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

Citation: *T. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 88

Tribunal File Number: GE-16-331

BETWEEN:

T. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Color Steels Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: February 28, 2017

DATE OF DECISION: June 16, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The hearing of this appeal proceeded by way of an in-person hearing in Toronto, Ontario on February 28, 2017. The Appellant attended the hearing with his representative, Eldon Hamid (Mr. Hamid).

The Appellant's former employer, Color Steels Inc. (Color Steels), was added as a party to the appeal, but did not attend the hearing. The Member of the Social Security Tribunal of Canada (the Member) waited 20 minutes beyond the scheduled time for the hearing, but no one representing Color Steels ever showed up. The Member then proceeded with the appeal in the absence of the Added Party in accordance with section 12 of the *Social Security Tribunal Regulations*. A Notice of Hearing was sent to the Added Party by Priority Post on November 24, 2016 to the address provided by Color Steels. The tracking information obtained from Canada Post indicates that the Notice of Hearing was delivered to that address on December 5, 2016 and includes a signature by "N. G." on delivery. Paragraph 19(1)(c) of the *Social Security Tribunal Regulations* deems the Notice of Hearing to have been communicated to the Added Party on the date it was delivered to its last known address, namely December 5, 2016. The Member is satisfied that the Added Party received the Notice of Hearing.

INTRODUCTION

[1] The Appellant made an initial application for regular employment insurance benefits (EI benefits) on August 25, 2015. The Respondent, the Canada Employment Insurance Commission (Commission), investigated the reason for separation from employment and determined that the Appellant lost his job with Color Steels on July 1, 2015 by reason of his own misconduct. On September 16, 2015, the Commission advised the Appellant that he would not be paid EI benefits because he lost his job as a result of his own misconduct.

[2] On October 7, 2015, the Appellant requested the Commission reconsider its decision, stating that the behaviour in question was not wilful, but negligent, and therefore did not constitute misconduct. Following an investigation, the Commission maintained its original

decision that the Appellant was disqualified from receipt of EI benefits because he lost his job due to his own misconduct.

[3] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) on January 25, 2016. Upon review of the appeal, the Commission decided to concede the issue before the Tribunal on the basis that the Appellant had provided a reasonable explanation for his behaviour and could not have known that his actions would lead to his termination. However, as the appeal was still before the Tribunal to decide, the employer was added as a party to the appeal because the Member determined that Color Steels had a direct interest in the appeal.

[4] The hearing was held by way of an in-person hearing for the following reasons:

a) The fact that the credibility may be a prevailing issue;

b) The fact that more than one party would be in attendance;

c) The fact that multiple participants, such as a witness, may be present; and

d) The fact that the Appellant or other parties are represented.

ISSUE

[5] Whether the Appellant is disqualified from receipt of EI benefits because he lost his employment at Color Steels as a result of his own misconduct.

EVIDENCE

[6] On August 25, 2015, the Appellant made an initial application for EI benefits (GD3-3 to GD3-13). On his application, the Appellant indicated he worked at Color Steels from June 5, 2000 to July 1, 2015, and gave his reason for separation from employment as “Dismissed or Suspended” (GD3-6). The Appellant completed a “Questionnaire: Fired (Dismissed)” as part of his application (GD3-7 to GD3-8), in which he indicated his employer had accused him of purposely blocking the lock of an access door to the warehouse prior to the warehouse being shut down for Canada Day. The Appellant stated that the employer did not have a policy about

this type of conduct, and further stated that there was no other occurrence of this type of conduct in the 6 months prior to his dismissal. The Appellant stated:

> "I explained to my employer that I had used the door to attend to my car and did not remember to lock it. My supervisor found the door unlocked during working hours and he locked it thereafter." (GD3-8)

[7] A Record of Employment (ROE) was issued by the employer on July 2, 2015 (GD3-14), which stated that the Appellant had worked as a Line Operator at Color Steels from June 5, 2000 until July 1, 2015, at which point he was dismissed.

[8] An agent of the Commission contacted Color Steel about the reason the Appellant was no longer working there. On September 16, 2015, the agent spoke with D. C., Manager of Color Steel (see Supplementary Record of Claim at GD3-16), who stated that the Appellant was dismissed because he was found to have placed a shim in one of the warehouse doors, propping it open so that he could get back into the warehouse after everyone else had left. The agent made the following notation about the information provided by the employer:

> "J. M., the supervisor is the last one to leave at the end of the shift.
>
> He was starting to go around and do all of his closing duties, so ensuring that all of the doors were locked before shutting down for the night.
>
> He found one of the doors had a piece of cardboard shoved in it, so that it would not latch and lock.
>
> The employer had had issues with doors being propped open in the past, and had suspected that it was the claimant that was doing it.
>
> The claimant was spoken to about the incident on his next shift. There were 3 other managers present during the conversation.
>
> The claimant admitted that he had put the piece of cardboard in the door.
>
> He said that the reason that he had blocked the door's lock was because he was planning on returning after his shift and filling his tires with air using the compressor.
>
> D. C. said that the workplace is a warehouse with dangerous machinery, and no one is allowed to come back to the worksite after hours and unescorted.

