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

[TRANSLATION]

Citation: *S. C. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 55

Tribunal File Number: GE-16-2618

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 26, 2017

DATE OF DECISION: April 21, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mr. S. C., participated in the videoconference hearing held on January 26, 2017. Ms. Marie-Pier Durocher of the law firm Poudrier Bradet, S. E. N. C. and Mr. Benoît Malo of the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ) ([translation] Quebec Quasi-Public and Public Service Union) represented him.

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

[3] In addition to the member designated by the Social Security Tribunal of Canada (Tribunal) to hear the appeal, a newly appointed Tribunal member, namely, Ms. Bernadette Syverin, participated in the hearing as an observer.

INTRODUCTION

[4] On March 30, 2016, the Appellant submitted an initial claim for benefits effective March 27, 2016. The Appellant reported to have worked as an "immigration officer—government services" for the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (Québec) ([translation] Department of Immigration, Diversity and Inclusion), from July 2, 2012, to March 24, 2016, inclusively, and to have stopped working for that employer due to a dismissal or a suspension (Exhibits GD3-3 to GD3-15).

[5] On April 28, 2016, the Commission notified the Appellant that he was not entitled to Employment Insurance regular benefits as of March 27, 2016, because he had stopped working for the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (Québec) on March 24, 2016, due to his misconduct (Exhibit GD3-23).

[6] On April 29, 2016, the Appellant submitted a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-24 and GD3-25).

[7] On June 3, 2016, the Commission notified the Appellant that it was upholding the decision made on April 28, 2016 (Exhibits GD3-55 and GD3-56).

[8] On June 3, 2016, the Commission notified the employer, the Government of Québec (*Ministère de l'Immigration, de la Diversité et de l'Inclusion*), that it had upheld the decision made regarding the loss of the Appellant's job due to his misconduct (Exhibits GD3-57 and GD3-58).

[9] On July 4, 2016, the Appellant, represented by Mr. François Catineau of the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ), submitted a notice of appeal to the General Division of the Tribunal's Employment Insurance Section (Exhibits GD2-1 to GD2-12).

[10] On July 12, 2016, the Tribunal notified the employer, the Government of Québec (*Ministère de l'Immigration, de la Diversité et de l'Inclusion*), that if it wished to be included as an "Added Party" in the current docket, it had to file an application to that effect to said Tribunal, by July 27, 2016, at the latest (Exhibits GD5-1 and GD5-2). The employer did not respond to the Tribunal's letter.

[11] On September 30, 2016, the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ) sent to the Tribunal an *Autorisation de divulguer des renseignements* ([translation] Authorization to Disclose Information) form specifying that Mr. Benoît Malo now represented the Appellant. The Appellant duly signed and completed this document on September 27, 2016, and the new representative duly signed and completed it on September 30, 2016 (Exhibit GD6-1).

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

a) the information in the file, including the need for additional information;

b) the fact that the Appellant or other parties are represented;

c) the availability of videoconferencing where the Appellant resides; and

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

ISSUE

[13] 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

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

a) A Record of Employment dated April 29, 2016, specifies that the Appellant had worked as "researcher" for the employer, Government of Québec—*Secrétariat du Conseil du trésor* ([translation] Secretariat of the Treasury Board) (*Ministère de l'Immigration, de la Diversité et de l'Inclusion*), from May 25, 2015, to March 24, 2016, inclusively, and that he stopped working for that employer for reason "other" (Code K—other). The following comment is indicated in Box 18 (submission) of the Record: [translation] "Revocation" (Exhibit GD3-16).

b) On April 18, 2016, the employer (Ms. M. L.) reported that the Appellant's dismissal is security-related, but that it was not at liberty to provide additional information to that effect, because it pertained to highly confidential data (Exhibit GD3-19).

c) On April 21, 2016, the employer (Ms. T., human resources service) explained that the Appellant's dismissal was due to the fact that he could not carry out the work for which he had been hired, according to the terms implemented on February 17, 2016. The employer specified that, without its consent, the Appellant cannot report to the work premises (Exhibit GD3-21).

d) On May 24, 2016, Mr. François Catineau, the Appellant's representative, sent to the Commission a copy of the following documents:

i. translation of a newspaper article written in Romanian and published on November 14, 2005, the title of which is: [translation] "The Head of the Agency of X [city in Romania] of the Romanian Highway Authority is the focus of a criminal investigation." This article specifies that Mr. L. P. faces accusations of

serious breaches during his time at the chairpersonship of the [translation] X Taxi Bureau, and that the current acting chairperson of the professional organization acknowledged that the money originating in taxi drivers' contributions had been spent inappropriately (Exhibits GD3-29 to GD3-32);

ii. translation of a newspaper article written in Romanian and published on March 11, 2006. This article conveys how Mr. L. P. used money from the [translation] X Taxi Bureau to purchase various assets and services (Exhibit GD3-33);

iii. grievance form completed that the Appellant completed with the aim of disputing his dismissal of March 24, 2016. The Appellant claimed to have submitted the grievance on March 19, 2016. The employer specified in this document, on April 6, 2016, that it was not going to allow this grievance (Exhibit GD3-34);

