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

[TRANSLATION]

Citation: *A. G. v Canada Employment Insurance Commission*, 2019 SST 817

Tribunal File Number: GE-18-3152

BETWEEN:

A. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: December 6, 2018

DATE OF DECISION: February 8, 2019

Canada

DECISION

[1] The appeal is allowed. The Tribunal finds that the Appellant, A. G., did not lose his employment because of his misconduct, under sections 29 and 30 of the *Employment Insurance Act* (Act).

OVERVIEW

[2] The Appellant worked as a [translation] "temporary marking foreman" for the employer X(X or employer), a road and parking lot marking business, from April 30, 2018, to July 17, 2018, inclusive, and stopped working for that employer because of a dismissal. The Appellant sold the assets of his personal business to that employer and worked for the employer only as an employee under a five-year contract. The Appellant's company also operated in the road marking industry. The employer indicated that it dismissed the Appellant for breaching an agreement with it that includes a non-competition clause and that he had failed to discharge his duty of loyalty to the business for which he worked. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant lost his employment because of his misconduct and refused to pay him Employment Insurance benefits. The Appellant explained that he did not comply with the non-competition clause in his agreement with the employer when he sold his business's assets to it. He clarified that his business issued invoices to his employer's clients because his employer asked him to do so so that it would be able to obtain or carry out contracts for the clients in question. The Appellant explained that, after his business invoiced the employer's clients, the employer then invoiced his business for the same amounts as the invoices he had issued, except in one case. The Appellant argued that the employer used that case to catch him out and dismiss him for not complying with the non-competition clause in the agreement they had reached. He argued that the employer had used his licence number (permit number) from the Régie du bâtiment du Québec (RBQ) [Québec building authority] without consent to secure contracts. On October 15, 2018, the Appellant challenged the Commission's reconsideration decision.

ISSUES

[3] The Tribunal must determine whether the Appellant lost his employment because of his misconduct, under sections 29 and 30 of the Act.

[4] To reach this conclusion, the Tribunal must answer the following questions:

a) What are the Appellant's alleged acts?

b) Did the Appellant commit the acts in question?

c) If so, were the Appellant's alleged acts conscious, deliberate or intentional such that he knew or should have known that they were likely to result in the loss of his employment?

d) Did the Commission meet its burden of showing that the Appellant's acts constitute misconduct?

e) Is the Appellant's misconduct the cause of his dismissal?

ANALYSIS

[5] Although the Act does not define the term "misconduct," the case law states, in *Tucker* (A-381-85), that, to constitute misconduct, the act complained of must have been wilful or at least of such careless or negligent nature that one could say the employee willfully disregarded the effects their actions would have on job performance.

[6] In *Mishibinijima* (2007 FCA 36), the Court stated that there is misconduct when the claimant's conduct is wilful, meaning that the acts leading to the dismissal are conscious, deliberate, or intentional. In other words, there will be misconduct where the claimant knew or should have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.

[7] The Court defined the legal notion of misconduct within the meaning of section 30(1) of the Act as wilful misconduct, where the claimant knew or should have known that their

misconduct was such that it would result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the loss of their employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Lemire*, 2010 FCA 314).

[8] 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 (*Crichlow*, A-592-97; *Meunier*, A-130-96; *Joseph*, A-636-85).

[9] Determining whether an employee's conduct that resulted in the loss of their employment constitutes misconduct is a question of fact to settle based on the circumstances of each case.

What are the Appellant's alleged acts?

[10] In this case, the Appellant's alleged acts are as follows:

- Having formed unfair competition with his employer by failing to comply with a non-competition clause in an agreement with the employer, by performing work for the employer's clients, and by keeping the money for himself;

- Having used equipment belonging to the employer's business and the employer's employees;

- Having advertised online, for himself or for his business, to offer marking services; and

- Having failed to discharge his duty of loyalty and honesty to the employer.

