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

[TRANSLATION]

Citation: *N. G. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 11

Tribunal File Number: GE-16-2058

BETWEEN:

N. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Groupe Archambault Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 5, 2017

DATE OF DECISION: January 27, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mr. N. G., attended the videoconference hearing on January 5, 2017. Mr. Réal Labarre from Mouvement Action-Chômage (Unemployment action movement) from Trois-Rivières, the Appellant's representative, did not attend the hearing. The Appellant explained that the representative was unable to attend the hearing for medical reasons.

[2] The Respondent, the Canada Employment Insurance Commission (Commission), did not attend the hearing.

[3] The employer, Groupe Archambault Inc., the Added Party to the file, did not attend the hearing.

[4] In a letter addressed to the Social Security Tribunal of Canada (Tribunal), on January 4, 2017, the employer explained that it was unable to attend hearing on January 5, 2017, but that it would reiterate the version of events that it had presented in statements made to the Commission.

[5] In addition to the member designated by the Tribunal to hear the appeal, two other newly appointed Tribunal members, Ms. Bernadette Syverin and Mr. Yoan Marier, attended the hearing as observers.

INTRODUCTION

[6] On February 15, 2016, the Appellant made an initial claim for benefits effective February 21, 2016. The Appellant reported that he had worked for the employer, Renaud-Bray (Groupe Service Archambault Canada Inc.), until February 11, 2016, inclusive, and that he had stopped working for that employer due to a dismissal or suspension (Exhibits GD3-3 to GD3-15).

[7] On March 17, 2016, the Commission informed the Appellant that he was not entitled to regular Employment Insurance benefits, commencing February 21, 2016, because he had stopped

working for the employer Groupe Archambault Inc. (Renaud-Bray), on February 18, 2016, due to his misconduct (Exhibits GD3-26 et GD3-27).

[8] On April 4, 2016, the Appellant, represented by Mr. Réal Labarre, filed a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-28 to GD3-32).

[9] On May 12, 2016, the Commission informed the Appellant that it was upholding the decision made on March 17, 2016 (Exhibits GD3-39 and GD3-40).

[10] On May 12, 2016, the Commission informed the employer, Groupe Archambault Inc., that it had upheld the decision made on March 17, 2016, regarding the loss of the Appellant's employment due to his misconduct (Exhibits GD3-41 and GD3-42).

[11] On May 26, 2016, the Appellant, represented by Mr. Réal Labarre, filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits G2-1 to GD2-4).

[12] On May 30, 2016, the Tribunal informed the employer that if it wanted to become an "added party" to this case, it had to file a request to that effect by June 14, 2016 (Exhibits GD5-1 and GD5-2).

[13] On June 15, 2016, the employer, Groupe Archambault Inc., informed the Tribunal that it wanted to join the appeal as an "added party" to this case (Exhibits GD6-1 to GD6-3).

[14] On September 1, 2016, the Tribunal added the employer, Groupe Archambault Inc., as an "added party" to this case because it had a direct interest in the outcome of the appeal (Exhibits GD7-1 to GD7-3).

[15] The appeal was heard by videoconference hearing for the following reasons:

a) The fact that the Appellant or other parties are represented;

b) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[16] The Tribunal must determine whether the Appellant lost his employment due to his misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

EVIDENCE

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

a) A Record of Employment dated March 2, 2016, indicates that the Appellant worked as a luthier for the employer, Groupe Archambault Inc., from September 27, 2015, to February 18, 2016, inclusive, and that he had stopped working for that employer because he was dismissed (Code M – Dismissal), (Exhibit GD3-16);

b) On or around March 4, 2016, the employer sent the Commission a copy of the following documents:

   i. A letter from the employer, Groupe Archambault Inc., dated February 18, 2016, informing the Appellant that he had been dismissed. In that letter, the employer informed the Appellant that he had repaired a Fender guitar without authorization and without the required certification. The employer also told the Appellant that he had repaired a piano, on September 15, 2015, without authorization to do so. The employer concluded that the Appellant had shown insubordination for failing to comply with the company's policies and Code of Ethics (Exhibits GD3-18 and GD3-19).

   ii. A letter from the employer, Groupe Archambault Inc., dated February 12, 2016, informing the Appellant that he was being relieved of his duties, without pay, and asking him to no longer show up to work (Exhibit GD3-20).

   iii. A letter from the employer, Groupe Archambault Inc., dated September 14, 2015 (disciplinary measure—two (2) week suspension without pay), informing the Appellant that he had been relieved of his duties on August 27, 2015, for a two-week period, for putting himself in a conflict of interest and thus breaching the company's Code of Ethics. In that letter, the employer indicated that the

