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

[TRANSLATION]

Citation: *G. N. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 71

Tribunal File Number: GE-16-4000

BETWEEN:

G. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: April 20, 2017

DATE OF DECISION: May 23, 2017

Canada

REASONS AND DECISION

APPEARANCES

[1] The Appellant, G. N., was present at the hearing, which took place by videoconference, and he attended it alone. The Commission was absent from the hearing, but submitted written arguments to the Social Security Tribunal (the Tribunal) on November 3, 2016.

DECISION

[2] The Tribunal finds that the Appellant did not lose his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the *Employment Insurance Act* (the Act).

INTRODUCTION

[3] On July 13, 2016, the Appellant filed an initial claim for regular benefits with the Canada Employment Insurance Commission (the Commission). A record of employment provided by the employer, the City of X, shows that the Appellant held this employment from August 11, 2003, to July 6, 2016 (exhibits GD3-3 to GD3-16).

[4] On September 13, 2016, the Commission informed the Appellant that he was not entitled to regular benefits starting on July 10, 2016, because he had stopped working for the City of X as a result of his misconduct (exhibits GD3-28 and GD3-29).

[5] On August 23, 2016, the Appellant filed a request for reconsideration of the decision with the Commission (exhibits GD3-30 to GD3-32).

[6] On September 27, 2016, the Commission informed the Appellant that it was upholding the decision rendered on September 13, 2016, regarding the misconduct as the reason for the Appellant's dismissal (exhibits GD3-39 and GD3-40).

[7] On October 27, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division (exhibits GD2-1 to GD2-8).

FORM OF HEARING

[8] The appeal was heard by teleconference for the following reasons (Exhibit GD1):

(a) The issue(s) are complex;

(b) Credibility may be a determinative issue;

(c) The Appellant is the only party attending the hearing;

(d) The information in the file, as well as the necessity of obtaining additional information;

(e) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] The Tribunal must determine whether the Appellant lost his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the Act.

EVIDENCE

[10] The evidence in the Commission's file is as follows:

(a) An initial claim for regular benefits sent to the Commission by the Appellant on July 13, 2016, in which he states that he was dismissed (exhibits GD3-3 to GD3-15);

(b) A record of employment dated July 22, 2016, showing that the Appellant worked for the City of X from August 11, 2003, to July 6, 2016, inclusively (code M—Dismissal) (Exhibit GD3-16);

(c) A statement by the employer to the Commission indicating that an investigation has been opened regarding the Appellant's time theft, that the investigation is supported by photographic and video evidence, and that a grievance regarding the dismissal is being processed (Exhibit GD3-17);

(d) A letter dated July 6, 2016, from the employer to the appellant, stating that, further to a disciplinary meeting on June 15, 2016, the employer is alleging the following faults by the Appellant (exhibits GD3-18 to GD3-20):

- Between January 21 and April 20, 2016: Recording on his time sheet time that was not work time, by recording a shorter lunch period and by arriving later and leaving earlier than the time reported on the time sheet, depriving the employer of work while being paid, and failing to follow the schedule set out in the collective agreement;

- March 22, 2016: Travelling needlessly, resulting in a loss of work time, by going to a restaurant in the area of X for personal purposes, leaving the borough of X without a valid reason, without justification and without authorization during the set hours of work;

- March 24, 2016: Smoking in a City vehicle, loitering during working hours, including wandering around for no specific purpose and without performing any inspections, travelling needlessly, depriving the employer of work while being paid, leaving the borough of X without a valid reason, and using work time for personal purposes;

- March 29, 2016: Loitering during work time by leaving the borough of X and going, for personal purposes, to a store, a restaurant and his residence in the Charlesbourg area, and depriving the employer of work while being paid;

- On March 30, 2016: Loitering during work time, travelling needlessly, using the City's car for personal use, on his time sheet, other than those worked;

- May 4, 2016: Violating section 386 of the *Highway Safety Code* by parking a City vehicle near a hydrant, tarnishing the image of the City of X and being negligent.