> The claimant was not a manager or a key holder, so he did not have permission to be on site after hours.
>
> D. C. said that J. M. is the last one allowed at the warehouse, as he has to go around and turn off the lights, make sure that all of the equipment is off and all the doors are secured.
>
> J. M. noticed that the door had been propped open, and waited to see if the claimant was going to leave it that way.
>
> He did leave it unlocked, and left at the end of his shift.
>
> When the managers spoke to the claimant on his next shift about it,
>
> It is an industry policy that there be at least 2 people at the warehouse at all times when any machinery is being used.
>
> So if the claimant was planning on coming back after hours, which he did not have permission to do, he was breaching the policy that requires there to be 2 trained employees on site at all time.
>
> D. C. said that if there is an issue with the machinery, and someone gets caught or injured, someone has to be there to provide help.
>
> Furthermore, the company's insurance does not allow anyone to be on site after hours.
>
> There are no written policies about these rules, it was just a common sense policy for everyone's safety.
>
> D. C. said that even the claimant's reasons behind why he had disabled the warehouse's locks did not make sense, since the compressor would have been off, so he would not have been able to just sneak back in to use it to fill up his car's tires.
>
> He states that the only reason that he would have been there was "to take something"." (GD3-16)

[9] The agent also spoke with the Appellant on September 16, 2015 (see Supplementary Record of Claim at GD3-17), and made the following notation about the explanation provided by the Appellant:

> "The claimant states that he used the door in question to come in for work, and when he leaves.
>
> It was a mistake and he left it unlocked when he was leaving.
>
> The claimant said that the door normally locked behind him, but this time it did not.

> The claimant said that this happens a lot, since there is usually snow that gets in the way of the door latching.
>
> Asked the claimant if the door simply did not close, or if he had propped it open purposely.
>
> The claimant said that he propped it open.
>
> He said that he had propped the door open so that he could go out to his car, put air in the tires then close the door.
>
> He said that he propped the door open so that he could put the compressor hose back in the warehouse.
>
> He just forgot to take the piece out of the door so that it would close. Asked the claimant if he had ended up putting air in his tires.
>
> He did not at that time, since he was still on shift, he was going to do it later.
>
> Verified that the claimant was planning on returning to the worksite, after hours, via the door with the disabled lock, to use the company's equipment.
>
> The claimant confirms that is the case.
>
> Asked if that was something that he had been approved to do. The claimant did not have permission to come back to the site.
>
> Advised that since he had wilfully breached his employer's policy about returning to the worksite after his shift without permission.
>
> Advised that he would not be entitled to receive Employment Insurance benefits, since he did not lose his position through no fault of his own." (GD3-17)

[10] By letter dated September 16, 2015 (GD3-18), the Appellant was advised that he would not be paid EI benefits because he lost his employment at Color Steels on July 1, 2015 as a result of his own misconduct.

[11] On October 7, 2015, the Appellant made a Request for Reconsideration (GD3-19 to GD3-26), stating:

> "On June 30, 2015 I inadvertently blocked an access door to the warehouse for roughly seven (7) minutes to put air in my car wheels. The door was left unlocked from 3:15 pm

> to 3:22 pm when my supervisor, J. M. discovered the door unblocked and immediately removed the block and closed the door.
>
> I admitted to blocking the door but this was not willful, it was just being negligent (forgetfulness) on my part, not gross negligence and certainly not misconduct which one would describe as willful or wanton disregard for the employer's interest. I think this incident did not call for my dismissal, I was never previously warned or reprimand *(sic)* for an infraction of this nature. However, Color Steels Ltd. justified my dismissal for Misconduct by grouping other contested violations with this incident." (GD3-21).

The Appellant referred to two Board of Referees cases (GD3-21 to GD3-22, with copies of the full decisions provided by the Commission at GD3-27 to GD3-31), and included the following additional documents with his Request for Reconsideration:

a) Letter dated July 29, 2015 from the Appellant to Color Steels, wherein the Appellant states that he is "demanding eight (8) weeks pay in lieu of notice" for termination pay pursuant to the *Employment Standards Act* (GD3-23).

b) Letter dated August 19, 2015 from Color Steels to the Appellant, wherein the employer stated that the Appellant's intentional blocking of the lock of the warehouse on June 30, 2015 constituted willful misconduct under the *Employment Standards Act* and, therefore, the employer was not obligated to provide the Appellant with severance or termination pay (GD3-24).

c) Termination letter, dated July 2, 2015, which is addressed to the Appellant and signed by four (4) representatives of the employer, and reads as follows:

> "After the incident that happened Tuesday 30th June 2015, where you purposely blocked the lock on an access door to the warehouse prior to the warehouse being shut for Canada Day, and taking into consideration the numerous written and verbal warnings that you have been given in the past, we have no option left but to dismiss you.
>
> Any pay owing to you will be calculated and forwarded to you along with the relevant paperwork." (GD3-25).

d) A hand-written note dated July 2, 2015, on which the Appellant wrote:

> "I block the dore *(sic)* on the 29/06/2015 due to I want ot *(sic)* put some air in my car weels *(sic)* on *(sic)* for get *(sic)* to remove the block 3:15 Left 3:22" (GD3-26)