Appellant had breached the company's Code of Ethics by proposing to sell a personal guitar to another Groupe Archambault employee, by repairing a Fender guitar belonging to a client in his own home (when he did not have the certification required by the company), and by having two guitars in his possession (at his home) that belonged to the company, without his manager's authorization. In that letter, the employer asked the Appellant to improve his behaviour and to respect the company's policies and directives, indicating that it had attached the document "2015 Company Code of Ethics." The employer also specified to the Appellant that any re-offense of the same or similar nature would result in more severe disciplinary measures, up to dismissal (Exhibits GD3-21 and GD3-22).

iv. A letter from the employer, Groupe Archambault Inc., dated August 27, 2015 (Relief from duties for investigative purposes), informing the Appellant that he had been relieved of his duties as of August 27, 2015, without pay, for investigative purposes (Exhibit GD3-23).

c) On January 4, 2017, the employer informed the Tribunal that it would not attend the hearing (Exhibits GD8-1 and GD8-2).

d) On January 5, 2017, the Appellant sent the Tribunal a copy of a document entitled "2015 Lutherie Fee Schedule." This document lists the repairs that can be done on guitars, the cost of these repairs and the time required to do them (Exhibits GD9-1 to GD9-5).

[18] The evidence at the hearing is as follows:

a) The Appellant recalled the circumstances leading to his dismissal, with the aim of demonstrating that he had not lost his job due to his misconduct.

b) The Appellant stated that he had begun working for the employer in 2009-2010. He explained that during the six-and-a-half year period that he was employed with the employer, he had developed an instrument repair service for all Archambault stores in eastern X. He specified that as part of his duties, he traveled to different stores (ex. X, X) to repair guitars. The Appellant explained that he had been given the mandate from

the company's director general, Mr. R., to develop a system in order to offer repair services for all makes of guitars. The Appellant noted that this service was very much appreciated by clients and that he had received a positive evaluation from the employer. The Appellant specified that during his career, he had never received complaints from guitar manufacturers, like Fender or Gibson.

PARTIES' ARGUMENTS

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

a) The Appellant explained that his employer had dismissed him, after nearly seven years of service, for repairing a Fender guitar on December 28, 2015, without the certification required by the guitar manufacturer (Exhibits GD3-9 and GD3-24). He explained that his job consisted of repairing musical instruments and that he had always provided the same service during his period of employment with the employer. The Appellant noted that he did not breach the company's Code of Ethics. He argued that following the acquisition of Groupe Archambault by Renaud-Bray, in the spring of 2015, he continued to repair Fender guitars until the employer informed him, in September 2015, that he was neither authorized nor certified to repair that brand of guitar (Exhibits GD3-24, GD3-33 and GD3-34).

b) He explained that when he met with the employer, on September 14, 2015, the employer informed him that he always had to have the authorization of a manager or director to do repairs on Fender guitars, given that there were things he could no longer do because he was not certified to repair guitars of that brand (Exhibits GD3-21 and GD3-22 and GD3-37).

c) The Appellant stated that when the employer informed him, in September 2015 (Exhibits GD3- 21 and GD3-22), that he could no longer repair Fender guitars, it was talking about major repairs. He noted that these instructions were first given to him by Mr. D. V. (Exhibit GD3-9), the then director of X (director of sales and operations), and by another of his superiors, Mr. F. The Appellant stated that while Mr. D. V. was in charge of X, another director for X, Mr. F. F., his top boss, specified that he was to

longer do major repairs on Fender guitars (ex.: pick-up replacement, installation of brackets inside the guitar, changing of potentiometers). He stated that Mr. F. F. had also specified that he could continue to do minor repairs and maintenance on that brand of guitars (ex. To ensure instrument safety), even if he did not have the company's certification. The Appellant argued that he had followed the instructions given to him by Mr. F. F. He explained that Mr. F. F. had prepared a list of repairs that he was still authorized to do ("2015 Lutherie Fee Schedule"—Exhibits GD9-1 to GD9-5) on all brands of guitars (ex.: Fender, Gibson). During the hearing, the Appellant showed that the repairs that he was still authorized to do were highlighted in yellow in the document in question (Exhibits GD9-1 to GD9-5). He noted that he had already refused to do repairs on Fender guitars, before he was dismissed, because they involved major repairs. He stated that he had thus continued to do repairs, but only with the authorization of the manager or director (Exhibits GD3-9, GD3-21, GD3-22, GD3- 37 and GD9-1 to GD9-5).