iv. letter from the employer (*Ministère de l'Immigration, de la Diversité et de l'Inclusion*—administrative dismissal) dated March 24, 2016, notifying the Appellant that, after having been temporarily relieved of his duties as a socio-economic assistance officer on February 17, 2016, he was dismissed administratively of his functions as of March 24, 2016. In this letter, the employer gave the following specification to the Appellant: [translation] "Given your inability to carry out the tasks intrinsic to your labour grade due to the fact that you do not have access to your workplace because of the terms imposed by the Court on February 17, 2016, we are dismissing you under section 18 of the *Public Service Act*. This article stipulates the following: 'Any public servant who is incompetent in the performance of his duties or who is unable to perform them may be demoted or dismissed.'" (Exhibit GD3-35 or Exhibit GD3-50);

v. letter from the employer (*Ministère de l'Immigration, de la Diversité et de l'Inclusion*—temporary relief of duties) dated February 17, 2016, notifying the Appellant that he was temporarily relieved of his duties as of February 17, 2016, until the competent authority had made a decision on his case. The document

specifies that the Appellant would continue receiving his salary. In that letter, the employer asked the Appellant not to report to the office until further notice, and it notified him that his access card had been deactivated (Exhibit GD3-36);

vi. [translation] "Recognizance—*Engagement*" (Canada—Province of Québec—*District judiciaire de X* ([translation] Judicial District of X)—Municipality of X […]) describing the conditions with which the Appellant must comply in light of his indictment (sec. 122 v. cr. et al), including the following conditions: not communicating in any way whatsoever with L. P. and the members of his family, not processing any request with the Minister of Immigration, Diversity and Inclusion (MIDI), not being anywhere near 285 Notre-Dame Ouest [Montréal], namely, the offices of the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI), without his employer's express consent (Exhibit GD3-37);

vii. documents entitled [translation] "Act of Appointment—Casual Employment—Québec" (contract extension) specifying that the Appellant was hired as an immigration technician at the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI), on the following dates: July 9, 2012 (Exhibit GD3-43), July 9, 2013 (Exhibit GD3-41), March 31, 2014 (Exhibit GD3-46), April 1, 2014 (Exhibit GD3-45), and April 3, 2015 (Exhibits GD3-38 and GD3-44) (Exhibits GD3-38, GD3-41 and GD3-43 to GD3-46);

viii. letters from the employer (hiring extension), one on July 2, 2013, and the other on March 13, 2014, notifying the Appellant of his hiring extension as immigration technician (Exhibits GD3-39 and GD3-40);

ix. letter from the employer (appointment as casual staff), as of July 16, 2012, notifying the Appellant that he was part of the staff of the *Service de la sélection des travailleurs qualifiés* ([translation] Qualified Workers Selection Service) (Eastern Europe, America, Asia and the Middle East) of the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (Exhibit GD3-42);

x. letter from the law office of Mercadante, Di Pace avocats, addressed to the Appellant, dated April 1, 2016, to inform him that his docket (*The Queen v. Stefan Constantinescu*) had been postponed until June 10, 2016 (Exhibits GD3-47 and GD3-48);

xi. excerpt from the *Public Service Act* (Québec) covering civil servants' rights and obligations (Exhibit GD3-49);

xii. [translation] "Documents from the Personal File," dated April 27, 2016, specifying that the Appellant authorizes the representative mandated by the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ) to obtain information on him (e.g. personal file, investigation reports) (Exhibit GD3-52).

e) On May 26, 2016, the employer (Mrs. J. J., human resources services) explained that the Appellant had been suspended as of February 17, 2016, and that a ruling had been made specifying that he could no longer process requests with the *Ministère de l'Immigration, de la Diversité et de l'Inclusion*, and that he could no longer report to the work premises. The employer specified that the Appellant was then dismissed, because he could no longer carry out his functions. The employer explained that the Appellant was a casual employee and that he had been hired due to extra work on the processing of immigration applications. The employer specified that it had no obligation to transfer him to another department, and that the other departments already had their casual and permanent employees. The employer explained that even though the Appellant had received authorization enabling him to report to the work premises, he could not accomplish the task for which he had been hired, namely, processing applications (Exhibit GD3-53);

f) In his Notice of Appeal filed on July 4, 2016, the Appellant sent to the Tribunal a copy of the following documents:

i. A letter from the Commission (reconsideration decision) addressed to the Appellant on June 3, 2016 (Exhibit GD2-6 or Exhibits GD3-55 and GD3-56);

ii. Letter from the Office of Mercadante, Di Pace avocats, addressed to the Appellant and dated April 1, 2016 (Exhibit GD2-7 or Exhibits GD3-476 and GD3-48);

iii. Letter from the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ), dated April 5, 2016, notifying the Appellant that it had received his grievance (Exhibit GD2-8);

iv. Arbitration notice (SFPQ) specifying that the arbitration filing was done on May 16, 2016, with the aim of disputing the Appellant's suspension and his dismissal (Exhibit GD2-9);

v. [translation] "Recognizance—*Engagement*" (Canada—Province of Quebec—*District judiciaire de X*—Municipality of X [...]) describing the terms with which the Appellant must comply in light of his indictment (sec. 122 c. cr. et al) (Exhibit GD2-10 or GD3-37);

vi. [translation] "Authorization to Disclose Information" form specifying that Mr. François Catineau of the SFPQ represented the Appellant. The Appellant and his representative duly completed and signed this document on July 5, 2016 (Exhibit GD2-12).

g) On January 31, 2017, Ms. Marie-Pier Durocher, the Appellant's representative, sent to the Tribunal a copy of the following documents:

i. The decision in ***J. J. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 145** (December 16, 2014) (Exhibits GD7-3 to GD7-16);

ii. Rulings by the Federal Court of Appeal (Court) in ***Granstrom* (2003 FCA 485) (**Exhibits GD7-17 to GD7-22) and ***Meunier* (A-130-96) (**Exhibits GD7-24 to GD7-29).

