Appellant specified that he left messages one after the other in the voicemail of three of the company's supervisors (production coordinator, maintenance coordinator and mechanical engineer).

[38] The statement of telephone calls provided by the Appellant clearly shows that three calls were made to the Employer's business on March 24, 2015 (Exhibits GD7-7 and GD7-9).

[39] The Tribunal also accepts as fact the Appellant's statement that he communicated again with the Employer on March 26, 2015 to explain, this time to the production coordinator, that he would be absent for medical reasons for an indeterminate period.

[40] The Appellant then told the production coordinator that he would provide medical evidence after meeting with a doctor. The Appellant also mentioned that the latter then indicated to him that his announcement did not pose any particular problem, having said to him [Translation] "that's fine".

[41] The documentary evidence adduced by the Appellant also supports his statement that he made a telephone call to the Employer on March 26, 2015 (Exhibits GD7-7 and GD7-9).

[42] In this context, the Tribunal considers that the Appellant clearly notified the Employer of his absence from work as of March 24, 2015 and that the absence was not "unauthorized" as the Employer stated (Exhibit GD3-20).

Medical evidence

[43] In the letter of dismissal sent to the Appellant and in the statements made to the Commission, the Employer invokes the application of clause 8.07 of the employee collective agreement as the reason for the Appellant's dismissal.

[44] The Employer explained that, under that clause, after three days of absence, an employee must justify the absence through medical evidence (Exhibit GD3-28).

[45] The Tribunal rejects the Employer's argument that after three days of absence an employee must justify that absence through medical evidence under clause 8.07 of the collective agreement.

[46] On this element, the Appellant's representative very clearly demonstrated that the clause in question was not that specific in this regard and that it does not require medical evidence after three consecutive days of absence.

[47] The representative argued that the wording of clause 8.07 of the collective agreement does not show that the Employer has an absenteeism policy requiring that an employee who has been absent for three or more consecutive days must provide medical evidence to that effect (***Lepretre,*** **A-246-10**).

[48] Clause 8.07 of the collective agreement to which the Appellant was subject states that: [Translation] "An employee shall lose his seniority and his employment in the following cases: . . . (f) If the employee is absent for a period of three consecutive work days without providing notice or without authorization, except in situations of *force majeur*" (Exhibit GD7-7).

[49] In the case before us, the Tribunal is of the view that the Appellant complied with the requirement set out in the collective agreement with respect to absenteeism. The Appellant's testimony demonstrates that he notified his employer on March 24, 2015 that he would be absent from work and that he then obtained the Employer's authorization to be absent for an indeterminate period as of March 26, 2015.

[50] Although the Appellant indicated that he knew that he was required to provide medical evidence to his employer for an absence of three or more consecutive days, there is nothing to show that he objected to that request.

[51] On this aspect, the Appellant explained how circumstances had resulted in him being unable to respond immediately to the Employer's request. In his claim for benefits, the Appellant also stated that he had [Translation] "complied with the Employer's policy regarding absences" (Exhibit GD3-10).

[52] The Appellant explained that he had been unable to obtain the document requested because his health insurance card had expired and he can been unable to consult a doctor. The Appellant specified that when he was able to consult a doctor, in early April 2015, he had already been dismissed (Exhibit GD3-20).

[53] The Tribunal rejects the Commission's submissions that, in the collective agreement, it is clearly indicated that medical evidence is required after three days of absence (Exhibit GD4-4).

[54] The Tribunal also rejects the Commission's analysis to the effect that, by not providing medical evidence after a three-day absence, the Appellant's conduct had led directly to his dismissal and that he had only himself to blame (Exhibit GD4-4).

[55] In this context, the Tribunal is of the opinion that the Appellant considered the standards of behaviour the Employer was entitled to expect of him (***Tucker*, A-381-85**).

[56] The Tribunal is of the opinion that the Appellant did not act in any way as to impair the interests of his employer.

[57] The Tribunal considers that the Appellant's alleged act was not of a nature that he would normally have foreseen that it might result in his dismissal. The Appellant could not know that his conduct was such as to impair the performance of the duties owed to his employer and that there was a real possibility he would be dismissed (***Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36**).

Evidence gathered by the Commission

[58] The Tribunal notes that in cases of misconduct, the burden of proof lies on the Commission or the employer, as the case may be (***Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485**).

[59] The Tribunal is of the view that, in this case, the Commission did not discharge its burden of proof in this regard (***Lepretre*, 2011, FCA 30; *Granstrom*, 2003 FCA 485**).

Reason for dismissal

[60] The Tribunal is of the view that the evidence presented shows that the Appellant was not dismissed as a result of a wilful and deliberate act (***Tucker*, A-381-85; *McKay-Eden*, A-402-96; *Mishibinijima*, 2007 FCA 36**).

[61] The Tribunal finds that the act complained of does not constitute misconduct within the meaning of the Act (***Tucker*, A-381-85; *McKay-Eden*, A-402-96; M*ishibinijima*, 2007 FCA 36**).

[62] On the basis of the case law referred to earlier and the evidence presented, the Tribunal finds that the Appellant did not lose his employment because of his misconduct under sections 29 and 30 of the Act (***Namaro*, A-834-82; *MacDonald*, A-152-96; *Cartier*, A-168-00**).

[63] The Tribunal finds that the appeal on this issue has merit.

CONCLUSION

[64] The appeal is allowed.

Normand Morin

Member, General Division - Employment Insurance Section