



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *E. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 70

Tribunal File Number: GE-16-3810

BETWEEN:

E. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: May 1, 2017

DATE OF DECISION: May 22, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, E. L., attended the hearing held by teleconference and was represented by Laurence Lorion.

DECISION

[2] The Tribunal finds that the Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act (Act)*.

INTRODUCTION

[3] On April 12, 2016, the Appellant filed an initial claim for regular benefits with the Canada Employment Insurance Commission (Commission). According to the Record of Employment provided by the Corporation ambulancière de X Inc. (CAMBI), the Appellant stopped working at this job on November 25, 2015 (code K–Other) (Exhibits GD3-3 to GD3-17).

[4] On May 4, 2016, the Commission informed the Appellant that he was not entitled to regular benefits as of April 10, 2016, because he had stopped working for CAMBI by reason of his misconduct (Exhibits GD3-20 and GD3-21).

[5] On June 13, 2016, the Appellant requested a reconsideration of the Commission's decision to deny him regular benefits because of his misconduct (Exhibits GD3-22 to GD3-24).

[6] On September 15, 2016, the Commission informed the Appellant that it was upholding the decision that it had made on April 8, 2016 (Exhibits GD3-40 and GD3-41).

[7] On October 11, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-7).

TYPE OF HEARING

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

- a) The complexity of the issue or issues;
- b) The fact that credibility may be a determinative issue;
- c) The information in the file, including the need for additional information;
- d) The availability of videoconferencing in the location where the Appellant lives.

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 April 12, 2016 (Exhibits GD3-3 to GD3-16);
- b) A Record of Employment, dated April 21, 2016, indicating that the Appellant worked for CAMBI from December 13, 2014, to November 25, 2015, inclusively (Code K–Other) (Exhibit GD3-17);
- c) A statement from the employer to the Commission indicating that the Appellant was dismissed following a criminal charge for theft and obstructing the work of police. The employer noted that a paramedic cannot work if they have a criminal record, according to the national registry of ambulance technicians. The employer stated that the employer-employee bond of trust was broken (Exhibit GD3-18);
- d) A statement from the Appellant to the Commission indicating that he was charged with theft and obstructing the work of police for hiding that his co-worker had stolen cannabis. The Appellant acknowledged that following this incident, the employer-employee bond of trust was broken (Exhibit GD3-19);

- e) A Commission decision, dated May 4, 2016, informing the Appellant that he was not entitled to regular benefits as of April 10, 2016, because he had stopped working for CAMBI on November 25, 2015, by reason of his own misconduct (Exhibits GD3-20 and GD3-21);
- f) A request for reconsideration of the Commission's initial decision, filed by the Appellant on June 13, 2016 (Exhibits GD3-22 to GD3-24);
- g) A letter of dismissal from the employer, dated March 31, 2016, indicating the following reasons for dismissal: The Appellant was charged with theft and possession of narcotics, as well as obstructing the work of police, after he was arrested at his home following a response on November 17, 2015. At the time of this response, the Appellant breached several applicable rules and protocols. The employer said that when he arrived at the scene, the Appellant did not try to ventilate the client according to protocol and that he pronounced the client dead before contacting the appropriate department. The Appellant allegedly moved and tried to hide a Ziploc bag containing cannabis. When police officers noticed that the bag in question had been moved, the Appellant told them that it was a "bag of pills." Then, subsequently, the Appellant allegedly handed over the bag he had previously hidden from police. Although these events were unusual, the Appellant did not notify his supervisor or send a report on this response as required by protocol. On November 26, 2015, the Appellant was arrested at his home, and he apparently stated that he had hidden the bag containing cannabis so that he could go back and get it after the response. Given the events and the criminal charges brought against the Appellant, he was suspended without pay on November 30, 2015, because he had failed to exercise his duties and because of the severity of his intentional wrongdoing on a response site. This letter indicates that on December 10, 2015, the Appellant went to the police station to change his initial statement. The Appellant then stated that his co-worker had taken some of the cannabis to put it in a Ziploc bag and that he had allegedly left the home with this content hidden. The Appellant then stated that he had hidden a bag containing cannabis behind the refrigerator because he thought that his co-worker had gone to hide the unlawfully taken drugs in the ambulance. The employer states that following these events, it conducted an investigation and found that the Appellant's conduct was not only extremely unprofessional, but also completely unethical. The