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

a) The Appellant reiterated the main elements of the file to show that he had not lost his job by reason of his misconduct. He described his education level and employment background with his employer, the *Ministère de l'Immigration, de la Diversité et de l'Inclusion*, from July 2, 2012, to March 24, 2016. He claimed to have worked as a socio-economic assistance official (immigration officer), even though the Record of Employment specifies that he worked as a "researcher." (Exhibits GD3-3 to GD3-18)

b) The Appellant claimed to hold a Bachelor of Laws, recognized by the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI). He claimed to also have had a certificate in criminology from the University of Montréal since 2006. The Appellant explained that, before working for MIDI (Department), he had worked as a security officer for Garda, between 2004 and 2006, while he was doing his criminology studies. The Appellant claimed to have also worked as a psychosocial officer in (two or three) houses working with youths and adults suffering from alcoholism, drug abuse or mental health issues. He specified that he wanted to acquire experience in order to work as a parole officer. The Appellant claimed to have worked as a socio-economic assistance officer for the Department of Employment and Social Solidarity in 2010 and 2011. He claimed to have started working for the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI) in 2012, also as a socio-economic assistance officer, and to have been dismissed on March 24, 2016.

PARTIES' ARGUMENTS

[16] The Appellant and his representatives made the following submissions and arguments:

a) The Appellant claimed his employer had first suspended him (suspension letter dated February 17, 2016—preliminary record of tasks) because he had been arrested (Exhibit GD3-36). He claimed to have then received a dismissal letter (letter dated March 24, 2016—administrative dismissal) (Exhibit GD3-35)

because he was no longer able to report to work after his indictment (charge), pursuant to section 122 of the *Criminal Code* (Exhibits GD3-20 and GD3-35 to GD3-37);

b) He claimed to have been awaiting a trial for his criminal charges and that an attorney (Ms. Mercadante) represented him. The Appellant claimed to have pleaded not guilty in October or November 2016. He explained that the next step in the docket consists of a preliminary investigation, scheduled for July 2017;

c) The Appellant contended that he had been dismissed for being unfit for work (Exhibits GD3-9, GD3-17 and GD3-18);

d) He specified that the reports that are attributed to him, from April 21, 2016, are a summary of a conversation that he had with a Commission officer (Exhibit GD3-20). During that conversation, the Appellant confirmed that a client had accused him of an abuse of power and had accused him of asking for money in return. He claimed to have never taken such actions and that it was an ambush. The Appellant claimed not to know why he had been dismissed. He specified that the police were keeping his employer in the loop. The Appellant explained not to have the right to report to the head office (employer) and that he could not meet a person from the human resources service. He specified that the employer first suspended him, with pay, because he had a legal issue. The Appellant claimed to have then been dismissed, on March 24, 2016, because he could no longer carry out his functions, given that he could no longer report to work. He specified that the police were keeping the employer in the loop. The Appellant claimed not to have had any problem with a co-worker (Exhibit GD3-20);

e) During the hearing, the Appellant specified that Mr. L. P., whose name appears in the articles referring to the charges that the Appellant faces with respect to the use that he made of the money originating in taxi drivers' contributions when he was at the chairpersonship of the [translation] X Taxi Bureau (Romania), was the client who had filed a complaint against him with the police service. The Appellant specified that the newspaper article in question aimed to depict the

credibility of the person who had filed the complaint against him (Exhibits GD3-20 and GD3-29 to GD3-33);

f) He explained that a preliminary ruling had been made in his regard, according to which he could not be in contact with the immigrant clientele or report to the work premises. The Appellant specified that it was a provisional ruling and that he had not been found guilty. He explained that, following the provisional ruling (pre-ruling), in February 2016, a tribunal gave a pre-ruling authorizing him to report to the work premises and to do other tasks, if the employer consents to it (Exhibit GD3-26);

g) The Appellant argued that the Commission's decision in his regard was unjust, because his employer had not established his misconduct. He explained that the Commission had considered only the employer's decision. The Appellant claimed no tribunal had found him guilty. He argued that his arguments had not been taken into consideration. The Appellant asked why the employer and the Commission consider him guilty. He emphasized that the Commission had denied him the right to receive Employment Insurance benefits before a guilty decision had been rendered in his regard. According to the Appellant, it is about a breach of justice (Exhibits GD2-4, GD3-24 and GD3-54);

h) He claimed to have filed a grievance with the union that represents him with the aim of disputing his dismissal (Exhibits GD3-20 and GD3-34);