[11] In the dismissal letter addressed to the Appellant and dated July 17, 2018, the employer informed him that he had violated his duty of loyalty and honesty to the company by completing road-marking contracts with its materials and employees for himself or for X, of which he is the sole shareholder, without reporting them to the company. The employer told him that those acts constituted unfair competition, were dishonest, and could be categorized as theft because he had

used the business's equipment and employees. The employer told the Appellant that he had taken all the profits from the contracts he completed (for example, X, a school located near the municipality of X, X in X, X in X, X in X, and other unidentified contracts). The employer told the Appellant that his breaches constituted an act of serious misconduct that justified his dismissal (GD3-25 to GD3-27).

[12] The evidence on file indicates that the Appellant entered into an employment contract dated April 10, 2017, with the employer (X) for five years, from April 10, 2017, to April 9, 2023. This employment contract's provisions include the following:

> [Translation]
> 6. OTHER SERVICES TO PROVIDE – The Employee will dedicate all his time, attention, knowledge, and skills to the activities and interests of the Employer; and the benefits, income, or other outcomes of his work, services, and advice will be attributed to the Employer and the Employee will not, for the duration of this contract, receive any direct or indirect interest as a partner, officer, member of the board of directors, shareholder, consultant, or employee for any other company having the same activities as or similar activities to those of the Employer, provided however that no provision of this contract prevents the Employee from purchasing shares or any other title in a Company or shares sold to the public or publicly traded; likewise, no provision of this contract will prevent the Employee from investing in funds or real estate. 7. LOYALTY – The Employee will act loyally and honestly toward the Employer. ... 12. EMPLOYEE'S INCAPACITY TO MAKE COMMITMENTS ON BEHALF OF THE COMPANY – Notwithstanding any provision in this contract to the contrary, the Employee will not have the right to make commitments or sign contracts on behalf of the Company without obtaining prior written authorization from the Employer (GD2-12 and GD2-13).

[13] The evidence on file also shows that an agreement was reached between the Appellant and X, dated April 14, 2017, which states the following:

> [Translation]
> [...] the Vendor [Appellant] has sold the Buyer [employer] all of his business's assets in the road-marking trade [...] dated March 30, 2017, [...] the parties have agreed that the Buyer engages the Vendor [...] under an employment contract with a duration of five (5) years [...] the parties have agreed that the Vendor will be bound by a non-competition and non-solicitation covenant in favour of the Buyer [...] (GD2-21).

[14] The agreement specifically states that:

> [Translation]
> The Vendor commits to the Buyer to not, for a duration of five (5) years following the signing of this agreement [...] participate in and/or work and/or act in any way whatsoever in any business, activity, commercial entity, legal entity, company and/or corporation operating in the road-marking industry in any part of the province of Québec [...] do business with any client of the Buyer and/or solicit any client of the Buyer, hire any employee of the Buyer and/or solicit any employee of the Buyer, directly or indirectly, on his behalf or on behalf of any other person, business, commercial or legal entity, company or corporation, related to the road-marking industry or to cause them to end their business relationship or their employment relationship with the Buyer, in any part of the province of Québec[...] (GD2-21 and GD2-22).

Did the Appellant commit the acts in question?

[15] No. Although the Appellant acknowledged that he invoiced the clients of the business for which he worked, which violated the non-competition clause set out in the agreement reached with the employer, he clarified that he committed those acts after agreeing with the employer to do so or after getting its approval to that effect. The Appellant stated that he did not keep the money from the contracts invoiced by his business because the employer then invoiced him for the same amounts and that those amounts were always repaid, except in one case.

[16] The Tribunal must now determine whether those acts constitute misconduct.

Were the Appellant's alleged acts conscious, deliberate, or intentional such that he knew or should have known that they were likely to result in the loss of his employment?

[17] No. Considering the specific context in which the Appellant's alleged acts occurred, the Tribunal finds that those acts were not conscious, deliberate, or intentional and cannot be considered misconduct within the meaning of the Act (*Mishibinijima*, 2007 FCA 36; *Tucker*, A-381-85).

