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

[TRANSLATION]

Citation: *E. L. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 30

Tribunal File Number: GE-16-2398

BETWEEN:

**E. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

---

DECISION BY: Normand Morin

HEARD ON: February 24, 2017

DATE OF DECISION: March 10, 2017

Canada

# REASONS AND DECISION

## PERSONS IN ATTENDANCE

[1] The Appellant, E. L., was absent during a videoconference hearing held on February 24, 2017.

[2] A notice of hearing was sent to the Appellant on January 24, 2017, to inform her about the hearing to be held on February 24, 2017 (Exhibits GD1-1 to GD1-4). Proof of delivery of the Notice of Hearing addressed to the Appellant dated January 26, 2017, was sent to the Social Security Tribunal of Canada (Tribunal) on February 9, 2017.

[3] Satisfied that the Appellant had been notified of the hearing to be held on February 24, 2017, the Tribunal proceeded in her absence, as permitted in such situations under section 12 of the *Social Security Tribunal Regulations*. The Tribunal waited for more than 30 minutes after the start of the hearing on February 24, 2017, to ensure that the Appellant would be present. Despite that waiting period, the Appellant did not show up. The Tribunal had not received notice from the Appellant before the hearing that she would be unable to be present.

[4] The Respondent, the Employment Insurance Commission of Canada (Commission), was absent during the hearing.

## INTRODUCTION

[5] On March 31, 2016, the Appellant made an initial claim for benefits commencing on March 27, 2016. The Appellant reported that she had worked for the employer, Place Lacordaire, from July 12, 2015, to February 17, 2016, inclusive, and that she had stopped working for that employer because of a dismissal or suspension (Exhibits GD3-3 to GD3-14).

[6] On April 26, 2016, the Commission notified the Appellant that she was not entitled to Employment Insurance regular benefits, as of February 14, 2016, because she had stopped working for the employer Place Lacordaire Inc., on February 14, 2016, due to her misconduct (Exhibits GD3-27 and GD3-28).

[7] On April 29, 2016, the Appellant submitted a Request for Reconsideration of an Employment Insurance decision (Exhibits GD3-29 and GD3-30).

[8] On June 2, 2016, the Commission notified the Appellant that it was upholding the decision in her regard of April 26, 2016 (Exhibits GD3-37 and GD3-38).

[9] On June 2, 2016, the Commission notified the employer Place Lacordaire Inc., that it had upheld its decision given in the Appellant's regard, dated April 26, 2016, on the subject of the loss of her job due to her misconduct (Exhibits GD3-39 and GD3-40).

[10] On June 16, 2016, the Appellant submitted a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-3).

[11] On July 4, 2016, in response to a form designed for this purpose by the Tribunal, dated June 17, 2016, the Appellant sent to this recipient a copy of the reconsideration decision that was subject to the appeal (Exhibit GD2A-1).

[12] On July 5, 2016, the Tribunal notified the employer Place Lacordaire Inc. that if it wanted to join the appeal as an "added person" in this matter, it was required to file a request to that effect to the Tribunal by July 20, 2016 (Exhibits GD5-1 and GD5-2), at the latest. The employer did not respond to the Tribunal's letter.

[13] This appeal was heard by videoconference for the following reasons:

a) the availability of videoconferencing in the area where the Appellant resides

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

**ISSUE**

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

## EVIDENCE

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

a) A Record of Employment, dated March 7, 2016, indicates that the Appellant worked as a resident caregiver for the employer, the Place Lacordaire Inc., from July 12, 2015, to February 14, 2016, inclusive, and that she had stopped working for this employer because of a dismissal (Code M—Dismissal), Exhibit GD3-15);

b) On April 19, 2016, the employer (V. C., Director) explained that the Appellant had used abusive and intimidating language toward one of her co-workers. It specified that the Appellant had received a written notice and that she had been suspended on two occasions. The employer specified that, following a dispute arising on December 29, 2015, in which the Appellant had used abusive language toward co-workers, she was thereby suspended on January 2 and 3, 2016. It indicated that, on February 7, 2016, the Appellant had used inappropriate language, had raised her voice, and was then suspended as of February 16, 2016, for an indefinite period. The employer claimed to have then attempted to contact the Appellant, on four occasions, in order to have her reinstated, but that she never called back. The employer claimed to have dismissed the Appellant for that reason, on March 11, 2016 (Exhibit GD3-16);