i) Mr. François Catineau, of the *Syndicat de la fonction publique et parapublique du Québec* (SFPQ), the Appellant's representative, argued that he was wrongfully dismissed. He explained that the Appellant was accused of having asked for sums of money in order to expedite the selection process for a client. The union representative confirmed that *l'Unité permanente anticorruption* ([translation] Permanent Anti-Corruption Unit) (UPAC) was involved in the present case. The representative specified that the Appellant had been suspended, with pay, on February 2016, and that on March 24, 2016, he was dismissed, despite the fact that the investigation into him had not concluded. The Appellant specified that the

dismissal letter specifies that the Appellant was dismissed, because he is incapable of carrying out the tasks of his labour grade, given the fact that he has no access to his workplace, due to the terms imposed by the Court on February 17, 2016. The representative specified that those terms are as follows: not to process any application with the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI), not to be at 285 Notre-Dame Ouest (Montréal), namely, in the Department offices (MIDI). The representative specified that a document was issued, on April 1, 2016, indicating that the Appellant could return to the work premises with his employer's consent and that could avail himself to any available position. He argued that, as a socio-economic officer, the Appellant could accomplish several other tasks other than processing [immigration] applications. The representative emphasized that, with the employer's consent, he could have worked in the employer's offices (Exhibits GD-322 and GD-327);

j) Mr. Marie-Pier Durocher, the Appellant's representative, explained that the nature of the latter's testimony dealt more with his educational profile (academic) and on his employment background at the employer. She specified that the Record of Employment that the employer had issued indicates that the Appellant had worked as a researcher, while he held a socio-economic assistance officer position (Exhibit GD3-16). The representative explained that the nature of the accusations made against the Appellant has not been specified with respect to the actions or breaches of which he is accused. She argued that there was nothing in the docket that needed to be refuted by the Appellant's testimony. The representative emphasized that the Appellant was awaiting a trial;

k) The representative argued that in cases of misconduct, the onus of proof is on the Commission. She maintained that there was no evidence in the docket showing the Appellant's misconduct. The representative explained that the only thing that is known is that the Appellant is accused of crimes and that those accusations are in line with a possible abuse of trust, without it being known what the facts supporting these accusations are. She emphasized that no one has any idea what it is about. The representative explained that the information that one of the

Appellant's representatives had provided on the accusations made against the Appellant represented the only information in the docket with respect to these accusations (Exhibit GD3-22). She argued that the Tribunal does not have to consider the criminal accusations made pending against the Appellant, but that it must rather see whether, given the docket, there is evidence of misconduct;

l) She explained that, given that the docket is so void on the evidence presented, both for the breaches and the actions the Appellant is accused of as well as the criminal accusations against him, she did not feel comfortable enhancing this evidence with the latter's testimony. The representative claimed not to want to mitigate the Commission's evidence or the employer's evidence by the Appellant's testimony, and to want also prevent the Appellant from committing with respect to his criminal trial;

m) The representative specified that, to constitute misconduct, the acts, omissions or breaches must be wilful or deliberate, or even reckless or negligent. She argued that the case law specifies that, to determine whether there has been misconduct in a given case, the Commission and the Tribunal must be able to examine and assess the facts within the docket, namely, the facts therein;

n) The representative explained that it was necessary first to examine the reason for the Appellant's dismissal. She emphasized that the Appellant's dismissal letter specifies that it was an administrative dismissal and not a disciplinary dismissal (Exhibit GD3-35). The representative specified that the dismissal was imposed due to the Appellant's inability to carry out the functions intrinsic to his labour grade because he does not have access to his workplace (Exhibit GD3-35). She maintained that the employer did not dismiss the Appellant due to acts that he had allegedly taken or the omissions that he had allegedly made within his work with respect to it. The representative argued that, in the dismissal letter addressed to the Appellant, the employer did not mention whether the latter had been dismissed due to criminal allegations against him or whether it was because it was irreconcilable with the company or even whether the reason was that there had

been a breach of trust. She indicated that, in its decision to dismiss the Appellant, the employer had chosen to rely only on the Court's order in February 2016 (Exhibit GD3-37). The representative argued that the fact that the Appellant could no longer do his socio-economic assistance work constituted the only ground for his dismissal. She argued that the Tribunal must decide whether this ground for dismissal constitutes misconduct within the meaning of the Act. The representative specified that the Appellant had lost his job because he can no longer carry out his functions and not because he could no longer report to the work premises, since he could have done so with his employer's consent, according to the order issued on February 17, 2016. She specified that preventing the Appellant from reporting to the work premises is in line with his indictment, pursuant to section 112 of the *Criminal Code*. The representative emphasized that the Court recognizance or order on February 17, 2016, clearly mentions that the Appellant can report to the work premises with the employer's consent (Exhibit GD2-10 or GD3-37);

o) It argued that in ***J. J. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 145** (December 16, 2014), the Tribunal indicated that "[w]hether criminal charges were filed or dropped does not come into play when deciding on a case of misconduct. The Tribunal has to weigh the evidence before it and decide the facts based on the evidence before it." Exhibit GD7-14). The representative argued that there was no evidence in the docket making it possible to determine that there had been misconduct;