[18] The Tribunal finds that the Appellant's credible testimony during the hearing provided a complete and highly detailed picture of the alleged acts that led to his dismissal. The Appellant's testimony was detailed and free of contradictions. It put the alleged acts in context. The Appellant gave a number of explanations, which are supported by persuasive physical evidence regarding why he used the name of his business to complete contracts with the employer's

clients and invoice them (for example, invoices issued by his business to the employer's clients, slips for deposits from the Appellant's business into the employer's business account).

[19] The Tribunal finds that the evidence gathered by the Commission does not support the finding that the Appellant's conduct was reprehensible and that he lost his employment because of his misconduct (*Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85).

[20] The Appellant explained that he sold the assets (tangible property) of his business (for example, trucks, paint, stencils), as well as the business names he used, to the employer's business (X) in April 2017. He clarified that, in addition to that sale, he entered into a five-year contract of employment and an agreement containing a clause forbidding competition with that business. The Appellant clarified that, despite the sale of the assets belonging to his business, X, he remained the sole shareholder. He specified that his business used the name X, as the information held by the Bureau du registraire des entreprises du Québec [Québec's enterprise register] indicates (GD2-8, GD2-11, GD2-17, and GD2-21).

[21] The Appellant explained that he did not comply with the non-competition clause in the agreement reached with the employer (X) after he sold his business's assets to it in April 2017 (GD3-24).

[22] The Appellant argued that, despite the existence of that clause, the employer asked him to invoice clients in the name of his own business (X) and that the employer then invoiced his business to receive the sums invoiced to the clients.

[23] The Appellant explained that he agreed in good faith to operate in this way and to invoice clients using the name of his business, despite the non-competition covenant he had toward his employer. He stated that issuing invoices in the name of his business was not his decision but that he had done so at the employer's request.

[24] The Appellant explained that the employer's business had used that invoicing method because it had a bad reputation with certain clients, who wanted to make sure that he would be the one completing the work, given the experience he had acquired in the marking industry, or

because that method enabled the employer to obtain other contracts that it could not have obtained otherwise.

[25] The Appellant explained that, according to that method, he would cash the client's cheque first and then pay the employer's business, based on the amount he had cashed, after the employer's business sent him an invoice.

[26] The Appellant stated that he did not keep a percentage of the invoiced amount and that he did not make any money ([translation] "not a cent") by invoicing this way. He stressed that he received nothing in return.

[27] The Appellant indicated that the evidence of the deposits he made into the employer's business account shows that he paid the invoices for the contracts completed when the employer's business invoiced him (GD2-15, GD2-28, GD2-29, GD2-32, and GD2-33).

[28] The Appellant stated that he invoiced clients, at the employer's request, and that he then received invoices from the employer to reimburse it, except in one case where he issued an invoice for X on May 18, 2018, for $550.00 (before the applicable taxes) (GD2-8 and GD2-34).

[29] The Appellant argued that the employer used that case to catch him out and dismiss him by not sending him the invoice it was supposed to send him so that X could pay it. He noted that it was the only invoice he issued without receiving an invoice from the employer's business afterward. He noted that, with the exception of that case, the total amount that he invoiced was then transferred to the employer's business for each invoice his business issued.

[30] The Appellant presented three examples concerning the employer's existing invoicing method to show that this procedure had allowed the employer's business to obtain contracts—one contract with X and, in the two other cases, contracts with X.

[31] The Appellant explained that, to complete a contract with X, his business had invoiced that client, at his employer's request (invoice issued by X), for $9,072.50 on August 27, 2017 (GD2-23). He indicated that X then invoiced his company for an equivalent amount (invoice issued by X, for $9,072.52, dated August 31, 2017 – GD2-24). He stated that the amounts on

those two invoices were identical. The Appellant stated that X had not been able to obtain a contract with that client because he had obtained the contract with that client in past years. He explained that he was not supposed to invoice a client because he no longer had the right to do so because of the non-competition agreement he had reached with the employer's business. The Appellant stated that he had explained to the employer that, normally, he did not have the right to issue invoices through his business but that the employer had asked him to do it that time. The Appellant stressed that he told the employer not to raise a non-competition issue later on.