Appellant is accused of stealing from a deceased person, as well as lying to the employer and to police officers. The employer finds that the Appellant lacked integrity, honesty, and civism, and that these serious actions definitively broke the bond of trust required between an employer and an employee (Exhibits GD3-27 to GD3-30);

- h) A statement from the employer to the Commission indicating that police have audio recordings and photo evidence of the incident. The employer states that two employees are facing charges and that the two employees are accusing each other of wrongful acts. The employer states that the misconduct is serious and that the bond of trust is broken (Exhibit GD3-32);
- i) A statement from the Appellant's representative indicating that the Appellant's co-worker admits to serious misconduct (Exhibit GD3-33);
- j) A statement from the Appellant to the Commission indicating that he did not provide certain information to the employer because he wanted to devise a strategy to denounce his co-worker and that he had changed his version of the facts after obtaining audio evidence of his co-worker's admissions. The Appellant states that he never voluntarily committed theft. The Appellant admits that he moved "things" at his co-worker's request and that he did not provide all the information to police or his employer. The Appellant admits to making a mistake, but not to serious misconduct (Exhibit GD3-34);
- k) A reconsideration decision from the Commission dated September 15, 2016, informing the Appellant that it was upholding the initial decision rendered on April 8, 2016 (Exhibits GD3-40 and GD3-41).

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

- a) A reconsideration decision from the Commission dated September 15, 2016, informing the Appellant that it was upholding the initial decision rendered on May 3, 2016 (Exhibit GD2-7);

- b) A notice of appeal of the Commission's September 15, 2016, decision (Exhibits GD2-1 to GD2-7).

[12] The Appellant submitted the following evidence at the hearing:

- a) The Appellant's representative stated that the Appellant was suspended without pay on November 30, 2015, that he was dismissed on March 31, 2016, and that he filed his claim for Employment Insurance benefits on April 10, 2016;
- b) The Appellant's representative stated that on November 17, 2015, the Appellant responded to an emergency call as an ambulance technician and that the client was pronounced dead at the scene;
- c) The Appellant's representative stated that on November 26, 2015, the Appellant was arrested by X X police and that on December 10, 2015, he gave a statement at the police station;
- d) The Appellant's representative stated that the Appellant acknowledged that he had moved things at his co-worker's request and that he did not say so "right away," but that he never intended to commit theft (Exhibit GD3-34);
- e) The Appellant's representative stated that the Appellant acknowledged that he had seen his co-worker steal cannabis on the response site and that he had not immediately denounced him (Exhibit GD3-8);
- f) The Appellant's representative stated that the Appellant had been charged with theft and possession of narcotics, as well as obstructing the work of police. On April 28, 2017, the charges of theft and possession of narcotics "were dropped" and the Appellant pleaded guilty to obstructing the work of police. The Appellant received an absolute discharge on the charge of obstructing the work of police (Exhibits GD7-1 to GD7-86, and GD8-1 to GD8-4);
- g) The Appellant's representative stated that the Appellant would be contesting his dismissal, with the help of his union.

PARTIES' SUBMISSIONS

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

- a) The Appellant's representative stated that the Appellant's dismissal was not justified and that it is being contested via a grievance; the case is scheduled to be heard in fall 2017;
- b) The Appellant's representative stated that the relationship between the misconduct and the dismissal must be proven, that the Appellant's action must be serious enough to constitute misconduct within the meaning of the Act, and that this behaviour must be proven on a balance of probabilities;
- c) The Appellant's representative stated that only when the conduct is deliberate and the actions that led to the dismissal are conscious and intentional can they lead to dismissal [*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII)];
- d) The Appellant's representative stated that the Court has previously established that a claimant can make mistakes under pressure and that this can cost the claimant their job without being considered misconduct within the meaning of the Act. The Appellant's representative stated that the relationship between the misconduct and the dismissal has not been proven (*Tucker*, A-381-85, and *D. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 103353);
- e) The Appellant's representative stated that the action was not premeditated. The Appellant did not think at the time he carried out this action, and he was not able to assess all the consequences that this action could have on his job (*D. Q. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 80090);
- f) The Appellant's representative stated that the employer had indicated code K on the Record of Employment when there is a code for dismissal (code M). The Appellant's representative stated that the employer's representative, Marie Rodrigue, had made some false statements to the Commission. For example, at the time the Appellant was dismissed, he had criminal charges against him but had not been convicted. Also, it is false to state that the Appellant cannot work for CAMBI with a criminal record; the *Act respecting pre-hospital emergency services* stipulates the terms and conditions in sections 67 and following. He must first be convicted and then a review committee must determine whether there is a connection between the criminal act and the profession. In addition, the letter of dismissal does not corroborate the employer's representative's statements (Exhibits GD3-18 and GD3-27 to GD3-30);