p) The representative explained that the only components in the docket corresponding to the actions that the Appellant had allegedly committed and that had led to criminal allegations against him are the following: the Court order, on February 17, 2017 [*sic*] (Exhibit GD3-37), the submissions made by one of the Appellant's representatives according to which sums of money were allegedly requested to expedite the selection process of a client (Exhibit GD3-22) and the Commission's arguments in which it refers to an abuse of power (Exhibit GD4-1);

q) She specified that, contrary to the confirmation that the Commission had made in this regard in its arguments (Exhibit GD4-3), the newspaper article referring to the allegations that L. P. faces, with respect to the use that he made of the money originating in taxi drivers' contributions when he was at the chairpersonship of the [translation] X Taxi Bureau (Romania) does not pertain to the Appellant, but only to Mr. L. P. She emphasized that the Appellant's name was not mentioned in the articles in question. The representative specified that these articles are in line with the person who allegedly remitted the money to expedite the selection process at the immigration service (Exhibits GD3-29 to GD3-33 and GD4-3);

r) The representative argued that the docket does not make it possible to pinpoint the number of counts that the Appellant faces, nor the wording of the counts specifying what he is specifically accused of, nor of the period concerned. She emphasized that no alleged act was filed in the current docket. The representative specified that the Appellant had entered a not-guilty plea with respect to the counts filed against him and that he is awaiting a preliminary investigation set to begin in July 2017. She explained that, despite the not-guilty plea the Appellant had entered, the employer or the Commission could have attempted to prove the breaches that the Appellant supposedly committed. The representative emphasized that there was no conviction and that the presumption of innocence must factor into the Appellant's favour in such a case. She explained that if it was not possible to show the Appellant's guilt within the criminal sense, an attempt could have been made to show that the Appellant had committed breaches within the context of his work that constitute misconduct. The representative explained that even if it was not necessary for there to be a conviction to rule that there is misconduct, there must be evidence that actions had been committed or that there had been breaches or omissions showing misconduct. The representative emphasized that there is nothing in the docket with respect to the criminal allegations made against the Appellant, except on the facts that led to these allegations. She argued that, in the absence of such as a conviction on the part of the Appellant, the Commission or the employer should have attempted to prove that the Appellant had committed

acts constituting misconduct. The representative confirmed that the Tribunal had to limit itself to the facts in the docket and to the facts gathered at the hearing;

s) It argued that in ***Granstrom*** **(2003 FCA 485)**, the Court stated that: "[t]he Commission proceeded on the premise that the charge of impaired driving without more, consists of misconduct. I am in accord with the view adopted by the Board of Referees that unless a conviction of the charge has been recorded no wrongful act has been proven." (Exhibits GD7-19 and GD7-20); The representative emphasized that, in that decision (***Granstrom*****, 2003 FCA 485)**, the claimant in question had admitted to drinking and driving, but that there was no evidence that he had exceeded the legal limit allowed by the law. She also argued that in that decision (***Granstrom*****, 2003 FCA 485**), the Court stated: [translation] "[8] With respect, we believe the Umpire in the *Speckling* case misstated our finding in *Brissette*. He defined misconduct of the claimant by the claimant's inability to fulfill a condition of employment. In so doing, he confused the effect of a misconduct with the cause of that misconduct. Under such an approach, there is misconduct every time a person is unable to fulfill a condition of his or her employment. This cannot be. In *Brissette*, our Court ruled that it was the commission of a summary conviction offence, which resulted in a conviction under the *Criminal Code*, that constituted misconduct within the meaning of the Act. The inability to fulfill a condition of employment resulted from that misconduct and entailed as a consequence the loss of employment. Thus the loss of employment was due to misconduct." (Exhibit GD7-20). On this point, the representative explained that in the present case, there was no evidence of the perpetration of an infraction. She also specified that, in this decision (***Granstrom*****, 2003 FCA 485**), the Court also confirmed that: "[10] Rather it appears to us that the conclusion of the Umpire that the appeal be dismissed results from a total lack of evidence as to the cause and legality of the suspension of the claimant's driving license. On the one hand, there was no conviction under the *Criminal Code* and, therefore, no ascertainable misconduct yet from that perspective which would have caused the loss of employment. […] In other words, if proper evidence of the statutory foundation for the suspension had been

filed, the Umpire would have been in a position to determine if the conditions or requirements for the suspension had been met." (Exhibit GD7-21). The representative argued that, notwithstanding the criminal allegations made against the Appellant and the guilty or not-guilty plea of the latter, the employer or the Commission should have provided proof of the breaches that he was accused of and that could constitute misconduct. She asked the Tribunal to follow the Court's reasoning in ***Granstrom* (2003 FCA 485)**, since that case most resembles this docket;