[32] The Appellant stated that, in that case (X), the invoicing method had been done with the agreement of the employer (X), but that it had been different with the two other examples of contracts completed for X.

[33] The Appellant explained that two other invoices referring to two contracts completed by the employer for X (X and X locations) had been sent to his business (invoice issued by the employer's business and sent to the Appellant's business for $9,177.06, dated October 13, 2017, corresponding to the invoice issued by the Appellant's business and sent to X for the same amount, dated October 13, 2017 – GD2-26 and GD2-27; invoice issued by the employer's business and sent to the Appellant's business for the amount of $2,278.24, dated October 13, 2017, corresponding to the invoice for the same amount issued by the Appellant's business and sent to X, dated October 13, 2017 – GD2-31 and GD2-32).

[34] In a statement made to Régie du bâtiment du Québec (RBQ), dated July 26, 2018, the Appellant explained that the employer had informed him that, after completing work for X's property management department, it needed him to invoice that client with his business number and his RBQ licence number. The Appellant stressed that he never saw the invitations to tender for those projects (GD2-9, GD2-10, and GD3-36 to GD3-38).

[35] The Appellant explained that the employer's business received invitations to tender from X, but, since that business could not bid for those invitations to tender, it had used the RBQ licence number of his business (X) to bid. He stated that that was how the employer obtained contracts from X.

[36] The Appellant stated that he never submitted a bid to X or saw the contracts in question and that he never signed them. He explained that, to invoice X, he first had to fill out a tender contract. The Appellant stated that he was obligated to invoice that client. He explained that he had evidence of the process at the employer's business, but that he did not have all the documents to prove it anymore because there had been no conclusion following the statement he made to the RBQ (GD2-8 to GD2-10 and GD3-36 to GD3-39).

[37] In the Appellant's view, in the case of the contracts completed at X, identity theft of his RBQ licence had taken place because tenders were submitted through the government's tender site (Québec government's electronic tender system—SEAO) in his business's name when he had not signed those tenders and did not know who had signed them. The Appellant explained that he had tenders but that he did not know who had signed them (GD2-8 to GD2-10 and GD3-36 to GD3-39).

[38] The Appellant explained that, normally, the employer invoiced him first, before he completed the work, indicating the information that he needed to enter on the invoice that X would issue. He stated that that is what he had done for the two invoices issued for X after the employer bid under the name X, with the RBQ licence number of that business.

[39] The Appellant explained that he had not agreed to the employer's business using his business's RBQ licence number. He stated that he had asked the employer if it was always going to operate in that way ([translation] "are you always going to run like this?") because that made three invoices issued by X.

[40] The Appellant indicated that he disagreed with the statement attributed to him to the effect that he told the Commission, regarding the theft of his RBQ licence, that he did not say anything before he was dismissed because the employer was lending him its warehouse. He stated that none of his belongings were in that warehouse because it contains the assets of the employer's business (GD3-39).

[41] In the Appellant's view, the employer broke the agreement between them three times and that he did not have the right to invoice clients using the name of his business.