- g) The Appellant's representative submitted that the Commission has not proven that the Appellant breached protocol and that he was aware that he was breaching protocol. In addition, the reason for dismissal does not seem related solely to misconduct; it also seems related to the fact that he did not follow the protocols and rules;
- h) The Appellant's representative submitted that several different versions explain the dismissal by the employer. The Appellant's representative submitted that the Appellant is entitled to benefits as of the date on which he applied.

[14] On October 19, 2016, the Commission sent a written submission to the Tribunal (Exhibits GD4-1 to GD4-9):

- a) The Commission submitted that subsection 30(2) of the Act provides that an indefinite disqualification is imposed if it is established that the claimant lost the employment by reason of his or her own misconduct. The Commission stated that, for the alleged action to constitute misconduct under section 30 of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. It stated that there must also have been a causal relationship between the misconduct and the dismissal (Exhibit GD4-5);
- b) The Commission stated that the employer had dismissed the Appellant because the bond of trust had been broken; the Appellant acknowledged that he had lied to his employer and to police. The Commission stated that the Claimant was facing charges for theft and obstructing the work of police. The Commission stated that the Claimant carried out these actions knowingly and that the Appellant knew or ought to have known that he was committing reprehensible acts (Exhibits GD4-5 and GD4-6);
- c) The Commission stated that the Appellant's actions go against the employer's policies and regulations (Exhibit GD4-6);
- d) The Commission submitted that the Appellant's actions constitute misconduct because they were committed in a deliberate, conscious, or intentional manner (Exhibit GD4-6).

ANALYSIS

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

[16] Subsection 30(1) of the Act stipulates 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: “[I]n order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance” (*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 is misconduct when “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” [*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII)].

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

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

[22] For behaviour to amount to misconduct under the Act, it is not necessary that there be wrongful intent. It is sufficient that the reprehensible act or omission complained of be “wilful,” that is, conscious, deliberate or intentional (*Caul*, 2006 FCA 251; *Pearson*, 2006 FCA 199; *Bellavance*, 2005 FCA 87; *Johnson*, 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85).

[23] 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).

[24] 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 [...].

[25] The Appellant worked as an ambulance technician for CAMBI for nearly a year. The Appellant’s representative stated that the Appellant was suspended from his duties on November 26, 2015, following events that occurred during a response at a client’s home. The Appellant was responding to an emergency call and had to pronounce a client’s death. After an investigation by the employer, the Appellant was dismissed on March 31, 2016 (Exhibit GD3-17).

[26] The employer stated to the Commission that the investigation revealed that the Appellant had not followed several steps of the rules and protocol during the response on November 17, 2015, and that the Appellant’s actions broke the bond of trust that is necessary between an employer and an employee. The investigation revealed that the Appellant had lied to the employer and to police. The Appellant was charged with theft and possession of cannabis, as well as obstructing the work of police (Exhibits GD3-18, GD3-27 to GD3-30, and GD3-32).

[27] Relying on the employer's statement, the Commission argues that the Appellant lost his job by reason of his own misconduct because his actions were conscious, deliberate, or intentional. The Appellant admitted that he had lied to his employer and to police. The Commission states that the Appellant is charged with theft and obstructing the work of police for, among other things, allegedly moving and trying to hide a Ziploc bag containing cannabis. The Commission contends that the Appellant carried out these actions knowingly and that he knew, or ought to have known, that his actions were reprehensible. According to the Commission, the Appellant's actions go against the employer's policies and regulations (Exhibits GD4-5 and GD4-6).

[28] The Appellant does not contest the events; he acknowledges that he made a mistake and that the employer-employee bond has been broken. However, he argues that he never committed a serious offence and that his actions do not constitute misconduct (Exhibit GD3-19).