c) On April 20, 2016, the employer (Ms. V. C.) claimed to have dismissed the Appellant because she had not returned the calls that had been made to her, following a second suspension that she had received on February 16, 2016. The employer claimed to have suspended the Appellant mainly due to her inappropriate way of communicating with her co-workers. The employer specified that the triggering factor of the second suspension that the Appellant had received had been an altercation that she had had with a co-worker, and not because of an issue with failing to comply with a procedure, although such an event had taken place to that effect (Exhibit GD3-21);

d) On April 21, 2016, the Appellant sent to the Commission a copy of the letter that the employer had addressed to her (disciplinary notice with indefinite suspension for bad behaviour and serious wrongdoing), dated February 17, 2016 (the letter had been sent to

the Appellant by registered mail on February 24, 2016). In that letter, the employer claimed to have received, on February 8, 2016, another official harassment complaint for threatening language by the Appellant towards another employee. The employer explained that in January 2016, during one of her work shifts, the Appellant had had an altercation with a co-worker (ex. raised voice used by the Appellant, intentional intimidation on her part, use of disrespectful terms, threatening, vexatious and degrading language by the Appellant). It also mentioned that an altercation had taken place with an assistant nurse about the hospital transfer. The employer specified to the Appellant that she had then been suspended indefinitely, without pay, until further notice. It specified that it was going to advise the Appellant of the final decision that was going to be made in her regard (Exhibits GD3-24 and GD3-26);

e) On May 26, 2016, the employer (Ms. V.C.) explained that the Appellant had been dismissed because, following the suspension levied against her on February 17, 2016, the Appellant did not return the coordinator's calls (care service), Mr. M. E., about reinstating her back at work. The employer specified that the Appellant did not wish to work with the coordinator in question, but that the coordinator had left in the meantime, and that he was no longer at that position. The employer specified that the Appellant had had conflicts with other employees, that she had received warnings and disciplinary notices to that effect, due to her unacceptable behaviour. The employer claimed to have met the Appellant on April 29, 2016, in order to give her another chance to be reinstated back at work, under specific conditions. It indicated that the Appellant was going to have a new probation period, given that she had already been dismissed. The employer specified that the Appellant was going to be reinstated depending on the work schedule in June 2016. It emphasized that the Appellant had asked it to resume work (Exhibit GD3-32);

f) On April 19 and May 26, 2016, the employer sent the Commission a copy of the following documents:

i. Letter from the employer (1st disciplinary notice) addressed to the Appellant, dated January 15, 2016, to advise her that she had been suspended, without pay, for a two-day period, because she had yelled and had made abusive remarks towards a co-worker and because she had had a verbal altercation with another co-worker. In that letter, the employer notified the Appellant that if the situations mentioned in the letter were not rectified as quickly as possible, failing to consent to this request, more severer disciplinary measures could be taken in her regard, possibly leading to her dismissal (Exhibit GD3-17);

ii. Letter from the employer (closing of file) addressed to the Appellant, dated March 11, 2016, to advise her that she could not be reinstated back at her work position, due to recent events unfolding periodically over the previous six months. The employer specified that the Appellant's last day of work was February 16, 2016, the day on which she had been suspended without pay and without a return-to-work date, for the review of her file. The employer claimed to have then attempted to contact her, on four occasions, in order to meet her, but that it had been impossible to reach her. The employer claimed to have forwarded her termination of employment to her (Exhibits GD3-18 and GD3-19);

iii. [translation] "Agreement to return to work following a dismissal," entered into by the employer and the Appellant, on April 29, 2016. This document specifies that, since the Appellant had already been dismissed for reasons of inappropriate demeanour, the employer accepts her return to work under the following conditions: respect at all times for the residents, families, visitors, stakeholders of CIUSSS (*Centre intégré universitaire de santé et de services sociaux* or [translation] "Integrated university centre for health and social services"), co-workers and team leader. The document specifies that, when the Appellant does not agree with a situation, she must refer to her team leader and discuss the situation calmly (Exhibit GD3-34).

g) On June 2, 2016, the employer (Ms. V. C.) specified that the coordinator (care service), Mr. M. E., stopped working on April 16, 2016. The employer specified that the initial message (voice mail) that it had received from the Appellant was on April 14, 2016. It claimed to have followed up on this message on April 15, 2016, and the Appellant had left it another message several days later. The employer claimed to have contacted the Appellant and to have agreed with her for a meeting on April 29, 2016, about her reinstatement back at work. The employer specified that the Appellant had left two messages in its voice mail (Exhibit GD3-35).