In general, the employer alleges that the Appellant has failed to demonstrate honesty and integrity and that he has abused the employer's trust and has failed to comply with the *Règlement établissant les règles de conduite des employés de la Ville de X [bylaw establishing the rules of conduct for employees of the City of X]* (exhibits GD3-18 to GD3-22);

(e) A letter to the Appellant, dated June 10, 2016, in which the Employer summons the Appellant to a discipline committee meeting (exhibits GD3-23 to GD3-26);

(f) A statement by the Appellant to the employer indicating that he never received any warnings from the employer. The Appellant states that the only warning he received from the employer was regarding the use of a City vehicle for personal purposes. The Appellant acknowledges that he stole time, but he is surprised to have be dismissed, since he never received any warnings (Exhibit GD3-27);

(g) A decision by the Commission dated September 13, 2016, informing the Appellant that he is not entitled to regular benefits starting on July 10, 2016, because of his misconduct (exhibits GD3-28 and GD3-29);

(h) A request for reconsideration of the Commission's initial decision filed by the Appellant on August 23, 2016 (exhibits GD3-30 to GD3-32);

(i) A statement by the Appellant to the Commission indicating that the disciplinary committee meeting was held on June 15, 2016. The Appellant states, inter alia, that the employer questioned him about his use of time on certain days and that the employer informed him about the results of an investigation that took place between January and April 2016. The Appellant states that, on March 24, 2016, it was true that he went to another borough, to get a co-worker. The Appellant says that he did not know that he had to inform his supervisor for that type of travel. The appellant states that it is true that he smoked in the City vehicle, but he did not know that it was not allowed. As for parking the vehicle less than five metres from a hydrant, the Appellant says that he did not see it, that he stopped his vehicle to check the inspection address and parked. The Appellant states that it was carelessness on his part. As for going to the restaurant, the Appellant states that it is true that he would go and get coffee from Tim Hortons, but he did not know that it was not allowed (exhibits GD3-33 and GD3-34);

(j) A statement by the Appellant to the Commission denying that he would leave work earlier than scheduled because he had to go and pick up his daughter at school at 4 p.m. and that he would leave based on that time. The Appellant also states that the supervisor

warned him once that he was not allowed to go home for lunch using the City vehicle and that, once he had received the warning, he stopped. The Appellant states that, had the employer given him clear instructions, he would have followed them, and he does not understand how he never received any warnings in 13 years, but was dismissed for a few incidents between January and April 2016 (exhibits GD3-33 and GD3-34);

(k) A statement by the Appellant to the Commission indicating that he contacted the human resources department in late 2015 to report that he was being harassed by a co-worker and could no longer work with him, and that he asked the human resources department to intervene. The Appellant stated that he was prepared to change boroughs to avoid working with him. In February 2016, no action had been taken, and the Appellant went to the human resources office to request action. The Appellant maintains that, right up to his dismissal, no action had been taken by the employer to improve the situation. The Appellant states that what he was going through with that co-worker affected his work, and that he was discouraged and demoralized. The Appellant states that he should have requested sick leave during that period (exhibits GD3-33 and GD3-34);

(l) A statement by the employer to the Commission indicating that the investigation began after the Appellant reported that he was being harassed by a co-worker. A meeting was held with the co-worker in question and, following that meeting, an investigation was conducted involving a number of employees. The investigation revealed that the Appellant had stolen several hours of work from the employer. The employer states that it used a number of methods to carry out the investigation, but that it could not disclose them, since a grievance was being processed. The employer states that the Appellant was stealing time almost daily. The employer stated that the Appellant had to spend 50% of his time on the road performing inspections at the homes of residents and that the investigation revealed that he had not done any inspections for three consecutive days. The employer states that the Appellant could go and get a coffee if it was on the way, but that that was not what the investigation revealed. The Appellant went to his home and to a restaurant during working hours. As for going to get a co-worker in another borough, the employer states that the employee was responsible for informing his manager about his travel, especially since he did not

work that afternoon for that reason. As for the smoking ban, the employer states that it had circulated bulletins regarding the vaping ban (exhibits GD3-33 and GD3-34);

(m) A statement by the employer to the Commission indicating that, at the end of the investigation, the Appellant was summoned to a disciplinary committee meeting and was given an opportunity to explain each of the alleged acts. The employer found that the Appellant's explanations were not always consistent with the results of the investigation; however, the employer does not wish to provide more details, preferring that the Commission consider only the reasons that appear on the dismissal letter. As for the Appelant's allegation of harassment, the employer states that it was a request to change boroughs and, if the Appellant did not want to have contact with the co-worker, he could have managed his time to go and do inspections and not be in the co-worker's presence (exhibits GD3-33 and GD3-34);