[12] A different agent of the Commission contacted the Appellant about his Request for Reconsideration (see Supplementary Record of Claim at GD3-32), and noted the Appellant agreed that he was dismissed because he had propped open a door, but stated that it was a mistake and was not made wilfully. The Appellant further stated that it was the first time he made this mistake and other people in the warehouse block the door open too; and that he had no warnings in the past except for something else that happened but not about leaving doors open. The agent noted the Appellant gave the following version of events:

> "The client stated that he propped the door open with small cardboard because the door automatically closed. The client was advised that he had told a previous agent that it was his intention to come back after hours to fill his car tires with air. The client stated that the agent misunderstood and she told him that he was trying to go back in. The client stated that that's not what happened and he was going to fill his tires with air during his shift. The client stated that he didn't fill his car tires with air because the compressor was off. The client stated that his supervisor had found the door blocked after he left and unblocked it. The client was asked if he saw the supervisor unblock it and if he was still there. The client stated that he had already left and found out the next day when he was told by his supervisor."

[13] The agent also spoke with D. C., Manager of Color Steel (see Supplementary Record of Claim at GD3-34), who reiterated that the Appellant was dismissed because he propped the door open with cardboard. The agent noted the employer gave the following version of events:

> "Mr. D. C. stated that the main thing is that when they lock up at night and go around it is the supervisor that checks the doors. Mr. D. C. stated that the client's supervisor saw the client was hanging around the door that was shimmied open after his shift. Mr. D. C. stated that when they asked the client about the door he admitted that he had propped it open and was claiming that he wanted to pump up his tires. Mr. D. C. stated that the compressor was off so he doesn't know why the client would be trying to pump up his tires. Mr. D. C. stated that he doesn't even know if the client knows how to turn on the compressor since there are a lot of electrical boxes.
>
> Mr. D. C. stated that the client's shift ends at 3:15pm and he was seen at the building at 3:30pm or 3:35pm. Mr. D. C. stated that if the client was going to come back to fill up his tires then he wouldn't have had to prop a door open. Mr. D. C. stated that the front office is open longer than they are and he could have gone into the office and asked if he could pump up his tires. Mr. D. C. stated that the client had no right to leave the door open and must have been going back for other intentions.
>
> Mr. D. C. stated that the door the client left open is not near the air compressor hose and if he wanted to do that he would have gone in the garage door which is on the other side of the building.

> Mr. D. C. stated that there was a meeting the next day with the client where they asked him what happened and he admitted that he left the door open. At the meeting was the Vice President of Operation, the owner and Mr. D. C. stated that the client told them that he was going to come in and blow up his tire. Mr. D. C. was advised that the client has stated that it was his intention to do this during work and that he accidentally left the door propped open. Mr. D. C. stated that the client had told them that he was planning on coming back after hours to blow up his car tires.
>
> Mr. D. C. stated that the other warnings the client had previously was about arguing with people. Mr. D. C. stated that the client blocking the door open was the last straw. Mr. D. C. stated that it is an industry standard that there are two people in the building at the time and they are an industrial complex. Mr. D. C. stated that if you were wandering around and were injured no body *(sic)* would hear you."

[14] The Appellant subsequently denied the employer's version of events (see Supplementary Record of Claim at GD3-35), and stated that the door he propped open was on the same side of the building as the hose, which was on the inside and he would have to pass it out. The Appellant further stated that he didn't take the hose out, but went in and forgot to close the door, just before the end of his shift.

[15] By letter dated November 5, 2015, the Appellant was advised that the Commission's original decision that he lost his employment at Color Steels due to his own misconduct was maintained (GD3-36 to GD3-37).

[16] In his appeal materials (GD2), the Appellant stated that he "inadvertently blocked an access door to the warehouse for roughly seven (7) minutes to put air in my car wheels." The Appellant admitted to blocking the door, but stated it was "not willful, it was just being negligent (forgetfulness) on my part" (GD2-6). The Appellant stated:

> "I think this incident did not call for my dismissal, I was never previously warned or reprimand for an infraction of this nature. However, Color Steels Ltd. justified my dismissal for Misconduct by grouping other contested violations with this incident." (GD2-6)

[17] The Appellant included a copies of seven (7) Employee Warning Reports issued to him by Color Steels ***prior*** to the one issued in connection with the termination of his employment on July 2, 2015:

a) Employee Warning Report dated **April 27, 2015** for violation of company policies or procedures and violation of safety rules for working without safety shoes (GD2-13). The Appellant received a warning and suspension, and was advised that failure to improve would result in dismissal. The Appellant checked off the box for "I agree with Employer's Statement" and signed an acknowledgement of receipt of the warning.

b) Employee Warning Report dated **March 23, 2015** for substandard work quality (GD2-14). The Employer's statement reads as follows:

> "Incorrect material processed (minus forty), Imperial Sheets scratches and constant use of personal cell phone during working hours and while operating machines or equipments *(sic)*."

The Employee's Statement reads as follows:

> "I refused to sign because no micrometer was provided to be used on embossed material."

The Appellant received a suspension and was advised that failure to improve would result in dismissal.

c) Memo dated **September 5, 2012** re: verbal warning for substandard work quality (GD2-15)

d) Employee Warning Report dated **December 23, 2010** for insubordination and threatening or engaging in violence (GD2-16).

e) Employee Warning Report dated **October 26, 2010** for threatening or engaging in violence (GD2-17).

f) Employee Warning Report dated **February 28, 2005** for threatening or engaging in violence and other (GD2-18).

g) Employee Warning Report dated **July 16, 2002** for attendance and unauthorized absence from work area (GD2-19).