d) The Appellant explained that the act the employer had accused him of and that had led to his dismissal, that is, repairing a Fender guitar, on December 28, 2015, changing three screws holding the guitar's tuning keys, was a repair that he was still authorized to do, including on Fenders, based on the document the employer had given him ("2015 Lutherie Fee Schedule"—Exhibits GD9-1 to GD9-5). The Appellant demonstrated, on a guitar, the repair that he had done on the Fender guitar that had been assigned to him on December 28, 2015. He explained that the document "2015 Lutherie Fee Schedule" states that he can install tuning keys with or without modifying the headstock of the guitar (ex. install keys with modifications to headstock: $35.00, install keys without modifications to headstock: $20.00 (Exhibits GD9-1 to GD9-5). The Appellant specified that he had not changed all the keys on the guitar that he repaired, but that he had only replaced the three screws holding the keys, because they were damaged. He noted that as part of his assignment, he had the right to change all the keys if he wanted to, but that they did not have any in the store and that he had only changed the three screws in question. The Appellant specified that these screws were sharp and presented an injury risk to anyone who used the guitar. He said that his replacement of the three screws to remove a tuning key was not a repair. The Appellant

stated that he could replace the screws and that the guitar in question would still have been covered by the manufacturer's warranty, despite the employer's assertion to the contrary. The Appellant explained that for more than six years, he had repaired guitars, including Fender guitars, even if the guitars in question were covered under warranty. He noted that Fender sent him parts so that he could do the repairs in question, without compromising the manufacturer's warranty (Exhibits GD3- 24, GD3-33, GD3-34, GD3-37 and GD9-1 to GD9-5).

e) He explained that he had done the repair asked of him on December 28, 2015, because he felt that letting the client leave with the guitar was too dangerous because of the damaged screws that presented a risk of injury; and that the client in question wanted to give it to their child. The Appellant noted that he did not want to see the child injured by the guitar and that he wanted the client to be satisfied (Exhibits GD3-33 and GD3-34 GD3-37). - 9 –

f) During the hearing, as well as in a statement that he made to the Commission on May 5, 2016 (Exhibits GD3-33 and GD3-34), the Appellant specified that the manager was not on site when he repaired the guitar in question. He also noted that it was the sales clerk who was in the store at that time, who asked him to do that repair, and to do what he had to do to make the guitar safe. In a statement made to the Commission on May 11, 2016 (Exhibit GD3-37), the Appellant explained that during the incident that occurred on December 28, 2015, there was a manager in the store, but they were unavailable. During the hearing, the Appellant also specified that after he repaired the guitar, he had placed the damaged screws in a bag and placed the bag in the manager's office. The Appellant also stated that the sales clerk had mentioned that after the holidays, there would maybe be more work to do on the guitar, replacing the tuning keys, if necessary (Exhibits GD3-33, GD3-34 and GD3-37).

g) He explained that he had told the employer that he wanted to obtain confirmation or certification from Fender in order to be able to do all types of repairs on Fender guitars. The Appellant stated that the employer had not followed up on his request and that he

had therefore been unable to obtain the required certification (Exhibits GD3-24, GD3-33 and GD3-34).

h) Regarding the incident that occurred on September 15, 2015, concerning the repair of a piano, which is also mentioned in the dismissal letter dated February 18, 2016 (Exhibits GD3-18 and GD3-19), the Appellant stated that he never received a written notice about it. He explained that when there is a damaged piano, the employer usually asks a self-employed person to come do the repair. The Appellant stated that the person who had done the repair on the piano had asked him to put a drop of glue on the piano, which he did. He stated that his supervisor, Mr. E. N., never told him not to touch the piano and that it was only after he had learned about the drop of glue on the piano that his supervisor had told him not to do that (Exhibits GD3-18, GD3-19, GD3-33 and GD3-34).

i) He explained that in the dismissal letter that he received in February 2016 (Exhibits GD3-18 and GD3-19) as well as in the notice of suspension that he received in September 14, 2015 (Exhibits GD3-21 and GD3-22), the employer also accused him of repairing a Fender guitar that was covered under the manufacturer's warranty. The Appellant submitted that contrary to the employer's statement to that effect, the guitar in question was not covered by the manufacturer's warranty, after verifying with the manager of the store in question, in X. He specified that this verification enabled him to obtain confirmation that the guitar in question was no longer covered by the manufacturer's warranty. The Appellant noted that he had repaired the guitar, at the request of the manager, and that he had explained that he had to bring the instrument home with him in order to complete the requested repair (the guitar had been crushed between two car seats). He explained that at the store where he worked, there was no workshop and that repairs were often difficult to do, while at his home, he had a workshop and all the tools necessary for those types of repairs. The Appellant noted that he had always been able to do repairs at his home, with the manager or director's permission. He stated that the employer had not informed him of the complaint mentioned in the September 14, 2015, notice of suspension, for having repaired a

client's guitar at his home (Exhibits GD3-18, GD3-19, GD3-21, GD3-22, GD3-33 and GD3-34).