(n) A statement by the Appellant to the Commission indicating that it is true that he went to see his wife in a store, but that it was for two minutes, it happened only once, and it was on the way. The appellant stated that, when he went to get his co-worker, it took approximately from 1:30 to 2:00. As for being in a restaurant in the area of X, the Appellant stated that it was not for personal purposes, but for work. The Appellant says that it is impossible that he did no inspections for three days. The Appellant states that all the allegations against him stem from his harassment complaint against a co-worker (exhibits GD3-33 and GD3-34);

(o) A statement by the employer to the Commission showing that it confirms that the Appellant's presence in a restaurant in the area of X was to exchange a document for work. As for the three days during which the Appellant allegedly performed no inspections, the employer stated that it did not penalize the Appellant for that reason and that the penalty was related only to the theft of time (exhibit GD3-38);

(p) A reconsideration decision by the Commission, dated September 27, 2016, informing the Appellant that it had not changed the initial decision rendered on August 21, 2016 (exhibits GD3-39 and GD3-40).

[11] On October 27, 2016, the Appellant provided the Tribunal with a copy of the following documents:

(a) A reconsideration decision of the Commission, dated September 27, 2016, informing the Appellant that it had not changed the initial decision rendered on August 21, 2016 (exhibits GD2-7 and GD2-8);

(b) A notice of appeal from the Board's decision of June 30, 2016 (exhibits GD2-1 to GD2-6);

(c) A statement by the Appellant indicating that no complaints had been made against him in the 13 years that he had worked for the City of X. The Appellant states that some of the employer's complaints are the result of the harassment that he was experiencing (exhibits GD2-3 and GD2-4).

[12] At the hearing, the Appellant presented the following evidence:

(a) The Appellant states that he shares the responsibility in this whole story, but he considers the dismissal to be wrongful, in light of the manner in which he was treated;

(b) The Appellant states that he worked as an inspector for 13 years with the City of X without any snags or complaints, and he feels that the alleged misconduct resulted from events that occurred during his last few years of work;

(c) The Appellant states that he filed a complaint with the human resources department of the City of X for harassment by a co-worker;

(d) The Appellant states that he was surprised by the action taken by his employer the City of X and found it strange that different levels of penalties did not exist;

(e) The Appellant states that, when the work was reorganized as a result of the establishment of the boroughs, 14 safety practitioners were placed on the same team, and there was one of them with whom none of the team members wanted to work. The Appellant states that he had a falling out with that person in the borough of X in August 2010 and from 2010

on, things did not go well with that person. His co-workers told him that they did not know how he was able to work with that person;

(f) The Appellant states that, in 2015, the situation deteriorated, and he tended to take his "problems" home with him. The Appellant states that he therefore suggested to the employer that he change boroughs to resolve the problem, even though he would be further from his home and from the school that his daughter was attending;

(g) The Appellant states that, in November 2015, he filed a harassment complaint with the human resources department, describing the problems that he was having with the person and stating that he was prepared to change boroughs to stop being harrassed;

(h) The Appellant states that Mr. M. of the human resources department told him that harassment was not acceptable and that something would be done. The Appellant states that he met Mr. M.. in February 2016 and, at that time, deplored the fact that the situation had deteriorated, that he was no longer motivated to go to work, that the situation was affecting his self-esteem and that he could no longer work with the person;

(i) The appellant states that the employer criticized him for leaving work, but he states that the situation was affecting his motivation. The Appellant states that he never received any warnings from the employer;

(j) The appellant states that the employer criticized him for leaving his borough on March 24, 2016, to go to the municipal garage in the area of X. The Appellant states that the employer never told him that, once the boroughs were established, he had to notify a supervisor if he was travelling to another borough. The Appellant states that he had made that trip for work, that he went to get a co-worker because her firefighting vehicle was being inspected. Because no one from her borough was available, she called the borough of X, where the Appellant worked, and he went to pick her up. The employer criticized him for this incident, saying that he should have told his supervisor that he was leaving his borough. However, the Appellant says that he went with co-workers to the municipal garage regularly, that it was allowed and that he did not see why the employer criticized him. The Appellant states that, if the trip was longer than expected, it was because there

was construction on the Autoroute de la Capitale and he took the small streets to get there. The Appellant states that he returned to his borough immediately afterward and that the employer never checked the facts with the co-worker in question.