[42] The Appellant explained that the invoice issued by X for work done at X (invoice dated May 18, 2018, for $550.00 before taxes – GD2-34) refers to line work done in May 2018 at X, where he stayed for about two weeks for a contract he completed for X. He reported that the owner of the establishment asked him to draw up a quote for line marking at his establishment. The Appellant explained that he had told the owner that, if he did the requested work, he would have to speak to his employer and that X would invoice him. He stressed that he had to give the amount of that quote to his employer for approval. The Appellant stated that he had contacted the company's president, X, to speak to him about the contract and his price (lump sum of $550.00, plus taxes). He stated that the president told him that there would be no problem with him completing that contract and told him, [translation] "You will invoice him…." The Appellant indicated that he agreed to do the work and that his business issued the invoice to that client. He stated that, when the work was done, he reminded the employer to invoice him for the amount of the contract completed for that client, but that the amount was never invoiced, when it should have been. The Appellant indicated that it was an oversight on the president of the business's part because he had the invoice for that contract in his possession. The Appellant stated that, for that invoice, there was no prior agreement with the employer that an invoice would be sent by the employer's business after he invoiced the client for whom he had worked (GD2-8, GD2-34, and GD3-36 to GD3-39).

[43] The Appellant explained that the employer had only to invoice him for the amount that he had invoiced the client. He stated that the employer could have invoiced him in the same way that it had for two other clients (X and X). He stated that the employer was aware of the fact that he had invoiced a client for $550.00 since it had the invoice because it went to the client for whom he worked to obtain that invoice (GD3-41).

[44] The Appellant stated that he did not invoice that client for the work he had done in the name of X because his company does not use the same invoicing system (Excel) and that it does not have the same business number as the employer's.

[45] The Appellant explained that it was the only invoice that he had made out without then having the corresponding invoice from the employer's business.

[46] The Appellant stated that he had been dismissed shortly after completing the work at X, in May 2018. He explained that, on the day of his dismissal, the employer had first asked him to go to the warehouse to unload materials. He explained that, when he arrived at the warehouse, two representatives of the employer told him that he was dismissed because of the invoice he had issued for X. The Appellant stated that he had not been warned about anything beforehand. He explained that he had told the employer that it had had him make out three invoices, including two without his knowledge (contracts with X) and that he had been obligated to invoice the employer's business, which violated the agreement (non-competition clause), and that it was dismissing him because he had made out a single invoice in 2018. The Appellant explained that the employer could have asked him to give it the money for the contract he had completed, but it instead dismissed him on the spot. He indicated that he would have made out the cheque for $550.00 to the company and that that would have resolved the problem.

[47] In a statement made to the Commission on October 9, 2018, the Appellant argued that the employer could have given him a warning or suspension, but it could not have dismissed him. He said that he finds it truly ridiculous that he was dismissed for $550.00 because he was bringing in a million dollars in income for the employer per year (GD3-39).

[48] The Appellant stated that he did not make out any other invoice, that he did not keep any amount, and that he did not complete any task without it being invoiced by the employer's business. He stated that, in one of its statements, the employer stated that it was true that it did not have other physical evidence that the Appellant worked elsewhere with the company's tools, except for the invoice for $550.00 (invoice for X) (GD3-41).

[49] The Appellant argued that it was the employer who acted improperly by not giving him the invoice for the work completed for X. He stated that he did what the employer had asked him to do.

[50] In the Appellant's view, the employer did not invoice him on purpose so that it could tell him that he had stolen from it. He argued that the employer had not invoiced him for the X contract to tick him off and to find a reason to dismiss him and get rid of him. The Appellant stated that the employer did this to remove him from the company. He stated that the employer

no longer wanted him in the business because he was costing it a lot ($52,000.00 for a six-month period in a five-year contract).

[51] The Appellant explained that his relationship with the employer started to deteriorate in 2018 (for example, time taken to complete a contract, sale of the X telephone number).

[52] The Appellant stated that, from the beginning, the employer made him do things that breached the agreement reached between them.

[53] The Appellant argued that he never wanted to harm the business for which he worked. He stressed that he had a five-year contract with X and did not want to be unemployed.

[54] The Appellant stated that he put his heart and soul into the employer's business and did nothing wrong.

[55] He stated that he did everything according to the contract of employment he had with the employer, invoiced clients at the employer's request, and then received invoices from that employer, except in one case.

[56] The Appellant argued that the alleged misconduct is having made out an invoice and that the employer did not invoice him afterward, as it should have done.