t) The representative also argued that, in ***Meunier* (A-130-76**), the Court recalled the following: "[...] 'For a board of referees to conclude that there was misconduct by an employee, it must have before it sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible.' [*Joseph*, A-636-85] [translation] In this case, the only evidence in the docket originates with the employer is the suspension letter that the latter sent to the applicant when it had learned of the accusations of sexual harassment that had been brought to light. […] We are compelled to observe that, essentially, the only evidence in the Commission's file was the employer's account of the facts, *remarkably* vague *and* speculative though that account was. [...] [translation] Not only did the Commission not seek to verify the nature and the merit of this 'preliminary information' on which the employer claimed to rely, but also, despite the request for a supplementary investigation that the board that it was advising, it considered pursuing an investigation to be useless. […] In order to establish misconduct and the connection between that misconduct and the employment, it is not sufficient to note that criminal charges have been laid that have not been proven at the time of the separation from employment, and to rely on speculation by the employer without doing any other verification. The consequences of loss of employment by reason of misconduct are serious. The Commission, and the board of referees and the umpire, cannot be allowed to be satisfied with the sole and unverified account of the facts given by the employer concerning actions that, at the time the employer makes its decision, are merely unproved allegations." (Exhibits GD7-24 to GD7-29) The representative

explained that, in the present case, we do not know how the Appellant acted and whether the facts of which he is accused are real. She specified that the employer had not provided speculations or information about the Appellant's alleged acts. The representative emphasized that not only are the allegations made against the Appellant unproven, but we have no idea about the accusations against him (***Meunier***, **A-130-76)**;

u) The representative argued that the Appellant's docket is different from the dockets referring to decisions rendered by the Court with respect to suspension of drivers' licences, in cases implicating claimants no longer able to meet the essential conditions for obtaining or maintaining their job (e.g. ***Brissette,* A-1342-92**). She explained that, in those cases, the cause of the loss of the driver's licence was misconduct (e.g. impaired driving, conviction following a loss of driver's licence, failure to pay a fine). The representative explained that the Appellant's case is completely different from those cases. She explained that one is not able to determine whether the reason that the order was issued with respect to the Appellant represents misconduct, because there are no facts that justify the criminal allegations made against him. The representative argued that even if there were facts, there is no conviction on the part of the Appellant with respect to the appearance of these facts;

v) The representative argued that, in his arguments, the Commission specified that [translation] "The Claimant states that he is not guilty. The Commission explained to him that it is not its role to rule on whether the Claimant is guilty or innocent. The Commission must refer to the preponderance of the evidence […]" (Exhibit GD4-3) In this aspect, the Representative argued that there is no evidence in the docket showing conduct by the Appellant;

w) She specified that the Commission also made the following confirmation: "[...] There are numerous acts and omissions that can be labeled misconduct, in the sense that they are incompatible with the objectives of an employment contract, present a conflict of interest with the employer's activities, or have a negative

effect on the relationship of trust between the parties. (Exhibit GD4-4) The representative claimed to be in agreement with this confirmation, but she argued that there is no evidence with respect to the Appellant's actions constituting misconduct;

x) The representative specified that the Commission took for granted that the Appellant was guilty of the allegations made against him when it confirmed that it [translation] "did not judge the severity of the employer's sanction, but rather of the actions that led directly to the dismissal and the loss of the employer-employee trust." (Exhibit GD4-4), while it is unclear what actions led to the latter's dismissal;

y) The representative explained that the Commission argued the following: [translation] "It is not essential to show beyond any doubt that a person is guilty or innocent of alleged infractions. […] The Claimant acted wilfully and knew that he could not take the alleged actions. [...] The Commission therefore found that the alleged actions are directly tied to the Claimant's dismissal, and that they constitute acts of misconduct within the meaning of the Act." (Exhibits GD4-4 and GD4-5). In these aspects, the representative argued that it must be shown, from the factual evidence, that the person committed misconduct by his or her actions or breaches, acts or omissions. She asked what actions the Appellant had been accused of;

z) The representative explained that, from the arguments that the Commission had presented, it was unclear whether the Appellant had been dismissed because he could not exercise his functions as a socio-economic assistance officer or whether it had been because he could no longer report to the work premises. She specified that, under the order issued on February 17, 2016 (Exhibit GD3-37), the Appellant could not report to the work site, except with the employer's express consent. The representative specified that, in the correspondence that the Appellant's attorney had addressed to the latter, as of April 1, 2016, it is mentioned that he may, with his employer's consent, report to the work site to accomplish tasks other than

those that have been assigned to him as a socio-economic assistance officer (Exhibit GD3-47);

aa) The representative explained that, from a telephone conversation with the employer, the Commission gave the following specification: [translation] "[...] the client was suspended as of February 17, 2016. Next, there was a ruling mentioning that Mr. L. P. could no longer process application [*sic*] with the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* and that he could no longer report to 285 Notre-Dame Ouest [...]" (Exhibit GD3-53). The representative confirmed that this information was inaccurate since the order issued on February 17, 2016, was the same one from the beginning and that there was no other order thereafter. She specified that, despite the fact that the Commission's note specifies that the employer realized, after the Appellant's dismissal (March 24, 2016), that he could report to 285, Notre-Dame Ouest, with the employer's authorization, while this element was already indicated in the order of February 17, 2016, and not after the dismissal arising on March 24, 2016 (Exhibit GD3-53). She emphasized that this note indicates that the Appellant could no longer carry out the functions for which he had been hired (Exhibit GD3-53);

bb) The representative argued that, in the event where the Appellant is found innocent, at the term of criminal proceedings, he would have been unjustly deprived of his right to receive Employment Insurance benefits. She emphasized that the Appellant has been jobless since being dismissed;

cc) She mentioned that the Appellant was represented with respect to the criminal allegations made against him and that the costs were attached to that situation. The representative indicated that a grievance had been filed with the aim of disputing the Appellant's dismissal, but that this grievance had not yet been heard;

dd) The representative asked the Tribunal to find that there is no misconduct in the current docket and to allow the appeal.