(k) The Appellant states that the employer criticized him for going to a restaurant, and he acknowledges that he went to Tim Hortons in the borough of X to meet a co-worker who was giving training, to give him a USB key. Since the Appellant had already given a great deal of training, the co-worker wanted to know what to do. The Appellant acknowledges that he had coffee at Tim Hortons with the co-worker, but it was to talk about work. The appellant states that he was at the restaurant for about 20 to 25 minutes. The Appellant states that his superior knew that he would go to get coffee from Tim Hortons, but he did not tell his superior that this time he was going to give a USB key containing training to a co-worker;

(l) The appellant states that the employer criticized him for leaving his office in March 2016 and for stopping the vehicle in front of an arena and a sports centre. The appellant states that, during the disciplinary committee meeting, in June 2016, the employer asked him why he had stopped in front of the arena in March 2016. The Appellant stated that he did not remember why; he thought that he stopped to take a call on his cell phone regarding an inspection appointment that he had. The Employer criticized him for meandering in his responses, yet he was not trying to hide anything, and it was not easy to remember that kind of event four months later;

(m) The Appellant states that it is true that he went to see his spouse after lunch on March 29, 2016. His spouse works in an optical store, and the Appellant wears glasses and had a corneal laceration at the time. The Appellant went to the shopping centre to meet her to obtain an ointment for his eye. The Appellant states that this event lasted a few minutes. He admits that he did not have to do it, but that it happened only once;

(n) The Appellant states that the employer criticized him for going to restaurants; the Appellant states that he goes to Tim Hortons drive-through to get coffee or he enters and leaves the restaurant with a coffee. The Appellant states that the restaurant is on the way

and that it is not really a detour. The Appellant states that he did not know that it was not allowed, and all City employees did it, even the police;

(o) The Appellant states that the employer's investigation lasted from January 21, 2016, to April 20, 2016, or four months, and, during those four months, the criticisms were those outlined, and it was no more serious than that.

(p) The Appellant states that the employer criticized him for parking the vehicle near a hydrant, when he was going to do an inspection in an area under construction and there were not even any sidewalks yet. The Appellant says that he could have paid the ticket, and he states that he did not know the new area under construction and that the road had not yet been completed. The Appellant states that while he was on his way to do an inspection, he could not find the address, and he stopped to search for directions and ended up parking there. The Appellant states that it was carelessness on his part, but that it does not call for dismissal;

(q) The Appellant states that he was being harassed by a co-worker. The Appellant is of Indigenous descent, and his co-worker called him an "[translation] Indian," saying "[translation] You're no good; you walk like that; you're rotten." The Appellant states that the person was making negative comments about his work and the work of other co-workers and had allegedly told him that he was an asshole. And the situation deteriorated;

(r) The Appellant states that, before the office moves in 2010, he had his own office and did not work as much with that co-worker. He was then placed in the same office as that co-worker. The Appellant states that he informed his supervisor about the problems, but he remained in the same office as the co-worker;

(s) The Appellant states that he could no longer endure his co-worker's inappropriate and harassing behaviour;

(t) The Appellant states that the employer never followed up on his harassment complaint;

(u) The Appellant states that, although the employer said that he could arrange his schedule as an inspector to avoid working with the co-worker, it did not work like that in reality.

The appellant says that he did not necessarily do inspections 50% of the time; it depended on the inspections, he had to write a report and send corrections to the owner;

(v) The Appellant states that he might be two days in the field and three days in the office; it varied. Moreover, he does not understand the employer's criticism that he did not do any inspections for three days;

(w) As for the employer's allegation of time theft, that the Appellant declared time other than time worked, the Appellant states that there was indeed a time sheet that had to be completed, but no one did so day by day; the employees completed the time sheet at the end of the week. The Appellant states that he had a flex schedule and that, although he had arrived at 8:15 a.m. and had indicated 8:00 a.m. based on his regular schedule, his lunch time was not necessarily one hour. The Appellant says that he could not confirm to the employer at what time he actually arrived on the morning in March 2016 and how long he had taken for lunch; however, he knew that he always left at the same time, because he had to go and pick up his daughter at school;

(x) The Appellant states that he had a question about the process used by the specialized firm that conducted the investigation: how they could claim that he was not in his borough or that the trips he made were not for work when that was not the case?