[18] In supplementary materials filed by the Appellant (GD6), he stated:

> "My actions do not meet the legal threshold for dismissal moreover for misconduct. It is noting *(sic)* strange to use the access door to the warehouse periodically to air up car wheels. It has never been a problem before, and I was never advised nor warned that the use is prohibited or restricted. Color Steel Inc. has extracted from my personal file of 15 years all previous UNRELATED incidents to make it appear a justifiable dismissal." (GD6-2)

[19] The employer filed evidence in response to the Appellant's appeal (at GD9), including the following documents:

a) A summary of Appellant's employment with Color Steels (GD9-2), including the Appellant's discipline history (Note: he received a verbal warning in 2015 for "Aluminum scrap being taken") and the following statement for "Circumstances for Dismissal":

> "Employee had physically been seen on two occasions, blocking the locks on exterior doors after a shift had finished. Prior to being seen doing it, there were countless occasions when the Supervisor carrying out his door checks at the end of a shift, found locks that had been blocked so that the door looked locked but could be pulled open later. The employee was confronted with the last sighting and asked why he had blocked the lock. He had no excuse and was asked to make a written statement. He returned with a statement which was implausible, and when he didn't offer anything else, was dismissed for willful negligence. He was given written notice with witnesses present and was escorted out of the building. As a sidenote, as he was escorted out he made a threat to his manager, which was subsequently reported to the police." (GD9-2)

b) The Appellant's July 2, 2015 incident note (GD9-3), with the following notation thereon:

> "Attached is a copy of Mr. T. L.'s statement as to why he blocked the lock of a personnel door. It was found implausible due to the fact that he had no permission from his supervisor to re-enter the warehouse after it had been locked and the air compressors would have been turned off so there would have been no air in the lines. The blocking was carried out on Tuesday 30th June 2015. The company was shut the following day for the Canada Day public holiday." (GD9-3)

c) The July 2, 2015 termination letter issued to the Appellant (GD9-4)

d) A written statement from one of the Appellant's co-workers describing threatening comments made by the Appellant as he was being escorted from the building on July 2, 2015 (GD9-5).

e) A copy of the April 15, 2016 covering letter and Reasons for Decision issued by the Employment Standards of Ontario provincial claims centre regarding the Appellant's claim for termination pay and severance pay (GD9-7 to GD9-9). The investigating officer concluded that no contraventions were found with respect to the Appellant's termination and, as such, no orders were issued. The employer advised that the Appellant had appealed this decision to the Ontario Labour Relations Board, and that a hearing was scheduled for August 2016 (see Notice at GD9-10).

At the Hearing

[20] The Appellant testified as follows:

a) At 3:10pm on June 30, 2015, he was going to use the compressor to "pump up my car", and he put "a small piece of cardboard in the door" to prop it open so he could lead the compressor hose outside. His car was parked outside, beside the door.

b) The door he propped open was an exterior "exit only" door. It was "a heavy steel door, with a push bar".

c) At 3:15pm, his shift was over. He "went in and saw the compressor was off".

d) "Just a few minutes later", he left via the door he had propped open, but "forgot to remove the block from the door".

e) He was not in a hurry on June 30th, it was "just a regular day and my car was parked right there. I got in and drove off".

f) He then went home. "The next day", his supervisor talked to him about it.

g) His shift supervisor, "J. M.", was the person responsible for checking that this door was locked. At the time J. M. discovered the door "jammed open", only 5-7 minutes had

elapsed. The supervisor told him that he then unblocked the door and made sure it was locked.

h) The Appellant's regular practice was to enter the workplace in the morning via "the main door", but he left from this exterior door "every day for at least 6 years" and it automatically closed behind him.

i) "When I left normally I could hear the door close behind me, but I didn't hear it close when I left that day."

j) This was the first time he had ever tried to fill his tires at work.

k) It was common practice for employees at the Color Steels plant to use the compressor to pump up their tires. This was mostly done on breaks or at the end of a shift.

l) He did not have permission to return after hours to use the hose to fill his tires.

m) He had never blocked the door lock before.

n) There is no written company policy regarding locking doors or setting out the consequences for unlocking doors.

[21] When asked what he thought would happen as a result of leaving the door propped open when he left for the day, the Appellant responded:

> "Probably a warning or something. Not any big consequences. I didn't really think it would lead to a termination."

The Appellant further stated that he "accepts" the employer's position that it was "a serious breach of security", and acknowledged that, by his actions, he created an access point from outside that would allow entry to the industrial plant, which the employer didn't know about it.

[22] When asked about the verbal warning he received in 2015 for taking aluminum scrap from the workplace, the Appellant stated that he did "not recall" receiving a warning for this.

SUBMISSIONS

[23] The Appellant submitted that the employer erred in considering his actions "gross negligence" and in dismissing him, when his conduct was "just a negligent act" and was neither willful nor reckless. As such, the conduct in question does not meet the threshold to be considered misconduct for purposes of the *Employment Insurance Act* (EI Act).