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

a) Both parties to the case were absent from the hearing, so no evidence was presented during the hearing.

**PARTIES' ARGUMENTS**

[17] The Appellant made the following submissions and arguments:

a) She claimed to disagree with the reconsideration decision made in her regard by the Commission. The Appellant claimed to be eligible for Employment Insurance benefits. She argues that the letters that the employer addressed to her were no longer valid (Exhibits GD3-29 to GD3-31);

b) The Appellant specified that she had worked for the employer Place Lacordaire Inc. since 2015 (Exhibit GD2-2);

c) In her benefit claim, the Appellant claimed to have been dismissed for not wanting to sign a suspension letter that was addressed to her. She explained that the suspension letter that the employer had addressed to her followed up on a discussion that she had had with two co-workers. The Appellant claimed to have been summoned to the employer's office to give her version of events, but that it had retained the one given by the two co-workers in question (Exhibits GD3-7 and GD3-8);

d) She claimed to have been unjustly suspended, for two days, without pay. The Appellant claimed to have then returned to work following her suspension (Exhibit GD2-2);

e) The Appellant claimed to have argued with a co-worker, on December 29, 2015, and to have been suspended, the first time, in January 2016. She claimed to be aware of the first disciplinary notice that the employer had issued to her and to have refused to sign the document in question after consulting the labour standards (*Commission des normes, de l'équité, de la santé et de la sécurité du travail* [CNESST] or [translation] "Workplace health, safety and equity standards commission") (Exhibits GD3-7, GD3-8, GD3-17 and GD3-20);

f) In a statement made to the Commission on April 19, 2016, the Appellant affirmed that the employer had told her that she was dismissed for failing to comply with the procedures in an event that arose on February 7, 2016, namely, for calling an ambulance for an ill resident. She affirmed not to have had a dispute with a co-worker on that day. The Appellant emphasized that on February 7, 2016, there was a problem with the protocol rather than with behaviour. She also specified that the employer had also let her know that it was fed up with her squabbles and that a nurse no longer wanted to work with her (Exhibit GD3-20);

g) In her notice of appeal, the Appellant recounted that on February 14, 2016, a beneficiary (resident) had complained of pains. The Appellant claimed to have asked for the assistance of a nurse, but that she had refused to bring the requested assistance, because the matter was not occurring on the floor where she was assigned. The Appellant affirmed that the nurse had told her that she had to call the ambulance. The Appellant indicated that this is what she had done (Exhibit GD2-2);

h) In a statement made to the Commission, on May 24, 2016, the Appellant explained that she had a conflict with a nurse (I. S.). The Appellant did not specify the date on which the event had taken place. She explained that the nurse in question had not followed up on the request that she had made of her to come and help a patient. The Appellant affirmed that the nurse had told her that it was not on her floor. The Appellant explained that there had not been a nurse at the post on the floor in question, and that an attendant

had then intervened to administer medication to the patient. The Appellant specified that, during the night that followed, the patient asked to go the hospital. She specified once again to have asked for the help of the nurse and to have also ensured that transportation by ambulance was requested for this patient, but that the nurse in question once again had responded that it was not on her floor. The Appellant claimed to have then asked the attendant who had administered medication to the patient, whether, within the context of her functions, she could ask for transportation by ambulance and that the attendant had responded in the affirmative. She therefore called for the ambulance. The Appellant affirmed that the nurse in question had shouted at her upon noticing the arrival of the ambulance. The Appellant claimed to have then left the floor she was on because she had not liked the atmosphere. In her statement of May 24, 2016, the Appellant also claimed to have had a conflict with an employee (Ms. S. E.) because she had told her that she was not doing her work, given that she had not changed all the patients under her responsibility. The Appellant claimed to have done all her work. The Appellant also claimed to have had a conflict with another employee (Ms. M. I.). The Appellant specified that this employee had complained because she had arrived at work later than expected and because she had used the telephone during her work hours (Exhibit GD3-31);