PARTIES' ARGUMENTS

[13] At the hearing, the Appellant made the following arguments:

(a) The Appellant states that he may have deserved a suspension but not a dismissal and that he did not expect to lose his job;

(b) The Appellant submits that the time theft was a matter of interpretation, since he was completing his time sheet on a weekly basis and could take less time for lunch if he arrived 15 minutes later. The Appellant states that, for the variable hours of work, he absolutely had to be in the office from 9:00 a.m. to noon and from 1:30 p.m. to 4:00 p.m. He could manage his schedule for the remaining hours. The Appellant wonders about the

employer's criticism and does not understand it; the Appellant states that perhaps the employer was right about one or two days, but the employer certainly did not check every week;

(c) The Appellant maintains that he was affected by what he was experiencing in the office and that it was undermining his motivation. The Appellant states that, starting in 2010, the employees were left on their own in the boroughs, and he states that he no longer had anyone to go to, that there was not really any follow up, and that he was left on his own;

(d) The Appellant argues that the employer should be responsible and tell employees what they can or cannot do and not announce it to them after an investigation. The Appellant argues that the employer did not have hold their hand, but the employer could have provided guidance;

(e) The Appellant claims that, after 13 years of service, he was very surprised to be dismissed, as were his colleagues; the Appellant states that he gave it his all for the employer for 13 years;

(f) The appellant maintains that he went to the human resources department because he had a problem with a co-worker, that it was the first time he had done that, and that he feels that no one had addressed his problem.

[14] On November 3, 2016, the Commission sent the Tribunal written arguments (exhibits GD4-1 to GD4-6):

(a) The Commission contends that subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that the claimant lost their employment because of their own misconduct. The Commission asserts that, for the act complained of to constitute misconduct within the meaning of section 30 of the Act, it must be wilful or deliberate, or so reckless as to approach wilfulness. It states that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-5);

(b) The Commission states that the Appellant was dismissed following an investigation by the employer because he made false statements when he was completing his time sheets, and the employer accused him of stealing time and not following the rules in effect. The

Commission contends that the Appellant acknowledged that he had stolen time (Exhibit GD4-6);

(c) The Commission states that time theft is a reason for misconduct and that a reasonable person wanting to keep their job would not have done such things (Exhibit GD4-6);

(d) The Commission states that the Appellant acted deliberately and that he knew his actions would adversely affect the employment relationship. The Commission contends that the loss of the Appellant's employment is the direct result of the alleged offence. The Commission states that the Appellant committed an offence and that it constituted misconduct. The Commission states that time theft damages the trust between the employer and the employee (Exhibit GD4-6);

(e) The Commission argues that, if the Appellant was discouraged and demoralized by the harassment situation, he should have seen a physician (Exhibit GD4-6).

ANALYSIS

[15] The statutory provisions relevant to this section are appended to this decision.

[16] Subsection 30(1) of the Act provides that 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.

[17] The Court has defined misconduct as follows: ". . . to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance" (*Tucker*, A-381-85).

[18] For the Tribunal to conclude that there was misconduct, it must have before it relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible (*Meunier, A-130-96*; *Joseph*, A-636-85).

[19] 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” (*Attorney General of Canada v. Mishibinijima* 2007 FCA 85 (CanLII)).

[20] The Court has also determined that the failure to comply with a condition of employment is the result of misconduct and that it is the misconduct that results in the loss of the employment (*Attorney General of Canada v. Brissette,* A-1342-92).

[21] The misconduct must be committed by the claimant while employed by the employer and must constitute a breach of a duty that is express or implied in the contract of employment. There must therefore be a connection between the loss of the employment and the act complained of (*Attorney General of Canada v. Brissette,* A-1342-92).

[22] Reprehensible conduct is not necessarily misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in dismissal (*Locke* 2003 FCA 262; *Cartier* 2001 FCA 274; *Gauthier*, A-6-98; *Meunier,* A-130-96).

[23] In *Tucker* (A-381-85), the Court noted that employees are human:

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

[24] The Appellant testified that he worked as an inspector with the City of X for 13 years. The Appellant testified that he contacted the human resources department of the City of X in Novmber 2015 to complain that he was being harrassed by a co-worker. The Appellant sought assistance from his employer to resolve the situation and told the employer that he was prepared to change his borough if required. The Appellant was dismissed on July 6, 2016 (Exhibit GD3-16).