[24] The Appellant's representative, Mr. Hamid, cited the decision in *CUB 67063* (reprinted at GD3-30) as "a similar case" where there was "no evidence of wilful misconduct – it's just negligence". Mr. Hamid submitted that the Appellant's "act was inadvertent, a simple mistake such as people make from time to time", and further submitted that the door was left open for "just a short period of time and the security of the company wasn't really exposed to endangerment".

[25] The Commission submitted that it was conceding the issue on the appeal because:

a) The Appellant has "provided a reasonable explanation for his motivation for leaving the door open: to allow him to fill his tires using the compressor", and that simple negligence does not support the finding of a reckless, deliberate or wilful act.

b) As there were no written policies with respect to leaving the door unlocked, the Appellant could not have known that these actions would lead to his termination.

c) The Appellant's prior disciplinary warnings were unrelated to the specific issue at hand, namely failing to keep the door locked or wedging it to prevent it from locking, and that the Appellant was not dismissed for these reasons.

ANALYSIS

[26] The relevant legislative provisions are reproduced in the Annex to this decision.

[27] Section 30 of the EI Act disqualifies a claimant from receiving EI benefits if the claimant has lost their employment as a result of misconduct.

[28] The onus is on the Commission to show that the claimant, on the balance of probabilities, lost his employment due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[29] In the present case, the Commission has now decided to concede the issue before the Tribunal. However, the Tribunal is not automatically required to allow an appeal where there has been a concession by the Commission. The Tribunal has a role to play once an appeal is filed, namely to take a fresh look at all of the evidence and submissions, and to make a decision that is fair, unbiased, and in accordance with the EI Act and associated legislation. This role is not negated by virtue of a concession from the Commission. Indeed, this role is critically important where, as in the present case, an employer provides additional evidence after the Commission decides to concede the appeal. In the present case, Color Steels filed further documentary evidence (at GD9 – and as described in paragraph 19 above) after the Commission filed its concession. The Tribunal will, therefore, proceed to consider this appeal as per its role, and will weigh the concession accordingly.

[30] In order to prove misconduct, it must be shown that the employee behaved in a way other than he should have and that he did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be demonstrated that the employee 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: *Lassonde A-213-09*, *Mishibinijima A-85-06*, *Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the employee's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

What is the conduct that led to the Appellant's dismissal?

[31] It is undisputed that the Appellant lost his job because he wedged open an exterior, exit-only door at the Color Steels warehouse and left through that door at the end of his shift without removing the block, thereby leaving the door open and unlocked behind him prior to the warehouse being shut down for Canada Day. There is an issue as to whether the Appellant intended to return to the premises after hours to fill the tires of his car using a compressor on site (as he initially told the employer and the Commission), or whether the Appellant

inadvertently left the door open when he left at the end of his shift after discovering the compressor was off (as he subsequently told the Commission after he was disqualified from EI benefits) or whether he intended to return to the premises after hours for some other undisclosed reason (as the employer has speculated). The Appellant's supervisor discovered that the door was open and removed the wedge, thereby preventing re-entry by the Appellant or anyone else. However, it was the Appellant's undisputed conduct in purposely blocking the lock of the warehouse door and then leaving without removing the wedge (such that the door remained wedged open and unlocked behind him prior to the warehouse being shut down for Canada Day) that led to his dismissal from employment at Color Steels. This was because the employer believed the Appellant's conduct was done with the intention of re-entering the warehouse after everyone else had left without the employer knowing, which the Appellant was not authorized to do. However, the Appellant's intentions will be considered below, as this factor goes to the question of whether the conduct was misconduct.

[32] Tribunal therefore finds that the conduct that caused the Appellant to lose his job on July 2, 2015 was his act of purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block on the lock, thereby leaving the door open and unlocked behind him prior to the warehouse being shut down for Canada Day.

Does that conduct constitute "misconduct" within the meaning of the EI Act?

[33] The Tribunal notes that employer's conduct is not the issue in this appeal. The Federal Court of Appeal has definitively held that the Tribunal's role is not to determine whether a dismissal was justified or the appropriate sanction, nor whether dismissal is too severe of a penalty in the circumstances: *Caul 2006 FCA 251, Secours A-352-94, Namaro A-834-82*. If the Appellant believes he was wrongfully dismissed from his employment at Color Steels, he is free to pursue whatever remedies he believes he may have in connection with his dismissal.

[34] Rather, having found that the Appellant purposely wedged open an exterior, exit-only door at the Color Steels plant and left through that door at the end of his shift without removing the block on the lock, thereby leaving the door open and unlocked behind him prior to the

warehouse being shut down for Canada Day, the Tribunal must now determine if this conduct is misconduct for purposes of the EI Act (*McNamara 2007 FCA 107; Fleming 2006 FCA 16*).

[35] As stated above, it is necessary for the Tribunal to determine the Appellant's intentions with respect to the conduct.

[36] The Tribunal first considered the Appellant's explanations for the conduct. For the reasons set out in paragraphs 36 to 41 below, the Tribunal finds that the Appellant's explanations are neither reasonable nor credible.

[37] The Appellant has given different versions of the incident.