j) The Appellant explained that he had done his job consciously, as always, and that he had respected what his director had asked him to do. He stated that he had always done repairs, without any problem, until Renaud-Bray acquired Groupe Archambault in 2015. The Appellant specified that following this acquisition, new procedures were put in place without notifying the employees. He argued that he was not wrong to commit the actions alleged against him because he had done them before. The Appellant submitted that he had been dismissed for wanting to offer good service to a customer who wanted to make his child happy, during the holidays (Exhibit GD3-24 and GD3-25). - 11 –

k) The Appellant argued that the employer had made no accusations against him during his period of employment, until he received a first letter on August 27, 2015, informing him that he had been relieved of his duties for investigative purposes, due to anomalies that were detected in his work (Exhibit GD3-23). He explained that when he received the notice of suspension on August 27, 2015, he had not received any previous warning from the employer. The Appellant stated that with that letter, the employer had essentially thrown him out. He specified that he had worked the day before he received the letter on August 27, 2015. The Appellant noted that when he received the letter from his director, his director said he had to take him outside, and he did not understand why (Exhibit GD3-23).

l) He stated that he had received an explanation only a week and a half later, in the notice of suspension the employer had sent to him on September 14, 2015 (Exhibits GD3-21 and GD3-22). The Appellant stated that in the letter, the employer had accused him of offering one of his own guitars to another employee in the store. He stated that he had been suspended for two weeks, without pay, due to this incident. The Appellant stated that the employer had then asked him to write a letter indicating that he had offered one of his guitars to another employee. He argued that this was not the case, because he had never offered or sold one of his guitars to the employee in question. The Appellant

explained that he had discussed with this employee his collection of guitars (Cigar Box) and that the employee had told him that if he ever decided to sell a guitar, she would be interested. He stated that he had responded that if he should decide to sell, he would let her know, but that he had never told her that he would sell a guitar. The Appellant noted that it was the employee in question who had asked him to inform her, should he decide to sell one of the guitars in his collection. The Appellant specified that he had received the letter from the employer on September 14, 2015, and that he had returned to work that day (Exhibits GD3-9, GD3-21, GD3-22, GD3-33 and GD3-34).

m) Concerning the accusation against him for having had two of the employer's guitars in his possession, which was also mentioned in the letter dated September 14, 2015 (Exhibits GD3-21 and GD3-22), the Appellant stated that he had informed the director of the store in X of the situation, after he had asked for his permission to take them home to repair them (Exhibits GD3-21, GD3-22, GD3- 33 et GD3-34).

n) He stated that he had a lot of difficulty making himself understood when he had to explain his situation to one of the Employment Insurance agents regarding the circumstances that led to the termination of his employment. The Appellant noted that the major difficulty that he faced was the language barrier. He stated that he had reported this problem to another agent at the Commission (Exhibit GD3-25).

o) The Appellant stated that he had initiated an appeal with the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (CNESST) (Commission for occupational equity, health and safety), to challenge his dismissal. He stated that he has not yet received the results of that appeal, especially since the lawyers have been on strike for several months (Exhibit GD3-24).

p) He argued that he did not deserve the treatment that he received from the employer. The Appellant said that he did not understand the employer's decision to dismiss him for his actions. He submitted that he was pushed out the door by his employer, without explanation. According to the Appellant, the employer wanted to dismiss him and was looking for a reason to do so, because it no longer wanted to offer repair services (Exhibits GD3-24, GD3-33, GD3-34 and GD3-37).

q) The Appellant said he found it deplorable that he had been deprived of income or salary for almost a year and had been forced to go into debt—a situation that adversely affected his quality of life. He said that he had found it very difficult to lose his job at age 60 through a process that he described as a "constructive layoff." The Appellant noted that he had lived a year from hell.

r) He argued that he had always carried out his tasks professionally, that he had given everything to ensure that everything worked well and that everyone was happy with his work, until Renaud-Bray took over Groupe Archambault.

s) The representative argued that the Commission's decision concerning the Appellant was unfounded in fact and in law (Exhibits GD2-1 and GD3-28).

[20] The Respondent (Commission) presented the following arguments and submissions:

a) Subsection 30(2) of the Act provides that an indefinite disqualification is imposed if it is established that the claimant lost the employment by reason of his or her own misconduct. The Commission specified 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 or careless as to approach wilfulness. It specified that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-5).

b) The Commission argued that the derogation from the established directives after having been formally informed with a written warning may constitute, on its face, misconduct, to the extent that the directive was presented verbally or in writing to the employee and the derogation was clearly stated. It specified that in such a case, the onus is on the individual in question to justify their behaviour or to show that there had been an unreasonable request (Exhibit GD4-6).