[25] The employer told the Commission that the Appellant was dismissed for time theft following an investigation by a specialized firm (Exhibit GD3-17). The dismissal letter sent by the employer to the Commission indicates, among other things, that the Appellant allegedly recorded on his time sheets time other than work time done, that he allegedly made unnecessary trips, resulting in a loss of work time, and that he allegedly loitered during his work time (exhibits GD3-18 to GD3-20).

[26] Relying on the employer's statement, the Commission argues that the Appellant lost his job because he made false statements on his time sheets, stole time and did not comply with the employer's rules. The Commission states that the Appellant's actions broke the bond of trust between the employer and an employee (Exhibit GD4-6).

[27] The Tribunal must determine whether the Appellant's behaviour, having stolen work time from the employer, constitutes misconduct within the meaning of the Act. The Commission has the onus of proving, on a balance of probabilities, that claimant lost his employment because of his misconduct (*Attorney General of Canada v. Larivée* 2007 FCA 312 (CanLII)).

[28] The Tribunal has analyzed all the circumstantial evidence by examining the various statements in the Commission's file and at the hearing (*Meunier*, A-130-96; *Joseph*, A-636-85).

[29] The Tribunal has considered the letter dated July 6, 2016, from the employer to the Appellant, stating that, further to the disciplinary meeting on June 15, 2016, the employer alleges the following faults by the Appellant (exhibits GD3-18 to GD3-20):

- Between January 21 and April 20, 2016: Recording on his time sheet time that was not work time, by recording a shorter lunch period and by arriving later and leaving earlier than the time reported on the time sheet, depriving the employer of work while being paid, and failing to follow the schedule set out in the collective agreement;

- March 22, 2016: Travelling needlessly, resulting in a loss of work time, by going to a restaurant in the area of X for personal purposes, leaving the borough of X without a valid reason, without justification and without authorization during the set hours of work;

- March 24, 2016: Smoking in a City vehicle, loitering during working hours, including wandering around for no specific purpose and without performing any inspections, travelling needlessly, depriving the employer of work while being paid, leaving the borough of X without a valid reason, and using work time for personal purposes;

- March 29, 2016: Loitering during work time by leaving the borough of X and going, for personal purposes, to a store, a restaurant and his residence in the Charlesbourg area, and depriving the employer of work while being paid;

- On March 30, 2016: Loitering during work time, travelling needlessly, using the City's car for personal use, on his time sheet, other than those worked;

- May 4, 2016: Violating section 386 of the *Highway Safety Code* by parking a City vehicle near a hydrant, tarnishing the image of the City of X and being negligent.

[30] The employer stated to the Commission that the penalty was related only to the theft of time. The employer acknowledged that when the Appellant was in a restaurant in the area of X, it was in fact to exchange a work document. In addition, as for the three days during which the Appellant allegedly performed no inspections, the employer stated that it did not penalize the Appellant for that reason (Exhibit GD3-38).

[31] At the hearing, the Appellant gave the following explanations regarding the employer's criticisms. First, the Appellant explained that, when he took time during work to go to the municipal garage, it was to drive a co-worker from another borough whose firefighting vehicle was being inspected. The Appellant stated that he did not use the Autoroute de la Capitale to go to the borough of X because there was construction on that highway, and he returned to his borough office after having dropped off his co-worker. The Appellant acknowledged that he had not given his supervisor advance notice of this trip. The Appellant testified that he did not know that he had to notify his supervisor for such travel and that he had managed his time in this way since the changes caused by the establishment of boroughs in 2010.

[32] The Appellant explained at the hearing that he sometimes went to Tim Hortons to get a coffee, either going to the drive-through or going inside to get it. The Appellant testified that if

he made a small detour to go to Tim Hortons, it was in the borough. The Appellant testified that all his co-workers and other groups of employees of the City of X working on the road did the same thing, and he did not know that it was not allowed.

[33] In the dismissal letter, the employer stated that the Appellant had stolen time between January 21, 2016, and April 20, 2016. In the letter, the employer maintained that the Appellant had recorded time other than work time by arriving later at the office, leaving earlier and taking a lunch period longer than the one reported on the time sheet (exhibits GD3-18 to GD3-20).