Version 1:

In his application for EI benefits, the Appellant stated that the employer claimed he had purposely blocked the lock of an access door to the warehouse prior to the warehouse being shut down for Canada Day. His explanation was:

> "I had used the door to attend to my car and did not remember to lock it." (GD3-8)

Employer's first statement:

An agent of the Commission spoke with the employer about why the Appellant was dismissed. The employer told the agent that the Appellant's supervisor found the door with a piece of cardboard shoved in it so that it would not latch and lock, and that this supervisor saw the Appellant leave at the end of his shift with the door unlocked. The supervisor then removed the block and locked the door. The Appellant was confronted and admitted he had put the piece of cardboard in the door. The Appellant told the employer that he blocked the door's lock because he was planning on returning after his shift and filling his tires with air using the compressor. The Appellant did not have permission to be on site after hours.

Version 2:

The agent then spoke with the Appellant, who at the start of the interview told the Commission's agent that he used the door in question to come in for work and when he leaves. The Appellant stated that the door normally locked behind him, but this time it did not, and that he made a mistake and left it unlocked when he was leaving. The Appellant further stated that this happens a lot, since there is usually snow that gets in the way of the door latching (GD3-17).

The Tribunal notes that the incident occurred on June 30, 2016 and that it is unlikely there would have been any snow at the time.

Version 3:

As the Commission's agent had already spoken to the employer (see Employer's Version 1 above and GD3-16), the agent then asked the Appellant directly if the door simply did not close, or if he had propped it open purposely. Only when prompted by this question did the Appellant admit that he had propped it open (GD3-17). The Appellant then went on to say that he had propped the door open so that he could go out to his car, put air in the tires and then close the door, and that he had propped the door open so he could put the compressor hose back in the warehouse. According to the Appellant, he just forgot to take the piece out of the door so that it would close.

When asked by the agent if he had put air in his tires, the Appellant said he did not at that time, since he was still on shift, but he was going to do it later. The agent deliberately verified with the Appellant that he was planning to return to the worksite after hours via the door with the disabled lock to use the company's equipment (GD3-17). The Appellant also confirmed that he did not have permission to come back to the site (GD3-17).

The Tribunal notes that, at this point in time, the Appellant's version of events is consistent with the employer's version of events.

Version 4:

After being told by the agent that he had wilfully breached the employer's policy about returning to the worksite after his shift without permission, and that he would not be entitled to EI benefits as a result (see GD3-17 and GD3-18), the Appellant stated on his Request for Reconsideration that he had "inadvertently blocked an access door to the warehouse for 7 minutes to put air in my car wheels".

Version 5:

A different agent of the Commission spoke with the Appellant about his request for reconsideration (see GD3-22). In his interview with this agent, the Appellant denied he had told the prior agent that it was his intention to come back after hours to fill his car tires with air. The Appellant now said he was going to fill his tires with air during his shift, but that he was unable to do so because the compressor was turned off.

Employer's second statement:

When the agent handling the Appellant's request for reconsideration contacted the employer, the employer gave some additional details about the incident, but reiterated that, when confronted by the employer, the Appellant advised that he was planning to come back after hours to blow up his car tires.

The employer further stated that the compressor was off so the employer didn't know why the Appellant would be trying to pump up his tires; that the employer didn't know if the Appellant even knew how to turn on the compressor; that the door the Appellant left open was not near the air compressor hose; that if the Appellant wanted to put air in his tires, he would have gone to

the garage door which is on the other side of the building; and that the Appellant had no right to leave the door open, but could have gone into the front office and asked if he could pump up his tires. The employer speculated that the Appellant must have intended to go back for other intentions.

Version 6:

In a further conversation with the agent conducting the reconsideration, the Appellant denied the employer's version of events and stated that the door he propped open was on the same side of the building as the hose, which was on the inside and he would have had to pass out to his car. But he didn't take the hose out; he went in and forgot to close the door when he left at the end of his shift (GD3-34).

Version 7:

In his appeal materials, the Appellant stated that it was not unusual to use the access door to the warehouse periodically to put air in tires, and that it was never a problem before and he was never advised nor warned that it was prohibited or restricted (GD6-2).

Version 8: Testimony at the Hearing

The Appellant testified that the June 30th incident was the first time he had ever tried to fill his tires at work and he had never blocked the door lock before.

The Appellant stated that he propped open the door so he could lead the compressor hose outside to where his car was parked, but that he went in and saw the compressor was off, and then left only a few minutes later but forgot to remove the block from the door.

[38] As outlined in paragraph 36 above, the Appellant's version of events changed significantly after he was disqualified from receipt of benefits, and further evolved thereafter to include details about the location of the compressor hose and discovering that the compressor was off.

[39] By contrast, the employer has been straightforward, consistent and credible: the Appellant was discovered to have purposely wedged open the warehouse door and to have left through that door without unblocking the lock at the end of his shift on June 30, 2015 – prior to the warehouse being closed for Canada Day. When confronted, the Appellant told the employer that he intended to return to the warehouse after hours to fill his tires with the compressor on site. The Tribunal notes the Appellant confirmed that this was his intention in his initial telephone interview with the Commission, and verified the employer's statement that he was

not authorized to do this. The Tribunal further notes that the employer's version of events and the Appellant's version of events were virtually identical up until the Appellant was disqualified from receipt of EI benefits.