[29] The Tribunal must determine whether the Appellant's behaviour, i.e. failing to follow the rules and protocol during an emergency response and lying to the employer and to police while he was performing his duties, constitutes misconduct within the meaning of the Act. The Commission has the burden of proof to demonstrate, on a balance of probabilities, that the claimant lost his employment by reason of his misconduct [*Canada (Attorney General) v. Larivée*, 2007 FCA 312 (CanLII)].

[30] The employer stated to the Commission that the Appellant had a protocol and rules to follow during responses. At the time of the response on November 17, 2015, the Appellant did not send a supplementary report, even though the events were irregular, and did not inform his supervisor of these irregularities. In addition, the Appellant did not ventilate the client, and pronounced the client's death before carrying out another step. Also, the Appellant searched the client's home and urinated on the premises, contrary to the applicable protocol and rules. Finally, during this response, the Appellant lied to police and, subsequently, lied to the employer (Exhibits GD3-15, GD3-27 to GD3-30).

[31] The Appellant's representative asserts that the employer provided several versions regarding the Appellant's dismissal and argues that the employer's representative's statements do not corroborate the reasons set out in the employer's letter of dismissal (Exhibits GD3-15, GD3-27 to GD3-30). The Tribunal notes that the Appellant acknowledged that he had failed to provide certain information to the employer and that he had changed his version of the facts (Exhibit GD3-34).

[32] The Tribunal analyzed the various statements in the Commission's file, as well as those made at the hearing, and is of the opinion that the Appellant was required to follow a protocol and rules during his responses and that he could expect, by failing to apply these rules and this protocol, to lose his job (Exhibits GD3-27 to GD3-30).

[33] The Tribunal finds that during the response on November 17, 2015, the Appellant failed to follow several established rules and protocols, and gives predominant weight to this evidence. As indicated in the letter of dismissal sent by the employer's representative to the Commission (Exhibits GD3-27 to GD3-30):

[translation]

On November 26, 2015, you were arrested at your home in relation to a response that you carried out on November 17, 2015 [...]. You and your co-worker [...] responded to a person in cardiopulmonary arrest. At that time, according to your different versions of the facts, you breached several procedures and protocols in effect at CAMBI. In addition, in relation to this response, charges of theft and possession of narcotics, as well as obstructing the work of police, were laid against you. [...].

You applied the MED-LEG.2 protocol without ventilating the patient as the protocol specifies. Next, you applied the death pronouncement protocol before contacting the UCCSPU [clinical coordination unit for pre-hospital emergency services]. You then starting searching the house, which is against response protocol. During your search, your team was alone in the deceased's house. [...]. You smelled the content of a Ziploc bag containing cannabis and moved it in order to hide it. [...]. Despite the fact that you were already on the phone, you said (to police) that it was actually a bag of pills. [...]. You got the bag that you had hidden [...] you handed it over to police and said, "here's your bag."

[...]. Although the events of November 17, 2015, were unusual, you did not report them to your supervisor or complete the supplementary report, as stipulated in the protocol.

On November 26, 2015 [...] you stated to police that you had hidden the bag [...] so you could go back to get it later.

On February 23, 2016, you were met with in the presence of a union representative. You stated that you had urinated on the response site, which is completely contrary to the applicable protocols.

[Emphasis ours]

[34] At the end of the letter, the employer indicates that it conducted an investigation into the events that occurred on November 17, 2015, and concludes that the Appellant's conduct was unprofessional and unethical, that the Appellant did not perform his duties in accordance with the applicable rules and protocol, and that he broke the law in performing his duties.

[35] The Appellant's representative refers the Tribunal to sections of the *Act respecting pre-hospital emergency services* and reiterates that at the time of the Appellant's dismissal, he had been charged with, but not convicted of, a crime. The Tribunal realizes this. The Tribunal points out that section 65 of that act states the following:

An ambulance technician shall provide the necessary care to a person whose condition requires pre-hospital emergency services in accordance with the clinical intervention protocols determined by the Minister.