i) She explained that a few days after the event in which when she had asked for the assistance of a nurse to come and help a patient (February 7 or February 14, 2016), the coordinator (care service), Mr. M. E., summoned her to his office and issued her a letter specifying that she had been suspended indefinitely. The Appellant affirmed that the coordinator told her to wait for the director's (Mrs. V. C.'s) call (Exhibit GD2-2);

j) In a statement made to the Commission, dated April 21, 2016, the Appellant claimed to have received a letter from the employer (letter sent by registered mail), dated February 17, 2016, notifying her that she had been suspended (Exhibit GD3-22). The Appellant specified that this letter indicated that she had been suspended, without pay, until the end of the investigation into her situation led by the employer, and that she was going to be notified of the final decision that was going to be made. She specified that this letter did not mention a dismissal (Exhibits GD3-22 and GD3-23);

k) In a statement made to the Commission on June 2, 2016, the Appellant confirmed knowing since February 17, 2016, that she had been dismissed, when the coordinator issued her a suspension letter. The Appellant said that she had held out hope, because he had told her that she was going to be called back (Exhibit GD3-36);

l) She affirmed to have never received the employer's dismissal letter, dated March 11, 2016 (Exhibits GD3-18 and GD3-19), because she had never been sought for this letter, which had been sent to her by registered mail. The Appellant specified that she knew that it was a dismissal letter (Exhibits GD3-18, GD3-19, GD3-22, GD3-23, GD3-26 and GD3-36);

m) The Appellant stated that the employer lied when it said that it had tried to reach her, on four occasions, following the suspension that had been levied on her as of February 16, 2016. She claimed to have received only one call from the employer, namely, on March 17, 2016, while she was outside of the country to attend funerals. The Appellant specified that it is her son who had therefore taken the employer's message. She claimed to have called back the employer upon returning from her trip, namely, on March 21, 2016. The Appellant claimed to have left three messages with the employer, but that the employer had not returned her calls (Exhibits GD3-22 and GD3-23);

n) She claimed not to remember exactly what the dates were for the period during which she had to be away from home due to a death. The Appellant specified that she believes that it was over the period from March 10 to 14, 2016 (Exhibit GD3-36);

o) In her statement from May 24, 2016, the Appellant claimed not to have returned the employer's calls after being suspended on February 17, 2016, because she no longer wanted to work with the person who had called her, namely, the coordinator (care service). She claimed to have contacted, on three occasions, the director (Mrs. V. C.) and to have left her messages, but that she had not returned her calls (Exhibit GD3-31). In her benefit claim, the Appellant claimed to have left three messages with the employer, after being dismissed, but not to have been called back (Exhibits GD3-7 and GD3-8);

p) In her statement of April 21, 2016, the Appellant claimed not to have followed up with her employer to clarify her situation. She argues that it was not up to her to call the employer back, but rather up to the employer to call her back, since that is what the employer had told the Appellant it would do. The Appellant explained that co-workers had informed her of having heard that she was going to be dismissed. She also claimed to have known that she was dismissed as of March 7, 2016. The Appellant specified that the Record of Employment issued by the employer indicating that she had stopped working due to a dismissal was on March 7, 2016 (Exhibit GD3-15). She explained that, after talking with a Commission agent, on March 31, 2016, she learned that the employer had issued a Record of Employment, on March 7, 2016, specifying that she had stopped working due a dismissal (Exhibit GD3-15). The Appellant claimed that she had known since February 16, 2016, that she had been dismissed, and that she also knew it from the Record of Employment that she had seen on March 31, 2016. She also claimed to be at a car dealership, on March 3, 2016, in order to validate (act as a guarantor for) her daughter, who was buying a vehicle. The Appellant recounted that, on that occasion, the director of financing for the dealership in question had to phone the employer, Place Lacordaire inc., and that the employer had specified that she was no longer working for it. She claimed to have therefore told the financing director that she was still working for that employer (Exhibits GD3-22 and GD3-23).