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

a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is determined that the claimant lost his or her employment due to 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. She stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-4);

b) The Commission explained that an employment contract can be defined overall as an agreement between an employer and the employee with respect to the payment of wages and other benefits in exchange for services and implies, by virtue of this mutual interest, respect for rules of conduct agreed to by the parties and sanctioned by professional ethics, common sense, general use and morals. She submitted that numerous actions and omissions can be labelled misconduct, in the sense that they are incompatible with the objectives of the employment contract, present a conflict of interest with the employer's activities or adversely affect the trust between the parties. This would also be the case where there is a violation of the Act, a regulation, or a professional code of ethics that results in the employee no longer meeting the essential condition of employment and that leads to the dismissal (Exhibit GD4-4).

c) She explained that it does not have to judge the severity of the employer's sanction, but rather the actions that led directly to the dismissal and the loss of employer/employee trust. The Commission specified that it is not essential to show that beyond any doubt a person is guilty or innocent of alleged infractions. She specified that this role and its functions do not belong to it, but that they belong to the Crown and to the tribunals that have jurisdiction in the matter. The Commission assessed that the Appellant had acted deliberately and that he had known that he could not take the alleged actions (Exhibit GD4-4);

d) The Commission determined that the actions taken were directly tied to the Appellant's dismissal and that those actions constituted misconduct within the meaning of the Act (***Mishibinijima***, **2007 FCA 36;** ***Lemire***, **2010 FCA 314**) (Exhibit GD4-5);

e) She specified that, in the notice that it had sent to the Appellant on April 28, 2016, it is indicated that the Appellant is refused benefits as of March 27, 2016, while this date is the beginning date of the benefit claim. She claimed to have impose an indefinite disqualification as of March 20, 2016, in accordance with subsection 30(1) of the Act. The Commission specified that the Appellant's electronic record complies with the decision that it had given and that no prejudice was caused toward her in that regard (Exhibit GD4-2).

ANALYSIS

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

[19] 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.

[20] In that decision (***Tucker,* A-381-85**), the 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 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 [...]

[21] 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.

[22] 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."

[23] 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 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 employment contract (***Lemire*, 2010 FCA 314**).

[24] In ***Lavallée* (2003 FCA 255)**, the Court stated:

> […] the performance of services is an essential condition of the employment contract. An employee who, through his own actions, can no longer meet that condition and as a result loses his employment, cannot force others to bear the burden of his unemployment, no more than someone who leaves his employment voluntarily.

[25] In ***Borden* (2004 FCA 176)**, the Court held as follows:

> The fact is that the employment relationship was terminated by the defendant's imprisonment because he was no longer in a position to fulfill an essential condition of his employment contract. As the Supreme Court of Canada ruled in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68 (CanLII), 2003 S.C.C. 68, at paragraphs 32 and 33, where an employee who cannot work because he is incarcerated is dismissed, "the dismissal arises out of the fact that the employee is not available, which is itself an inescapable consequence of the

> deprivation of liberty lawfully imposed on an employee who has committed a prohibited act... Every incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability". For these reasons, the application for judicial review will be allowed, the decision of the Umpire will be set aside and the matter will be referred back to the Chief Umpire, or to his designate, for a re-determination on the basis that the defendant lost his employment because of his own misconduct.

[26] In ***Djalabi* (2013 FCA 213)**, the Court recalled as follows:

> According to the case law, the concept of misconduct does not require evidence of the elements of criminal liability: "It is not necessary for a behaviour to amount to misconduct under the Act that there be a wrongful intent. It is sufficient that the reprehensible act or omission complained of be made 'willfully', i.e. consciously, deliberately or intentionally" (*Canada (Attorney General) v. Secours*, [1995] F.C.J. No. 210 (QL) at paragraph 2, as cited in *Canada (Attorney General) v. Pearson*, 2006 FCA 199 at paragraph 15). That is, an act is deliberate if "the claimant knew or ought to have known that the conduct was such as to impair the performance of the owed to the employer and as a result dismissal was a real possibility" (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at paragraph 14).

[27] 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 whether the misconduct was the cause of the claimant's dismissal.

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

[29] For the act 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. There must also be a causal relationship between the misconduct and the dismissal.

[30] Determining whether the action of an employee who has lost his or her job constitutes misconduct is a question of fact to be decided based on the circumstances of each case.

[31] In this docket, the action that the Appellant committed, namely, no longer being able to exercise his functions as socio-economic assistance officer with his employer, due to the terms

with which he had to comply following his indictment under section 122 of the *Criminal Code*, clearly constitutes misconduct within the meaning of the Act.

[32] The Appellant was no longer able to meet an essential condition of his employment contract (***Lavallée*, 2003 FCA 255; *Borden*, 2004 FCA 176**).