c) It explained that an individual who is experienced in the repair of musical instruments, but who is not certified by a company to do repairs on their product, and who proceeds with repairs nonetheless, dropping the instrument's warranty, is in violation of an established directive when they know the company's policy because they have received a warning to that effect and they did not ask for the manager's permission, represents

wilful and reckless behaviour and that the Appellant should have been aware of the consequences of his actions, including his dismissal (Exhibit GD4-6).

d) The Commission stated that the Appellant had been dismissed because he repaired a Fender guitar when he was not certified by the manufacturer of this product, and because he had not obtained permission from his manager to do this repair. It specified that the Appellant was aware of the company's directive because he had received a written warning a few months earlier to that effect, and for which he had been suspended for two weeks. The Commission stated that it could accept that in the circumstances, the Appellant wanted to satisfy the client in question, avoid injury to a child and that the manager was not available at that time, but the employer's policy prohibited him from doing repairs for which he was not certified by the company of the product in question and for which he had not obtained his manager's permission. It argued that in acting as he did, the Appellant caused pecuniary loss for the employer and broke the relationship of trust with the employer. The Commission explained that the Appellant stated that it was the sales clerk who had told him to do the repair, when he knew that that employee was not allowed to authorize the repair. It stated that the Appellant explained that he did not feel that replacing three screws was a repair. The Commission argued that despite the situation described by the Appellant, he was not authorized to proceed with the correction of the instrument for which Fender had not certified him. It explained that the Appellant should have, at the very least, waited for permission from his manager before proceeding with the repair in question. The Commission explained that the Appellant stated that he had been doing this type of repair for over six years, while he worked for the employer, but that since the sale of Archambault to Renaud-Bray, the directives had changed. It also indicated that the employer had specified that Fender's directives had not changed, but that there had never been an incident, and that it could not have known that the Appellant was doing these types of repairs. The Commission specified that the incident for which the Appellant had been dismissed stemmed from the fact that in December 2015, he had failed to respect the employer's directives, even after he was formally notified a few months earlier of the guidelines to follow, and considering the fact that he had been suspended for two weeks (Exhibit GD4-6).

e) The Commission concluded that the Appellant's alleged actions, that is, repairing a Fender guitar without the company's certification and without obtaining the manager's permission to do so, and having failed to respect the employer's directives, constituted misconduct within the meaning of the Act. It noted that the Appellant knew that he was not certified to do the repair and that it was prohibited, without obtaining the manager's permission, for having been suspended in the past for a similar action in order to demonstrate the seriousness of the incident (Exhibit GD4-7).

[21] The employer, Added Party to the file, presented the following observations and submissions:

a) It explained that it dismissed the Appellant because he repaired musical instruments (ex. Fender guitars, piano) without obtaining prior authorization and because he did not have the required certification to do so. The employer concluded that the Appellant had shown insubordination to his superiors for failing to respect the directives that he had been given, on several occasions, and that he had thus breached the company's policies rules and Code of Ethics (Exhibits GD3-17 to GD3-19, GD3- 35, GD3-36 and GD3-38).

b) The employer stated that the Appellant had been informed, in September 2015, of the directive to follow, that is, to not repair Fender guitars, because he was not certified or authorized to do so. It noted that it had been very clear to that effect, but that the Appellant had repaired a guitar of that brand, in December 2015. The employer noted that on September 15, 2015, the Appellant had received directives to follow the rules after he had been already been suspended (Exhibits GD3-17, GD3-35, GD3-36 and GD3-38).

c) The employer explained that on December 28, 2015, the Appellant had repaired a Fender guitar (replaced three screws), despite the directive he had received in September 2015. The employer explained that according to Fender's policy, as soon as someone repaired a guitar of that brand, without the required certification, the store loses the warranty applicable to that guitar. The employer specified that in such a situation, it can no longer sell the guitar in question or return it to Fender, because that guitar is no longer covered by warranty. It noted that it could also lose its sales accreditation with