q) She claimed to have waited for a month and a half before the coordinator called her back, namely, at the beginning of April 2016 (Exhibit GD2-2);

r) The Appellant claimed not to have received the employer’s message before April 2016 (Exhibit GD3-36);

s) She explained that the director, Mrs. V. C., contacted her to reinstate her back into her position (Exhibit GD3-31);

t) In her statement of June 2, 2016, the Appellant claimed to be in agreement with the employer’s affirmation, according to which she had left two messages in its voice mail box, namely, a message on April 14, 2016, and another, a few days later. The Appellant also claimed to be in agreement with the explanation given by a Commission agent to

the effect that the director (Mrs. V. C.) had left her a message in her voice mail box on April 15, 2016, and that on a second callback, a meeting was scheduled with the employer on April 29, 2016. The Commission claimed to have notified the Appellant that the director had specified receiving only two messages from her. The Appellant also played the phone message that she had received from the director dated April 26, 2016. She also denied receiving messages from the employer before April 2016. The Appellant also explained that she did not want to speak with the coordinator (Exhibit GD3-36);

u) She claimed to have met the director on April 29, 2016. The Appellant affirmed that the director had told her that she was lifting the suspension and that she was going to give her a second chance. She claimed to have accepted the employer's offer of reinstatement. The Appellant specified that, if the coordinator had still been at his position, she would not have accepted the employer's offer. She claimed to have also accepted the employer's condition to the effect that, if she had to be dismissed again, she would have no prior notice. The Appellant affirmed to have never used disrespectful or threatening language (Exhibits GD2-2 and GD3-31);

v) The Appellant argues that the letters that the employer had addressed to her (e.g. suspension letter and dismissal letter) were no longer valid (Exhibits GD3-29 and GD3-30).

[18] The Respondent (the Commission) made the following submissions and arguments:

a) It explained that subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that the claimant lost an employment because of his or her own misconduct. The Commission specified that for the action complained of to constitute misconduct under section 30 of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. It stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-5);

b) The Commission claimed to have initially concluded that the ground for dismissal was due to the fact that the Appellant had not returned the messages of the four calls that the employer had made between February 17 and March 11, 2016 (Exhibit GD4-5);

c) It argued that although the Appellant had been suspended for using abusive and intimidating language towards her co-workers, this ground is not taken into consideration to determine whether there was misconduct within the meaning of the Act (Exhibit GD4-5);

d) The Commission specified that, during the Appellant's suspension period, the employer attempted to reach her in order to make a proposal to her about reinstating her back at work, but that the Appellant had not responded to the employer's requests (Exhibit GD4-5);

e) It claimed that the Appellant had confirmed not to have returned the care coordinator's calls, after the suspension levied against her of February 17, 2016, because she no longer wanted to work with him. The Commission emphasized that the Appellant admitted to having received all the messages from her son, but that she had not returned the coordinator's calls (Exhibits GD3-31 and GD4-5);

f) The Commission explained that the Appellant also confirmed having received the employer's suspension letter, dated February 17, 2016, and that the letter had been forwarded to her by registered mail (Exhibit GD3-22). It specified that this letter indicates that, during the suspension period, management was going to complete the investigation, analyze the Appellant's docket and that she was going to be notified of the final decision (Exhibit GD3-25). The Commission emphasized that the Appellant knew that the employer would contact her (Exhibit GD4-5);

g) It argued that not responding to the employer's calls, knowing that she is awaiting a decision, reveals a personal choice. According to the Commission, the Appellant behaved deliberately and intentionally (***Mishibinijima*, 2007 FCA 36, *Lemire*, 2010 FCA 314**) (Exhibit GD4-6);

h) The Commission found that not returning the employer's calls constituted misconduct within the meaning of the Act because the Appellant knew that she was awaiting a decision and that her job was in jeopardy, because she had previously received warnings (Exhibit GD4-6).

**ANALYSIS**

[19] The relevant legislative provisions are reproduced in an appendix to this decision.

[20] 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.

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

> Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful [*sic*] or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behaviour 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 ***McKay-Eden*** **(A-402-96)**, the Court made the following specification: "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."

[23] In ***Mishibinijima*** **(2007 FCA 36)**, the Court reiterated the following:

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

[24] The Court 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 misconduct can result in dismissal, there must be a causal relationship between the misconduct of which the claimant was accused and the loss of his or her 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 rendered in ***Cartier*** **(A-168-00)** and ***MacDonald*** **(A-152-96)** confirm the principle established in ***Namaro*** **(A-834-82)** whereby it must also be established that the misconduct constituted cause for the claimant's dismissal.

[26] The Court has reaffirmed the principle whereby the onus is on the employer or the Commission to prove 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 alleged action to constitute misconduct under section 30 of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. There must also be a causal relationship between the misconduct and the dismissal.

[28] 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.