[36] The Tribunal notes that for a behaviour to amount to misconduct under the Act, it is not necessary that there be a wrongful intent. It is sufficient that the reprehensible act or omission complained of be "wilful," that is, conscious, deliberate or intentional. The Appellant acknowledged to the Commission that he had made a mistake, but stated that he had not committed serious misconduct (Exhibit GD3-34). The Appellant also stated that he had committed a criminal act during work hours and that the employer had dismissed him when it [translation] "learned that he was involved in a criminal act" (Exhibit GD3-8). In *Tucker* (A-381-85), the Court found that the claimant may make mistakes that are not necessarily misconduct within the meaning of the Act. The Tribunal respectfully submits that lying and hiding information from the employer and from police during a response constitutes a deliberate and conscious act. The Appellant may not have reflected on it at the time, but he did not change his version of the facts until December 10, 2015—nearly a month later. The alleged acts during this response occurred on November 17, 2015, and the Appellant maintained his initial version of the facts at the time of his arrest on November 26, 2015 (*Caul*, 2006 FCA 251; *Pearson*,

2006 FCA 199; *Bellavance*, 2005 FCA 87; *Johnson*, 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85), (Exhibits GD3-27 to GD3-30).

[37] The Tribunal is of the opinion that the Appellant failed to follow several steps of the applicable protocol and rules, as shown by the employer's letter of dismissal. The Tribunal accepts the employer's version that the Appellant did not act with the integrity and professionalism required by his job and that he was dismissed because of his actions during the response on November 17, 2015. These actions went against the rules and protocol, and broke the bond of trust that is necessary between an employer and an employee (Exhibits GD3-27 to GD3-30).

[38] It is true that undesirable behaviour does not necessarily constitute misconduct within the meaning of the Act. However, for the behaviour in question to amount to misconduct under the Act, it is not necessary that there be wrongful intent. It is sufficient that the reprehensible act or omission complained of be "wilful", that is, conscious, deliberate, or intentional (*Caul*, 2006 FCA 251; *Pearson*, 2006 FCA 199; *Bellavance*, 2005 FCA 87; *Johnson*, 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85).

[39] First, the Tribunal finds that as an ambulance technician, the Appellant knew the protocol and the rules to apply and that he knew that he was supposed to apply them during the response on November 17, 2015. However, despite several irregularities during this response, the Appellant did not inform his supervisor or prepare a supplementary report (Exhibits GD3-27 to GD3-30). Next, in terms of the facts surrounding the bag of cannabis found at the response site, the Tribunal finds that the Appellant knew or ought to have known that by intentionally choosing to search the client's home and by hiding facts from his employer and from police, his behaviour was such as to hinder the bond of trust with his employer and that this act could lead to his dismissal [*Tucker*, A-381-85; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII)].

[40] Employees may make mistakes under pressure, but there is misconduct within the meaning of the Act when the employee's conduct evinces willful or wanton disregard of the employer's interests, as in deliberate violations, or disregard of standards of behaviour that the employer has a right to expect of its employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent. The Tribunal is of the opinion that by hiding information from the employer and from police, and by failing to follow the employer's established and expected protocol and standards during the response on November 17, 2015, the Appellant displayed conduct akin to misconduct under the Act (*Tucker*, A-381-85).

[41] The Tribunal heard the Appellant's representative's arguments to the effect that the employer's representative had not always given the same version to the Commission. Indeed, compliance with the rules and protocol during the intervention must be distinguished from the Appellant's criminal charges (Exhibits GD3-15, and GD3-27 to GD3-30). The letter of dismissal sent by the employer clearly states that the Appellant was dismissed because he failed to follow the rules and protocol in effect at the time of the response. In addition, this letter indicates that the Appellant's conduct broke the bond of trust between the employer and the employee (Exhibit GD3-34).

[42] The Tribunal notes that the Appellant's actions took place during a response required by the employer, while the Appellant was performing his duties. The Tribunal does not accept the Appellant's representative's assertion that the Appellant did not think before carrying out these actions. The investigation conducted by the employer shows, notably, that the Appellant intentionally decided to search the client's home, which is against the applicable protocol and rules. In doing so, the Appellant chose not to comply with the rules and protocol he was required to follow (Exhibits GD3-27 to GD3-30).

[43] The breaches during the response on November 17, 2015, for both failing to apply the steps of the protocol during a response and for lying to the employer and to police, also contributed to the breaking of the bond of trust between the employer and the employee.