Fender for failing to respect the procedures stipulated in the contract for such situations. Regarding the incident on December 28, 2015, the employer explained that a new guitar had been ordered for the client. It noted that because the guitar repair had been done by a person who was not authorized or certified to do so, it had been unable to return the guitar and take advantage of the warranty. This resulted in a loss of money. The employer specified that according to the established procedure, the Appellant should have given the guitar in question to a manager. It specified that when a repair was needed on a Fender guitar, it is the owner or director (manager) who decides what to do with it and who then makes sure the repair is done. It specified that when Fender guitars are covered by warranty, the manager must always communicate with the company in question to ask whether the repair can be done. It is the Fender company that decides to have it repaired by someone who is certified to that effect. The employer specified that generally, when a guitar of that brand needs a repair, it is sent to a store in Montreal, because there are certified luthiers there who do those types of repairs, without the need for Fender's authorization. The company may also decide to do the repair itself or, decide to throw out the guitar in question. The employer specified that there is always a department manager or store manager in the store. It specified that during the holidays, there is often a director and there is always at least one department manager. The employer noted that on December 28, 2015, when the client came into the store, the Appellant should have referred her to a manager or director, and that if no one was available at that time, he should have taken the client's contact information and called her the next day to inform her of the steps he had taken. It noted that the Appellant knew that he could not repair the Fender guitar himself, because he had been informed on September 2015 that he was neither authorized nor certified to do so. The employer indicated that when a guitar is no longer covered by warranty, the manager or director could then ask the Appellant to do the repair. It noted that the Appellant had been hired primarily to tune and adjust instruments. The employer indicated that the Appellant could repair guitars that clients were trying on the floors, but not those that had been sold to them, unless he had prior authorization from a manager. It explained that if a guitar was not covered by warranty, the Appellant still had to check with a manager to ensure he could repair it. The employer noted that a sales clerk could not make a

decision about repairs on Fender guitars, because they are not managers (Exhibits GD3-35 and GD3-36 and GD3-38).

d) The employer said that it did not believe there was a written policy concerning repairs on Fender guitars. It mentioned that if there was a written policy concerning guitar repairs, it would send it to the Commission (Exhibit GD3-38).

e) Concerning the guitar repairs the Appellant did from his home, and which are mentioned in the letter addressed to him on September 14, 2015 (Exhibits GD3-21 and GD3-22), the employer explained that the Appellant could do them, but that he always had to have a manager's authorization. The employer explained that in the letter addressed to the Appellant on September 14, 2015 (Exhibits GD3-21 and GD3-22), he was also accused of bringing guitars home with him, because he had not obtained a manager's authorization to do so. Regarding the Fender guitar that the Appellant repaired and which is mentioned in the letter addressed to him on September 14, 2015 (Exhibits GD3-21 and GD3-22), the employer specified that the guitar was covered by warranty. It explained that it had learned after a client had complained that the Appellant had repaired the Fender guitar in question, even though he did not have the authorization or certification to do so. The employer explained that for that reason, the former managers had met with the Appellant in September 2015 and explained to him that he was not authorized or certified to do those types of repairs, and to always refer to a manager in this type of situation. It noted that the Appellant had also been informed of the consequences for the company if he carried out non-authorized repairs. The employer noted that the Appellant did have the skills required to do the repairs in question, but that without the required certification, the repairs were not in accordance with the manufacturer's warranty (Exhibits GD3-17, GD3-35 and GD3-36).

f) The employer explained that in 2015, the Renaud-Bray bought Groupe Archambault stores. The stores were then managed by Renaud-Bray, while before they were managed by Québecor. The employer specified that the transaction for the purchase of the Archambault stores was finalized in the fall of 2015. It noted that the procedures remained the same as before the purchase of Groupe Archambault by Renaud-Bray.

The employer specified that if the Appellant had repaired Fender guitars in the past, he was no longer authorized to do so. The employer noted that there had never been an incident before and that it had not been aware. The employer explained that following the incident that occurred in December 2015, follow up with the Appellant's file was not done until February 12, 2016, because of the acquisition of Groupe Archambault Inc. by Renaud-Bray. The employer explained that the purchase of the Archambault stores by Renaud-Bray had been complex and that it was because of their restructuring that it had received the information about the incident on December 28, 2015, only on January 18, 2016. It stated that an investigation had then been carried out and that the Appellant had been dismissed, which explains why the dismissal was not until February 18, 2016 (Exhibits GD3-17, GD3-35 and GD3-36).

g) The employer argued that the Appellant knew that if he repaired a Fender guitar, of if he failed to respect the policies in place, he risked dismissal. The employer stated that the Appellant had broken the relationship of trust (Exhibits GD3-17, GD3-35, GD3-36 and GD3-38).

ANALYSIS

[22] The relevant legislative provisions are set out in the annex to this decision.

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

> 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

[24] In that decision (***Tucker*, A-381-85**), the Federal Court of Appeal (Court) recalled the words of Justice Reed, who stated that:

> Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces wilful 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...

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

> Thus, there will be misconduct where the conduct of a claimant was willful, 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] 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."

[27] 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 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 an express or implied duty resulting from the contract of employment (***Lemire*, 2010 FCA 314**).

[28] 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.

[29] 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**).

[30] For the alleged act 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.

[31] 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.

[32] In this case, the Appellant's alleged actions, namely, having repaired a Fender guitar without the proper certification to repair that brand of guitar, and having repaired a piano without obtaining instructions or authorization, do not constitute misconduct under the Act.