[40] The Tribunal gives greater weight to the Appellant's initial, spontaneous statement that the reason he wedged the door open was because he intended to return to the warehouse after hours and use the employer's equipment to fill his tires, and finds this statement to be more credible than subsequent statements made after he was notified that he was disqualified from receipt of EI benefits. The Tribunal is guided by the Federal Court of Appeal decision in *Bellefleur v. Canada (AG), 2008 FCA 13*, which held that more weight is to be given to initial, spontaneous statements rather than to subsequent statements made following an unfavourable decision from the Commission.

[41] The Tribunal is also troubled by the Appellant's statement that he "inadvertently blocked an access door to the warehouse for roughly seven (7) minutes to put air in my tires" (see Request for Reconsideration at GD3-21). The act of taking a piece of cardboard and wedging it in a heavy, steel door to prevent it from locking is a deliberate, purposeful act – not an inadvertent act. The Tribunal finds that the Appellant's conduct was done purposely.

[42] Furthermore, the sequence of events and the timing involved do not support the Appellant's testimony that he simply forgot to remove the wedge from the door. The Appellant repeatedly stated that the door was propped open for only 5-7 minutes. This means that it took the Appellant a mere 5-7 minutes to purposely configure a wedge of cardboard, jam it in to block the lock on the door, walk to the compressor to get the hose, discover it was off, walk back to the door he had just propped open and leave through that door. The Tribunal finds it is not plausible that, in the span of 5-7 minutes of concerted activity involving the door, the Appellant forgot he had wedged it open and needed to remove the block on the lock before leaving. If the whole point of the conduct was to jam the door open, go and get the compressor hose, drag it over and fill his tires, then when he very quickly found out that he couldn't fill his tires because the compressor was off, the Appellant could easily have unblocked the lock before he left. Additionally, if he had never blocked the door before and went to the trouble of doing it for the first time that day, and the total time elapsed between checking the compressor and

leaving was mere minutes, the Appellant surely would not have inadvertently forgotten to remove the block on his way out. The Tribunal finds it is far more likely that the Appellant intended to return at a later time and enter the warehouse through the door he had purposely left wedged open. Given that it is undisputed that the Appellant was not authorized to be unescorted on site after hours, the Tribunal also finds that the Appellant clearly intended to return to the warehouse without the employer's knowledge.

[43] For the reasons in paragraphs 37 to 42 above, the Tribunal finds that the Appellant's conduct of purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block on the lock, thereby leaving the door open and unlocked behind him prior to the warehouse being shut down for Canada Day – was done with the intention of returning to the warehouse after hours without the employer knowing and using the employer's equipment on site, namely the compressor to fill his tires.

[44] Having made this finding regarding the intention behind the Appellant's conduct, the Tribunal then considered the employer's evidence regarding the safety issues raised by the Appellant's conduct.

[45] The employer made the following statements at GD3-16:

- The workplace is a warehouse with dangerous machinery, and no one is allowed to come back to the worksite after hours unescorted;
- It is an industrial policy that there be at least 2 people at the warehouse at all times when any machinery is being used;
- If there is an issue with the machinery and someone gets caught or injured, someone has to be there to provide help;
- The company's insurance does not allow unauthorized individuals to be on site after hours, and the Appellant was not a manager or an authorized key-holder or otherwise permitted to be on site after hours;

- There are no written policies about these rules, they are just a common sense policy for everyone's safety.

[46] The employer made the following statements at GD3-34:

- The compressor was off at the time of the incident, and it was unclear whether the Appellant even knew how to turn the compressor on, since there are a lot of electrical boxes associated with it.

- Color Steels workplace is an industrial complex.

- It is an industry standard that there are to be two (2) people in the building at any time.

  Otherwise, if you are wandering around and were injured, no one would hear you.

- The blocking was carried out on Tuesday, June 30, 2015. The company was shut the following day for the Canada Day public holiday.

[47] The explanation provided to the employer on July 2, 2015, namely that the Appellant blocked the warehouse door's lock because he was planning to return after his shift and fill his tires with air using the compressor on site, was a breach of the employer's workplace safety policy that requires there to be two (2) trained employees on site at all times. The Tribunal notes that an unauthorized entrance into the Color Steels warehouse after a shift is over would also be considered trespassing.

[48] The Tribunal gives significant weight to the credible and very sensible statements by the employer regarding the importance of this safety policy. While it is true that Color Steels did not have a written policy explicitly stating that an employee is not permitted to shim open an exterior access door in order to prevent it from locking after the employee leaves the location, the Tribunal finds that such a prohibition is not something that needs to be written down for it to be considered a workplace policy. Maintaining the safety and security of the workplace premises is a basic requirement and central to an employee's duties and responsibilities. In the present case, the Appellant had a duty to maintain the integrity of workplace security, both for the safety of all employees and to prevent theft from the warehouse. This duty included ensuring that the door was locked when he left. The Tribunal finds that the Appellant's conduct

in purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block, thereby leaving the door open and unlocked behind him so that he could re-enter the premises unescorted after hours, was a violation of a fundamental workplace safety policy.

[49] The Appellant submits that his conduct lacked the element of wilfulness required to be considered misconduct for purposes of the EI Act. The Tribunal notes that it is not necessary for there to be wrongful intent for behavior to amount to misconduct under the EI Act. The Tribunal further notes that the Federal Court of Appeal has held that violation of a workplace policy can constitute misconduct (*Vo 2013 CAF 235*), and that such behavior can be "misconduct" within the meaning of the EI Act if the conduct is reckless and shows a lack of concern with respect to the employer (*Parsons 2005 FCA 248; Murray A-245-96*). Indeed, the Federal Court of Appeal has specifically held that recklessness is present where a claimant fails to take precautions and follow the safety rules established by the employer (*Canada (AG) v. Hallee, 2008 FCA 159*).