[34] The Appellant testified that he completed his time sheet on a weekly basis, that he completed it mechanically and that this method had been in use since 2010. The Appellant could take less time for lunch if he arrived 15 minutes later. The Appellant stated that, for the flex schedule, he absolutely had to be in the office from 9:00 a.m. to noon and from 1:30 p.m. to 4:00 p.m., and that he could manage his schedule for the remaining hours. The Appellant testified that he was always left around 4:00 p.m., because he had to pick up his daughter at school. The Appellant wonders about the employer's criticism and does not understand it. The Appellant states that he was in a difficult situation with his co-worker and that he found it demoralizing to be in the same office with the co-worker, and he states that the employer might be right for a day or two, but that the employer certainly had not checked every week.

[35] The Tribunal notes that the Appellant acknowledged that, one time after lunch, he had gone to the shopping centre to meet his spouse. The Appellant stated that his spouse works in an optical store and, because the Appellant had a corneal laceration, he went to the shopping centre to get ointment for his eye. The Appellant states that this event lasted a few minutes. He admitted that he did not have to do it, but that it happened only once.

[36] As for smoking in a City vehicle, The Appellant testified that the employer may have had some instructions, but that they were not circulated and he had never been informed that he could not smoke in the vehicle. The City of X representative told the Commission that a bulletin prohibiting vaping in vehicles had been circulated (Exhibit GD3-35). The employer's statement does not indicate whether the bulletin was posted on the website or whether posters were distributed to the borough offices, but the Tribunal notes that the Appellant had not seen this instruction.

[37] Finally, as for parking the City car near a hydrant, the Appellant stated that he was going to do an inspection in an area under construction and that there were not yet any sidewalks. The Appellant testified that he did not know the new area under construction and that the road had not yet been completed. The appellant explained that, during this event, he could not find the address, and he stopped to search for directions and ended up parking there. The Appellant states that it was carelessness on his part, that he could have paid the ticket he had received, but that it does not call for dismissal.

[38] The Tribunal also notes that the Appellant filed a harassment complaint about a situation with a co-worker in fall 2015. The appellant testified that no follow-up had been done aside from a meeting in February 2016 on his own initiative. In response to the complaint, the employer stated that it conducted an investigation, the Appellant was summoned to a meeting of a disciplinary committee and he was dismissed (exhibits GD3-17, GD3-18 to GD3-20).

[39] When questioned by an officer of the Commission about the harassment complaint filed by the Appellant, the employer's representative stated that it was a request from the Appellant to change boroughs, and the employer chose to conduct checks before proceeding with a change. The employer also stated that, if the Appellant had problems with his co-worker, he had only to organize his time to avoid working with him (Exhibit GD3-35).

[40] The Tribunal finds that this is what the Appellant did in part and that the Employer was expecting autonomy on the part of the Appellant to manage his time. However, the Appellant testified that it was not as simple as the employer said. The Appellant stated that he shared the same office as the co-worker with whom he was having problems, that he had asked his supervisor to change offices, but that there had been no change. The Appellant stated that when he did his inspections, he was on the road and away from his office, but that he had to allocate time to write his reports, and he was then in the presence of that co-worker.

[41] The Tribunal notes that the employer considered the harassment complaint to be a request to change boroughs and that there was no follow-up with the Appellant regarding the situation. The Appellant testified that, during that period (November 2015 to July 2016), he was discouraged and demoralized, that he was no longer able to work with the co-worker and that he asked the employer for assistance to improve the situation (exhibits GD3-33 to GD3-35).

[42] The Tribunal notes that undesirable conduct does not necessarily constitute misconduct within the meaning of Act. After weighing the evidence in the record, the Tribunal finds that the Commission did not demonstrate that the Appellant's actions, and that constituted time theft, were "voluntary," that is, conscious, deliberate or intentional for the following reasons (*Caul* 2006 FCA 251; *Pearson* 2006 FCA 199; *Bellavance* 2005 FCA 87; *Johnson* 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85).