[33] In the dismissal letter addressed to the Applicant on February 18, 2016, the employer gave him the following explanations:

> [Translation]
>
> [...] The information obtained from this investigation shows that you have done instrument repairs, at our X branch, without prior authorization. First, on December 28, 2015, you repaired a Fender guitar that was returned by a client, despite the fact that you are not certified or authorized to do repairs on this brand of guitar. Second, on September 15, 2015, you repaired a Perzina piano, which was delivered damaged, despite having received instructions from your supervisor, E. N., not to do repairs on that piano. You actions are unacceptable, serious and we consider you to have shown insubordination in failing to respect the directives that were given to you on several occasions. […] As you know, you were already spoken to on September 14, 2015, regarding several situations where you breached the company's policies and Code of Ethics, including an incident where you repaired a Fender guitar without the proper certification, which resulted in us losing the warranty. […] Therefore, we have no alternative but to terminate your employment today, February 18, 2016 (Exhibits GD3-18 and GD3-19).

Unintentional nature of the alleged actions

[34] The Appellant admitted to committing the actions alleged against him.

[35] Taking into account the specific circumstances surrounding the acts of which the Appellant is accused, the Tribunal finds that such acts were not deliberate or wilful and cannot be considered misconduct within the meaning of the Act (***Mishibinijima,* 2007 FCA 36, *McKay-Eden,* A-402-96, *Tucker,* A-381-85**).

[36] The Tribunal is of the opinion that the Appellant took account of the standards of behaviour that the employer was entitled to expect of him (***Tucker,* A-381-85**).

[37] The Tribunal finds that the credible testimony the Appellant gave during the hearing provided a complete and highly detailed picture of the events leading up to his dismissal.

[38] The Appellant's testimony was detailed and put the actions alleged against him that led to his dismissal into context. His testimony was also supported by significant evidence, that is, the document entitled "2015 Lutherie Fee Schedule" (Exhibit GD9-1 to GD9-5), to explain one of the actions alleged against him.

[39] This document allows for better interpretation of the instructions given by the employer to the Appellant that he was not authorized to repair Fender guitars because he was neither authorized nor certified to repair guitars of that brand.

Repair of Fender guitar

[40] Regarding the repair done on December 28, 2015, on a Fender guitar, the Appellant's uncontradicted testimony indicates that the employer told him that he could no longer repair guitars of that brand, but that the instructions that he had been given applied only to major and not minor repairs.

[41] The Appellant presented the content of a document entitled "2015 Lutherie Fee Schedule" (Exhibits GD9-1 to GD9-5), which lists types of repairs on guitars, including Fender guitars, the fee for these repairs and the time required to do them (Exhibits GD9-1 to GD9-5). The Appellant noted that the document had been prepared by his director (Mr. F. F.).

[42] The employer indicated that he did not believe there was a written policy concerning repairs on Fender guitars and that, if there was one, he would send it to the Commission (Exhibit GD3-38). The documentary evidence shows that the employer sent no such document.

[43] The Tribunal accepts as true the Appellant's explanation that the "2015 Lutherie Fee Schedule" (Exhibits GD9-1 to GD9-5) specifies which types of repairs he was still able to do on all brands of guitars.

[44] The Appellant's explanations offer a very important distinction regarding the instructions he received in September 2015, according to which he was no longer able to repair Fender guitars because he was not certified or authorized to do so.

[45] During the hearing, the Appellant demonstrated, however, with the help of a guitar, the type of repair he did on December 28, 2015, that is, changing three screws that were holding the

tuning keys in place, to ensure the guitar's safety, because the screws were damaged and posed a safety risk.

[46] He demonstrated how this repair was a minor repair and that it corresponded to the repairs that he was still authorized to do on all brands of guitars (ex.: install tuning keys with or without modifying headstock), based on the instructions he received from the employer in September 2015.

[47] The Appellant also demonstrated several types of repairs that could be done on guitars to better establish the distinction between minor and major repairs (ex. pick-up replacement, installation of brackets inside the guitar, changing potentiometers).

[48] The Appellant explained that before he was dismissed, he had already refused to do major repairs on other Fender guitars.

[49] He stated that he had also asked for authorization from the manager or director when a Fender guitar required repairs, as was the case when he asked and obtained authorization from the manager of the store in X to repair a guitar of that brand at his home.

[50] In the case of the repair done on December 28, 2015, the Appellant demonstrated that he did not do the work without his manager knowing. The Appellant noted that he had left the screws that he had replaced on his manager's desk.

[51] The Tribunal does not consider relevant whether the manager was in the store or not when the Appellant repaired the Fender guitar on December 28, 2015, despite a seeming discrepancy on the part of the Appellant regarding the manager's presence that day. It was a minor repair that he was authorized to do.