[50] While the Tribunal agrees that something more than forgetfulness is required for a finding of misconduct, the Tribunal finds that the Appellant's act was not an inadvertent memory lapse but was so reckless as to be wilful. The Tribunal further finds that, given the potential for injury to himself (or anyone else who may have discovered the unlocked door and entered the premises) and for damage to the equipment in the warehouse, not to mention the possibility of theft in the event someone else discovered the unlocked door and entered the premises, the Appellant's conduct that day showed a serious lack of concern and disregard for the employer and its business operations. As such, it meets the threshold for misconduct.

[51] Finally, the Tribunal considered whether the Appellant knew or ought to have known that his conduct could lead to his dismissal. The Tribunal has already addressed the fact that there was no written policy, and found that the Appellant's conduct in purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block, thereby leaving the door open and unlocked behind him so that he could re-enter the premises unescorted after hours to use the employer's equipment without the employer knowing - was a violation of a fundamental workplace safety

policy. As such, the Appellant ought to have known that breaching it could lead to his dismissal.

[52] Furthermore, the policy he violated by his conduct on June 30, 2015 was a safety policy, and the Appellant had been disciplined on two prior occasions for safety violations occurring in the preceding four (4) months. While the Appellant stated that his prior discipline was unrelated to the specific conduct of blocking the door, the Tribunal finds that they all had safety issues in common. On March 23, 2015, the Appellant received a warning and suspension for "constant use" of his personal cell phone while operating machinery and equipment (see GD2-14), which would obviously be a safety concern; and on April 27, 2015, he received a warning and suspension for working without safety shoes (GD2-13), also a safety concern. In both instances, the Appellant was advised that failure to improve would result in dismissal. While the Tribunal acknowledges that these prior disciplinary incidents were not explicitly for leaving an exterior door open, their occurrence is considered contemporaneous with the June 30, 2015 event and certainly provided the Appellant with notice of the consequences for further workplace safety policy violations. This is especially the case since the Appellant signed the April 27, 2015 Employee Warning Report wherein was told dismissal was the next step.

[53] This sequence of events, coupled with the Appellant's evasive response to the Member's question regarding the verbal warning he received in 2015 for "Aluminum scrap being taken", lead the Tribunal to conclude that the Appellant was well aware termination would be the next step for a further workplace policy violation following the April 27, 2015 incident.

[54] For all of these reasons, the Tribunal finds that the Appellant knew or ought to have known that dismissal was a real possibility for any further incident involving a safety or other violation of the employer's workplace policies.

[55] In the present case, the Tribunal's finding that the Appellant's conduct in purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block, thereby leaving the door open and unlocked behind him so that he could re-enter the premises after hours and use the employer's equipment without the employer knowing - was a violation of a common sense and fundamental workplace safety policy, *coupled with the history of discipline he had received for unsafe work practices*, make his conduct on June 30, 2015 so reckless as to approach willfulness. The

Tribunal further finds that, given the nature of the workplace and the industrial equipment on site, and the fact that the Appellant did not have permission to re-enter the warehouse unescorted after hours, his act of blocking the lock on the warehouse door on June 30, 2015 irreparably broke the trust relationship with the employer; and that the Appellant ought to have known this could lead to his dismissal.

[56] The Tribunal therefore finds that the Appellant's conduct was misconduct within the meaning of section 30 of the EI Act.

[57] The Tribunal gives significant weight to the evidence filed by the employer after the Commission's concession and, for the reasons set out in paragraphs 36 to 41 above, the Tribunal finds that the Appellant has not provided a reasonable or credible explanation for the conduct in question. The Tribunal is also satisfied that this is not a case where the evidence on each side of the issue is equally balanced and, therefore, finds that there is no basis to give the benefit of the doubt to the Appellant pursuant to section 49(2) of the EI Act. For these reasons, the Tribunal gives no weight to the Commission's concession.

CONCLUSION

[58] The Tribunal finds that:

a) The conduct which caused the Appellant to lose his employment was his act of purposely wedging open an exterior, exit-only door to the Color Steels warehouse and leaving through that door at the end of his shift without removing the block on the lock, thereby leaving the door open and unlocked behind him prior to the warehouse being shut down for Canada Day;

b) The Appellant's conduct was done with the intention of returning to the warehouse unescorted after hours to use the employer's equipment without the employer knowing, which was not something the Appellant was authorized to do;

c) In the circumstances noted in the analysis herein, the Appellant's conduct was so reckless as to be wilful;

d) The Appellant's conduct was a breach of a fundamental workplace safety policy, and that the breach irreparably damaged the employer-employee trust relationship, and that the Appellant ought to have known it would lead to his dismissal.

[59] The Tribunal therefore finds that the Appellant lost his employment at Color Steels on July 2, 2015 by reason of his own misconduct, and that he is subject to an indefinite disqualification from EI benefits pursuant to section 30 of the EI Act.

[60] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.