[29] In the present case, the acts alleged against the Appellant, namely, to not have called back the employer after being suspended, for an indeterminate period, as well as for acts of intimidation towards co-workers, the use of abusive language and a raised and inappropriate tone of voice, as well as her lack of teamwork, does not constitute misconduct within the meaning of the Act.

[30] In the letter of termination of employment (closing of file) addressed to the Appellant, dated March 11, 2016, the employer gave her the following explanations.

> [translation]
> [...] Following the assessment of your file, management at Place Lacordaire has come to the conclusion that we will not be able to reinstate you into your work position despite [*sic*] recent events that have unfolded periodically over the last six months. As you already know, in accordance with the Guide for employees, which you received upon being hired, our company does not accept any form of intimidation, abusive language or psychological harassment. In light of several complaints that were received about you, including [...] intimidation of coworkers [...] abusive language used in the work environment [...] your high and inappropriate voice [...] lack of teamwork [...], it goes without saying that, in the situations that have occurred, we have met you on two occasions and provided an opportunity to rectify your behaviour, without resorting to serious disciplinary measures. The employer feels that you have lacked professionalism in your interaction with the other employers in the face of your conflicts by acting, with users as witnesses, with all the commotion that this incites, and this is totally unacceptable. Your last day of work was on February 16, 2016, when you were suspended without pay and without a return date for a review of your file. As a result, the employer tried contacting you on four occasions in order to reach you and, on the last attempt, your son let us know that you were absent because of a death. As a result, following our inability to reach you, we are notifying you by registered mail of your termination of employment [...] (Exhibits GD3-18 and GD3-19).

**Unintentional nature of the alleged actions**

[31] The Appellant did not acknowledge neglecting to contact her employer following of the suspension levied against her on February 17, 2016.

[32] The Appellant acknowledged doing certain things that she was alleged to have done and that were the basis of suspensions she incurred, of having had verbal altercations with co-workers.

[33] 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**).

**Reasons for end of employment**

[34] The Tribunal finds the employer’s explanations about the Appellant’s termination of employment to be contradictory.

[35] In statements made to the Commission on April 19, 20 and May 26, 2016, the employer claimed to have dismissed the Appellant, as of March 11, 2016, because she had not returned calls, on four occasions, that were made with the aim of reinstating her into her position, following the suspension levied against her on February 17, 2016, due to conflicts arising with other employees (Exhibits GD3-16, GD3-21 and GD3-32).

[36] In its statements, the employer invoked reasons different from those that it had presented in the original dismissal letter (closing of file) addressed to the Appellant, dated March 11, 2016 (Exhibits GD3-18 and GD3-19).

[37] The Tribunal finds that this letter essentially refers to complaints that the employer received about acts of intimidation that the Appellant had allegedly done towards co-workers, her lack of teamwork, as well as her use of abusive language, as well as a raised and inappropriate tone of voice (Exhibit GD3-18 and GD3-19).

[38] The letter in question does not explicitly mention a dismissal because the Appellant did not call her employer back. On this point, the employer wrote that it had tried to contact the Appellant, on four occasions, and that during the last call, the Appellant’s son had indicated that she was absent due to a death. The employer therefore indicated to the Appellant that, because it had been unable to reach her, it had forwarded her termination of employment (Exhibits GD3-18 and GD3-19).

**The Appellant’s follow-up on the employer’s calls**

[39] In the present case, the Tribunal finds that the Appellant followed up with her employer after being suspended indefinitely on February 17, 2016.

[40] In the notice of suspension (Disciplinary notice with indeterminate suspension for misconduct and wrongdoing) that it sent to the Appellant, dated February 17, 2016, the employer gave her the following specifications: [translation] “[...] you are suspended from work indefinitely without pay until further notice. During this suspension period, management will conduct an investigation, analyze your file and, afterwards, notify you of its final decision.” (Exhibits GD3-24 and GD3-25).

[41] The evidence from the file substantiates that communication was established in mid-April 2016 (April 14 and 15, 2016) between the employer and the Appellant, namely, almost two months after the Appellant had been suspended, on February 17, 2016, and more than a month after her dismissal on March 11, 2016.

[42] In the letter of suspension of February 17, 2016, it is an issue of an indeterminate suspension, of a management-led investigation, subsequent to which a final decision was going to be communicated to the Appellant (Exhibits GD3-24 and GD3-25). In this letter, the employer does not define any condition on the Appellant’s eventual return to work or a modality to that effect, the exception being that it was going to inform her of the results of the investigation that was being done into her situation but that, in the meantime, she was suspended until further notice.