[52] During the hearing, and in his statement of May 5, 2015 (Exhibits GD3-33 and GD3-34), the Appellant specified that the manager was absent on December 28, 2015, but in his statement of May 11, 2015, he confirmed that the manager was just unavailable (Exhibit GD3-37). However, this situation does not change the fact that the Appellant was still authorized to do minor repairs on Fender guitars, like the one he did on December 28, 2015.

[53] Even if the employer argued that he was unable to take advantage of the manufacturer's warranty for Fender guitars because the repair on the guitar in question had been done by the Appellant, this situation does not demonstrate that the Appellant's actions were deliberate or intentional.

Piano repair

[54] Regarding the repair of a Perzina piano, to which the employer referred in the letter of dismissal to the Appellant on February 18, 2016, to explain his dismissal, no prior notice was given to the Appellant informing him that he was unauthorized to do that type of repair.

[55] That fact appears only in the dismissal letter (Exhibits GD3-18 and GD3-19). In that letter, the employer noted that the Appellant's alleged action occurred on September 15, 2015. The employer did not mention it until four months later, in the dismissal letter to the Appellant.

[56] The employer did not mention that incident in the notice of suspension sent to the Appellant on February 12, 2016, before announcing his dismissal.

[57] With the exception of the employer's reference to the incident, in the dismissal letter, the employer gave no explanation that could have led to the conclusion that it was misconduct under the Ac.t

[58] On this issue, the Appellant explained that he had never received written notice or a directive on the matter from the employer. There is no evidence that the Appellant had to have specific authorization to repair a piano, like he did on September 15, 2015.

[59] The Tribunal considers entirely plausible the Appellant's version of the facts surrounding this event.

[60] The Appellant explained that when he did the repair on the piano in question, the person who the employer had authorized to do the repair had asked him to put a drop of glue on the piano and that is what he did. The Appellant noted that his supervisor, Mr. E. N., had never given him the directive not to touch the piano in question. The Appellant noted that it was only after he had put the glue on the piano that the employer had told him that he was not allowed to touch it.

[61] There is no evidence to show to what extent the employer took into account the Appellant's version of the facts relating to that particular incident.

[62] The Tribunal also notes that the Commission made no arguments about that incident. The Commission did not show how that action could constitute misconduct within the meaning of the Act, despite the fact that the question about the piano repair is an integral part of the letter to the Appellant on February 18, 2016, to explain his dismissal.

[63] The Tribunal does not accept the employer's argument that the Appellant showed insubordination for not following the directives given to him multiple times, or for breaching the company's policies and Code of, in terms of both the repairs on Fender guitars and to the piano (Exhibits GD3-18 and GD3-19).

[64] The employer did not provide any document showing how the Appellant had breached the company's policies and Code of Ethics, because of the repairs he had done.

[65] The Appellant acknowledged that he had been informed, in September 2015, that he should no longer to repairs on Fender guitars because he did not have the proper certification to do so. He clearly specified that the directive that his director had given him applied only to major repairs.

[66] The Tribunal finds that there may have been a misunderstanding between the employer and the Appellant regarding the instructions relating to repairs on Fender guitars, but that the actions alleged against him do not constitute misconduct within the meaning of the Act.

[67] 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**).

[68] Based on the evidence before it, the Tribunal considers that the actions alleged against the Appellant do not constitute the violation of a fundamental obligation arising expressly or implicitly from the employment agreement (***Tucker,* A-381-85**, ***Lemire,* 2010 FCA 314**).

[69] The Tribunal considers that the Appellant did not show willful or wanton disregard for the employer’s interests or manifest wrongful intent (***Tucker,* A-381- 85**).

[70] The Tribunal finds that the acts of which the Appellant is accused were not of such magnitude that he could normally have expected them to cause his dismissal. The Appellant could not 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 (***Tucker*, A-381-85, *Mishibinijima*, 2007 FCA 36**).

Burden of proof

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

[72] In the Tribunal's opinion, neither the Commission nor the employer discharged their onus of proof herein (***Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

[73] The Tribunal finds that the evidence is not sufficiently detailed to find that the Appellant lost his job by reason of his own misconduct.

Cause of dismissal

[74] The Tribunal considers that the Appellant was not dismissed by reason of any wilful or deliberate action on his part (***Tucker*, A-381- 85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[75] The Tribunal finds that the acts alleged against the Appellant do not constitute misconduct within the meaning of the Act (***Tucker*, A-381-85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[76] Relying on the case law citied above and on the evidence submitted, the Tribunal is of the view that the Appellant did not lose his employment by reason of misconduct, pursuant to sections 29 and 30 of the Act (***Namaro*, A-834-82, *MacDonald*, A-152-96, *Cartier*, A-168-00**).

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

CONCLUSION

[78] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

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 or common-law partner or a 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:

(6) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(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.