[33] In the dismissal letter addressed to the Appellant on March 24, 2016, the employer gave him the following specifications:

> [Translation]
> […] Given your inability to carry out the tasks intrinsic to your labour grade due to the fact that you do not have access to your workplace because of the terms imposed by the Court on February 17, 2016, we are dismissing you under section 18 of the *Public Service Act*. This article stipulates the following: "Any public servant who is incompetent in the performance of his duties or who is unable to perform them may be demoted or dismissed." (Exhibit GD3-35 or Exhibit GD3-50).

[34] The evidence in the docket reveals that the Appellant was accused, under section 122 of the *Criminal Code*, of having asked for sums of money to expedite the selection process of a client (Exhibits GD2-10, GD3-22 and GD3-37). One of the Appellant's representatives specified that this situation had led to the intervention of the *Unité permanente anticorruption* (UPAC) in this docket.

[35] The Appellant claimed to have been accused of a breach of trust by a client (Exhibit GD3-20).

[36] The evidence shows that the Appellant must comply with specific conditions due to his indictment under section 122 of the *Criminal Code* (Exhibits GD2-10 and GD3-37).

[37] This section, referring to "breach of trust by a public servant," stipulates the following:

> [...] Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

[38] Among the conditions with which the Appellant had to comply following his indictment, under section 122 of the *Criminal Code*, the order issued by the *Cour du district judiciaire de X* ([translation] Judicial District Court of X), on February 17, 2016, specifies that the Appellant must proceed with [translation] "not processing any application to the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI)" and to [translation] "not be at 285 Notre-Dame Ouest [Montréal], namely the offices of the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI), without the express consent of [his] employer." (Exhibit GD2-10 or GD3-37).

[39] Due to that order, the Appellant could no longer, as of February 17, 2016, carry out the tasks that were incumbent upon him as a socio-economic assistance officer nor to report to work without the employer's authorization to do so, which was not the case. The employer terminated the relationship with its employee on March 24, 2016.

[40] The performance of services is an essential condition of the employment contract. The preclusion of the Appellant from performing his duties stems from the conditions that he proceeded to comply with following his indictment. This situation means that the Appellant was no longer able to perform the duties incumbent upon him under his employment contract.

[41] The loss of his employment is entirely attributable to him. The Appellant "cannot force others to bear the burden of his unemployment, no more than someone who leaves his employment voluntarily." (***Lavallée,* 2003 FCA 255)**

[42] The fact that the Appellant was no longer able to carry out his functions, following the criminal accusations made against him, is a breach of an express or implied duty resulting from the employment contract, and that breach led to his dismissal (***Lemire,* 2010 FCA 314; *Namaro,* A-834-82; *MacDonald,* A-152-96; and *Cartier,* A-168-00**).

[43] The Appellant has argued that he had not been found guilty of any action, and he has not admitted to carrying out any of the actions that led to his dismissal.

[44] The representative argued that the employer had no other evidence making it possible to find that the criminal accusations made against the Appellant were justified. She emphasized that there was nothing justifying the criminal accusations made against the Appellant, and that there was no conviction on his part.

[45] The Tribunal rejects the argument of the Appellant's representative in these aspects and in relying on ***Granstrom* (2003 FCA 485)** and ***Meunier* (A-130-76)**.

[46] The Tribunal finds that, in this case, it is not essential to prove that the Appellant is guilty of the actions for which he is accused and likely to be associated to a case of a breach of trust, under section 122 of the *Criminal Code*. The Tribunal points out that, according to the case law, "the concept of misconduct does not require evidence of the elements of criminal liability" (***Djalabi*, 2013 FCA 213**).

[47] In the case before us, the Appellant's misconduct is essentially tied to the fact that he could not carry out his work to process claims at the *Ministère de l'Immigration, de la Diversité et de l'Inclusion* (MIDI) nor report to the work premises without his employer's consent, under an order issued by the Court (*District judiciaire de X*) on February 17, 2016 (Exhibit GD2-10 or GD3-37).

Cause of the Dismissal

[48] The Tribunal is of the opinion that the causal link between the Appellant's action and his dismissal was established. The Employer clearly showed the reasons giving rise to the Appellant's dismissal (***Namaro*, A-834-82; *MacDonald*, A-152-96; and *Cartier*, A-168-00**).

[49] The Appellant was no longer able to carry out his functions as socio-economic assistance officer or to report to the work premises without his employer's specific authorization for him to do so (Exhibit GD2-10 or GD3-37). His dismissal is the direct consequence of the action of which he was accused (***Namaro*, A-834-82; *MacDonald*, A-152-96; and *Cartier*, A-168-00**).

[50] Relying on the case law mentioned above and the evidence submitted, the Tribunal determines that the Appellant lost his employment due to his misconduct because he could not meet an essential condition of his employment contract and that, as a result, the Commission's decision to disqualify him from receiving Employment Insurance benefits is justified under the circumstances.

[51] The Tribunal finds that this appeal has no merit.

CONCLUSION

[52] The appeal is dismissed.

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, 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.

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) L'exclusion vaut pour toutes les semaines de la période de prestations du prestataire qui suivent son délai de carence. Il demeure par ailleurs entendu que la durée de cette exclusion n'est pas affectée par la perte subséquente d'un emploi au cours de la période de prestations.

(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.

Employment Insurance Regulations