[43] First, the Tribunal believes the Appellant's version when he explained that he was surprised to be dismissed after 13 years of service for the City of X. The Appellant stated that the employer had never criticized him in 13 years. The Appellant stated that his work required a high degree of autonomy, he even stated that he was left on his own when, on occasion, he and his colleagues would have liked a clear guideline on certain work-related issues. The Appellant submitted to the Tribunal that, if the employer had provided clear instructions, he would have followed them. The Appellant stated that the director had given an instruction on the use of City vehicles: he had met the employees to inform them that using City vehicles to go for lunch was not allowed. The appellant stated that as soon as this instruction had been given, he followed it. However, the Appellant stated that he did not know that he had to always notify his supervisor if he went to another borough for work. The Appellant acknowledges that he took some work time to go and get coffee from Tim Hortons while he was travelling for work, but he did not know that it was not allowed. As for time sheets, the Appellant stated that he had a flex schedule and did not understand how the employer could criticize him for arriving 15 minutes late in the morning, when he could take less time for lunch. In the absence of clear instructions and rules, when faced with work that requires a high degree of autonomy, the Appellant could not know that those actions were likely to result in his dismissal. Especially if this practice had been established for many years, since 2010 (Tucker, A-381-85, *Attorney General of Canada v. Mishibinijima* 2007 FCA 85 (CanLII)).

[44] In order for the conduct to be considered to be misconduct within the meaning of Act, the employee must wilfully disregard the interests of the employer by committing deliberate violations, by disregarding the standards of behaviour that the employer has the right to expect from its employees or by demonstrating carelessness of such degree as to manifest wrongful intent. Loi, The Tribunal is of the opinion that the Appellant's explanations do not support a finding that his conduct is analogous to misconduct within the meaning of the Act (*Tucker*, A-381-85).

[45] The employer's statements with respect to time theft, including the time sheets completed by the Appellant that are allegedly inconsistent with the work performed, are not supported by physical evidence that could have enabled the Tribunal to make a determination by confirming or refuting the hours actually worked by the Appellant and the hours reported. The Tribunal must examine the evidence on a balance of probabilities. After weighing the statements in the file and the Appellant's plausible explanations at the hearing, the Tribunal gives preponderance to his testimony.

[46] As an inspector, the Appellant must act responsibly and independently, and the Appellant acknowledged that he had performed certain undesirable acts. However, as an inspector, the Appellant had been managing his time for many years and the evidence in the Commission's file shows that the employer also expected the Appellant to manage his time himself (Exhibit GD3-35). In the absence of any clear warnings or other guidance, the Tribunal is of the opinion that the Appellant could not expect his actions to be likely to lead to his dismissal, and the evidence in the file does not support the conclusion that the Appellant did not respect a condition of his employment (*Attorney General of Canada v. Brissette*, A-1342-92).

[47] As the Court has determined, the Appellant's intentions must be considered to determine the deliberate nature of the action. The appellant testified that he was in a difficult situation with a co-worker, and he tried to find solutions that remained unsuccessful. The Tribunal finds that the employer even trivialized the harassment complaint filed by the Appellant (Exhibit GD3-35). The Appellant stated that he was demoralized during this period and that his co-worker's remarks discouraged him. Given the circumstances of the case, the Tribunal finds that the Appellant's behaviour cannot be considered deliberate to the point of being wilful (*Tucker*, A-381-85).

[48] The Commission did not show that the Appellant's actions were voluntary, conscious and deliberate. The evidence shows that the Appellant committed certain undesirable acts, but they do not have the substance of reprehensible acts constituting misconduct under the Act because they are not of such scope that the Appellant could normally foresee that they would be likely to result in dismissal (*Meunier*, A-130-96-96; *Joseph*, A-636-85). The Tribunal finds that the Appellant could not assume that his behaviour, by going to Tim Hortons for coffee or leaving his borough to go to another borough for work, would be likely to result in his dismissal (*Attorney General of Canada v. Mishibinijima* 2007 FCA 85 (CanLII)). As for the time sheets compiled by

the Appellant, he did not keep a record of his comings and goings, and the Commission did not file this evidence with the Tribunal either. Having weighed all the statements, the Tribunal is satisfied with the explanations provided by the Appellant regarding the flex schedule.

[49] The Tribunal is of the view that the Appellant's actions, in the circumstances, do not demonstrate behaviour that is "wilful or deliberate, or so reckless as to approach wilfulness," and it finds it unwarranted to disqualify the Appellant from receiving benefits by reason of his own misconduct under sections 29 and 30 of the Act.

COMING INTO FORCE

[50] Having weighed the evidence and the arguments of the parties, the Tribunal is of the view that the Appellant did not lose his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the Act.

[51] The appeal is allowed.

Josée Langlois
Member, General Division—Employment Insurance Section

APPENDIX

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

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

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

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

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

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