[44] As an ambulance technician, the Appellant is required to act responsibly, and the Tribunal is of the view that by failing to follow the protocol and rules during the response and by lying to the employer and to police while performing his duties, the Appellant committed reprehensible acts. The Tribunal finds that the Appellant knew or ought to have known that these acts could lead to his dismissal. The Tribunal finds that as an ambulance technician, the Appellant knew the applicable rules and protocol and that by failing to apply them, he breached a material condition of his employment [*Canada (Attorney General) v. Brissette*, A-1342-92].

[45] Of course, the Tribunal heard the argument presented by the Appellant's representative that the charges of theft and possession of narcotics were ultimately dropped, but that the Appellant pleaded guilty to the charge of obstructing the work of police and obtained an absolute discharge (Exhibits GD7-6 and GD7-7). However, the Tribunal finds that even in the absence of criminal convictions, misconduct can be established [*Canada (Attorney General) v. Larivée*, 2007 FCA 312].

[46] The claimant's intentions must be taken into consideration when determining whether the act was wilful. Although the Appellant's representative submits that the Appellant did not think when carrying out this act, the evidence shows that the Appellant maintained this version for more than a month before making a different statement at the police station on December 10, 2015, and that he stated to the Commission that he wanted to devise a strategy to denounce his co-worker (Exhibit GD3-34). Based on this statement, along with the one the Appellant made to police on November 26, 2015, when he was arrested and he admitted to having hidden the bag containing cannabis so that he could go back and get it later, the Tribunal finds that the Appellant thought about his actions and that his act of lying to his employer and to police was wilful. The Tribunal finds that the Appellant's conduct was wilful or so reckless as to approach wilfulness (*Tucker*, A-381-85).

[47] But as the Appellant's representative pointed out, criminal charges or lying about a potential strategy to hide or take a bag of cannabis is one thing, and failing to follow the employer's protocol and rules during the response is another. However, the Appellant admitted that he had lied or hidden information (Exhibit GD3-34). And the Tribunal is of the view that it was the Appellant's actions breaching the rules and protocol to be applied during the response

on November 17, 2015, that contributed to breaking the bond of trust necessary between an employer and an employee (Exhibits GD3-27 to GD3-30).

[48] The Tribunal is of the opinion that by failing to follow several steps of the protocol and rules during that response, the Appellant displayed behaviour that was deliberate or so reckless as to approach wilfulness. The Appellant did not apply the rules and protocol in effect. For example, the Appellant did not ventilate the client, and he pronounced the client's death before carrying out another step. The Appellant searched the client's home. He urinated on the response site. The Appellant did not send a supplementary report (Exhibits GD3-15, GD3-34 and GD3-35) (*Tucker*, A-381-85).

[49] The Commission demonstrated that the Appellant's actions were wilful and deliberate. The evidence shows that the Appellant admitted that he had lied to the employer and to police at the time of a response on November 17, 2015. During this response, the Appellant failed to follow several steps of the applicable protocol and rules (Exhibits GD3-27 to GD3-30, and GD3-34).

[50] The Tribunal finds that the Appellant could have presumed that his actions, i.e. hiding information or lying to his employer and to police while performing his duties during a response and failing to follow the applicable rules and protocol, were such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility because he knew the employer's rules he was supposed to follow [*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 (CanLII)].

[51] Finally, the Court has stated that the Tribunal's role is not to determine whether the dismissal or penalty was justified (*Fakhari*, A-732-95). It must instead determine whether the claimant's action constituted misconduct under the Act (*Marion*, 2002 FCA 185). In this case, the Appellant admitted that he had lied and hidden information from the employer and from police (Exhibit GD3-34). And the evidence on file shows that the Appellant did not follow the applicable protocol and rules when he responded at the scene of an emergency (Exhibits GD3-27 to GD3-30). The Tribunal is of the view that the Appellant demonstrated behaviour that was "wilful or deliberate or so reckless as to approach wilfulness."

[52] The Tribunal finds that the disentitlement imposed on the Appellant because of his own misconduct under sections 29 and 30 of the Act is justified.

CONCLUSION

[53] Having weighed the evidence and the parties' arguments, the Tribunal finds that the Appellant lost his job by reason of his own misconduct, pursuant to sections 29 and 30 of the Act.

[54] The appeal is dismissed.

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.