[57] He argued that his dismissal because of his misconduct or a lack of loyalty to his employer is baseless (GD2-8).

[58] The employer, in turn, explained in a statement made to the Commission on September 4, 2018, that after purchasing the Appellant's company, the Appellant continued to work as an employee and had signed a non-competition clause for a period of five years. The employer stated that the Appellant worked for clients and kept the money for himself. In the employer's view, it was a lack of loyalty on the Appellant's part. It stressed that the Appellant irreparably broke the relationship of trust (GD3-23).

[59] In a statement made to the Commission on October 9, 2018, the employer (X and X) explained that it did not have all the evidence about places where the Appellant could have

worked for himself with the company's tools, except for one invoice for $550.00 when he worked for X. It indicated that, for the other contracts for which it accused the Appellant of working for himself, the evidence was only verbal. The employer explained that, for one contract, when it went to the X, it had asked the owner who had done the parking lines for its establishment and that they had responded that the Appellant had. The employer explained that it was tipped it off when it noticed how much paint had been used and the high mileage on the vehicle the Appellant used. The employer stated that the Appellant left with employees and did his work on weekends. It indicated that the employees did not say anything because they could not have known whether the Appellant was invoicing for the work in his own name or in the company's name. The employer said that, one week before dismissing the Appellant, it noticed that he was advertising his marking services online, even though he had signed a non-competition agreement. The employer indicated that it was true that a contract was completed last year when the business was sold and that it was invoiced using the Appellant's Régie du bâtiment du Québec (RBQ) licence (for example, contract with X), but that, because the contract had already been signed, the parties agreed that there would be no problem. The employer explained that the company never used the Appellant's RBQ licence again after that (GD3-41).

[60] In a letter addressed to the Appellant and dated July 17, 2018, the firm Matte Poirier avocats, the employer's representative, informed him that he had been dismissed and that he had signed a non-competition and non-solicitation agreement, which he had breached. In that letter, the Appellant was given notice to pay the employer $10,000.00 for trouble and inconvenience. The employer's representative also asked the Appellant to stop all marking activities throughout Québec and not to solicit or do business with their clients, on his own behalf or for any other person (GD3-28 to GD3-31).

[61] The Commission determined that the act that the employer reported, that the Appellant invoiced one of the employer's clients on behalf of his own company, constitutes the direct cause of the dismissal. It stressed that the employer and the Appellant had both mentioned that it was the event that led to the dismissal (GD3-23, GD3-24, GD3-39, GD3-41, and GD4-4).

[62] In the Commission's view, the Appellant specifically breached the following three clauses of the work contract:

- [translation] “6. Other services to provide [...] the Employee will not [...] receive any direct or indirect interest as a partner, officer, member of the board of directors, shareholder, consultant, or employee for any other business with the same activities as or similar activities to those of the Employer” (GD2-12);
- [translation] “7. Loyalty – The Employee will act loyally and honestly toward the Employer” (GD2-13);
- Clause in the April 14, 2017, agreement between the employer and the Appellant prohibiting the Appellant from participating in or working in any way in the road marking industry in Québec for a period of five years (GD2-21 and GD2-22) (GD4-4).

[63] The Commission argued that, by invoicing one of the employer’s clients on his behalf, the Appellant actually sought his own advantage as an officer of his own business, to the detriment of his employer’s interests. It explained that it would be difficult to state that the Appellant, in using the employer’s materials and employees to complete and invoice a contract for his business, acted honestly toward his employer. The Commission considered that, in doing the work and invoicing for his business, the Appellant directly contravened the agreement he reached with his employer. It argued that, in invoicing the contract for his business, the Appellant took his employer’s property and employees’ time for his personal profit (GD4-4 and GD4-5).