[43] Accounting for the imprecise nature of the disciplinary action taken against the Appellant, more specifically about her eventual return to work, the Tribunal finds that the time that she followed up on the messages that the employer had left for her in order to discuss the action that it intended to take on the suspension that had been levied against her does not make it possible to associate this action with misconduct under the Act.

[44] Even if the Appellant’s statements contain more apparent contradictions and several inaccuracies on the dates on which she claimed to have made contact with the employer, she followed up on the message that it had sent to her.

[45] The Tribunal finds that the disciplinary measure that the employer took with regard to the Appellant (suspension letter of February 17, 2016) does not specify the date of the communication of the final decision that it expected to make with respect to the Appellant, nor does it specify under what condition her reinstatement into her position was going to be possible, if such was the case.

[46] The evidence gathered from the employer also contains several inaccuracies that do not show how the Appellant committed an alleged act in the follow-up that she did with her employer to reinstate her into her position, following the suspension that had been levied against her.

[47] First, the employer was not able to specify the dates on which it contacted the Appellant. The dismissal letter addressed to the Appellant does not mention any date to that effect (Exhibits GD3-18 and GD3-19).

[48] The evidence shows that the employer made calls to the Appellant between her suspension on February 17, 2016, and the mailing of the dismissal letter of March 11, 2016. Nothing in the evidence in the docket specifies the weight of the messages in question or the timeframe given to the Appellant to take action on them.

[49] The Appellant, for her part, claimed to have received a single call from the employer, namely, on March 17, 2016, but that it was her son who had taken the message since she was outside of the country to attend funerals (Exhibits GD3-22 and GD3-23).

[50] The Appellant affirmed to have called back the client on March 21, 2016 (Exhibits GD3-22 and GD3-23).

[51] However, without specifying the dates to that effect, other than March 21, 2016, the Appellant also stated, on several occasions, that she had left three messages with the director, but that she had not returned her calls (Exhibits GD3-7 and GD3-8, GD3-22, GD3-23 and GD3-31).

[52] The employer claimed to have received an initial message (voice mail) from the Appellant, on April 14, 2016, and to have followed up on April 15, 2016. The employer specified that the Appellant had left it another message a few days later (Exhibit GD3-35).

[53] The Appellant acknowledged leaving two messages in the employer’s voice mail, namely, one on April 14, 2016, and another, a few days later, all while affirming not to have had messages from it before April 2016 (Exhibit GD3-36).

[54] The evidence in the docket substantiates that communication was finally established between the employer and the Appellant, in mid-April 2016 (April 14 and 15, 2016) to discuss the reinstatement of the Appellant into her position (Exhibits GD3-31 and GD3-36). A meeting also took place between the employer and the Appellant, dated April 29, 2016, subsequent to which the Appellant could resume her position.

[55] The Tribunal does not accept the Commission's submission that the Appellant did not return the employer's calls and that this action constituted misconduct within the meaning of the Act, because it knew that she was awaiting a decision and that her job was in jeopardy, because she had received prior warnings (Exhibit GD4-6).

[56] The Tribunal is of the opinion that the Appellant followed up on calls made by her employer, following the suspension levied against her and that, even if the follow-up made in this regard was not done according to the timeframe or the conditions that the employer in question allegedly wanted, it never specified it.

**Actions at the heart of the Appellant's suspension**

[57] With respect to the Appellant's alleged actions, which are mentioned in the dismissal letter of March 11, 2016, the employer claimed to have received several complaints made against her for the following reasons: intimidation of co-workers; abusive language used in the workplace, raised and inappropriate tone of voice; lack of teamwork [...] (Exhibits GD3-18 and GD3-19).

[58] The employer found that the Appellant had lacked professionalism in her interactions with the other employees, a situation that the employer deemed totally unacceptable (Exhibits GD3-18 and GD3-19).

[59] The evidence on file and the employer's statements do not make it possible to put into context the actions that the Appellant was alleged to have done and to associate them with misconduct within the meaning of the Act.

[60] In the statements made to the Commission on April 19, 20 and May 26, 2016, the employer recounted that the events of February 7, 2016, over the course of which, the Appellant had, according to it, used inappropriate language and a raised and inappropriate tone of voice, were the basis of her suspension on February 16, 2016 (February 17, 2016).

[61] However, the employer clearly explained in it statements that it had not dismissed the Appellant due to these events, but rather because she had not returned its calls that it had made to discuss her reinstatement (Exhibits GD3-16, GD3-21 and GD3-32).

[62] These statements thereby contradict what the employer wrote in the letter of termination of employment that was addressed to her on March 11, 2016 (Exhibits GD3-18 and GD3-19).

[63] The letter of the Appellant's termination of employment of March 11, 2016, does not describe the precise events or facts in relation to the act of intimidation that the Appellant allegedly did towards her co-workers, the abusive language that she allegedly used, the high and inappropriate tone of voice that she allegedly used, nor does it describe the precise events or facts in comparison with her lack of teamwork.

[64] The Tribunal emphasizes that, in its arguments, the Commission found that the fact that the Appellant had been suspended for using abusive and intimidating language towards her co-workers did not represent a ground that can be used for the purpose of determining whether there had been misconduct within the meaning of the Act (Exhibit GD4-5).

[65] Based on the evidence presented, the Tribunal finds that the acts alleged against the Appellant, whether about the way she followed up on calls that the employer had made to her or by actions resulting in her suspension, do not constitute a lack of a fundamental obligation resulting expressly or implicitly from the employment contract (***Tucker*, A-381-85, *Lemire*, 2010 FCA 314**).

[66] The Tribunal finds that the Appellant has not displayed wilful or wanton disregard for the interests of her employer or manifested wrongful intent towards it (***Tucker*, A-381- 85**).

[67] The Tribunal finds that the acts alleged against the Appellant were not of such scope that she could have normally expected them to lead to her dismissal. The Appellant could not have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility (***Tucker*, A-381-85, *Mishibinijima*, 2007 FCA 36**).

**Evidence gathered by the Commission**

[68] The Tribunal would point out that, in cases of misconduct, the onus of proof is on the Commission or the employer, as the case may be (***Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

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

[70] The Tribunal finds that, despite the acts alleged against the Appellant, the evidence gathered by the Commission is insufficient and that this evidence is not sufficiently detailed to determine that the Appellant lost her job due to her misconduct.

**Cause of the dismissal**

[71] The Tribunal considers that the Appellant was dismissed because of wilful and deliberate actions (***Tucker*, A-381-85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[72] 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**).

[73] Relying on the case law cited above and on the evidence presented, the Tribunal finds that the Appellant did not lose her employment by reason of her own misconduct, pursuant to sections 29 and 30 of the Act (***Namaro*, A-834-82, *MacDonald*, A-152-96, *Cartier*, A-168-00**).

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

## CONCLUSION

[75] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance section

## ANNEX

## THE LAW

### Employment Insurance Act

**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 employment; and
>
> **(b)** the claimant is disentitled under sections 31 to 33 in relation to the employment.

**(2)** Concerning the "length of disqualification," subsection 30(2) of the Act states the following: length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

**(3)** If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

**(4)** Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

**(5)** If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

> **(a)** hours of insurable employment from that or any other employment before the employment was lost or left; and
>
> **(b)** hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

**(6)** No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

**(7)** For greater certainty, but subject to paragraph (1)(*a*), a claimant May be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

**29** For the purposes of sections 30 to 33,

**a)** “employment refers to any employment of the claimant within their qualifying period or their benefit period;

**b)** loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

**b.1)** voluntarily leaving an employment includes

**(i)** the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

**(ii)** the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

**(iii)** the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

**c)** just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

**(i)** sexual or other harassment,

**(ii)** obligation to accompany a spouse, common-law partner or dependent child to another residence,

**(iii)** discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

**(iv)** working conditions that constitute a danger to health or safety,

**(v)** obligation to care for a child or a member of the immediate family,

**(vi)** reasonable assurance of another employment in the immediate future,

**(vii)** significant modification of terms and conditions respecting wages or salary,

**(viii)** excessive overtime work or refusal to pay for overtime work,

**(ix)** significant changes in work duties,

**(x)** antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

**(xi)** practices of an employer that are contrary to law,

**(xii)** discrimination with regard to employment because of membership in an association, organization or union of workers,

**(xiii)** undue pressure by an employer on the claimant to leave their employment, and

**(xiv)** any other reasonable circumstances that are prescribed.