[64] The Commission found that the fact that the Appellant completed and invoiced a contract for his own business, instead of for the employer, constituted misconduct within the meaning of the Act because, in acting that way, he breached his work contract and took the employer’s property (profits from the contract), while breaking his relationship of trust with the employer (GD4-6 and GD4-7).

[65] The Tribunal takes the position that, with the employer’s consent, the Appellant did not comply with the terms of the non-competition clause in their agreement.

[66] The Tribunal is of the view that, in this case, there was a practice at the employer's business that, even though the employer and the Appellant had agreed to a non-competition clause, he had obtained authorization to take on commitments or complete contracts on behalf of the employer's business.

[67] In this context, the Tribunal takes the position that the fact that the Appellant did not comply with the non-competition covenant set out in the agreement that he reached with the employer does not mean that he was unfairly competing with or that he was dishonest or disloyal to the employer.

[68] The Tribunal finds as fact the Appellant's testimony that he invoiced clients using the name of his business and not that of the employer at its request or because he agreed with the employer to do so.

[69] The review of the invoices issued by X and X is particularly telling of the practice in place at the employer's business and shows that non-compliance with the non-competition clause it had reached with the Appellant did not constitute a deliberate or intentional act by the Appellant.

[70] In terms of the contract completed at X, at the cost of $550.00 (before applicable taxes), the Appellant's testimony, which was not contradicted, indicates that, before completing the work the owner of that establishment requested, he first received permission from his employer to complete that work for that cost and to issue the invoice for that contract from the Appellant's business, as had been the case for other contracts (for example, X and X).

[71] In this case, the Appellant's business issued an invoice dated May 18, 2018, in the name of X, for $632.36 ($550.00 plus the applicable taxes) (GD2-34). However, the employer's business did not issue an invoice to the Appellant's business for the completion of that work so that his business could reimburse it the equivalent sum, as had been the case for the contracts completed for X and X.

[72] The Appellant’s testimony indicates that, after that invoice was issued, the employer decided to dismiss him because he had not complied with the non-competition clause in their agreement.

[73] The Tribunal takes the position that the fact that the Appellant used the name of his business to invoice X does not show that this act was committed deliberately or intentionally with the aim of competing with his employer and keeping the money from that contract.

[74] The Tribunal considers the Appellant’s explanation that the invoicing method in place at the employer’s business enabled the employer to obtain contracts that it would not have been able to obtain otherwise because the employer’s business did not have a good reputation with certain clients (for example, X), or because it had used the Régie du bâtiment du Québec (RBQ) licence number held by the Appellant’s business to bid and obtain contracts from X.

[75] The Appellant’s testimony is supported by persuasive physical evidence, which shows that when he completed contracts for various clients (for example, X and X, his business Xissued invoices to those clients and then the employer’s business X invoiced him for the equivalent amounts (GD2-23 to GD2-33). The evidence shows that the Appellant’s business paid all those amounts to the employer’s business.

[76] The Appellant presented several examples of invoices that his business had first issued to the employer’s clients and whose amounts were then reimbursed to the employer after invoices were issued for equivalent amounts.

[77] Therefore, for the contract the Appellant completed for X, his business X issued an invoice dated August 27, 2017, for $9,072.50, to that client (GD2-23). The employer’s business, X, then issued an invoice, dated August 31, 2017, for $9,072.52, to the Appellant’s business (GD2-24). The description of the services completed is essentially the same in both cases. A document entitled [translation] “Desjardins – Transaction Summary” and dated October 30, 2017, indicates that a payment of $9,072.52 was made to the employer’s business X.

[78] Regarding a contract completed for X (X location), the Appellant’s business issued an invoice, dated October 13, 2017, for $9,177.06, to that client (GD2-26). The employer’s business

then invoiced the Appellant's business, that same day, for an identical amount and for the same types of services (GD2-27). Documents entitled [translation] "Desjardins – Bill Payments – Immediate Payments" and [translation] "Desjardins – Transaction Summary" dated November 17, 2017, also indicate that a $9,177.06 payment was made to the employer's business X.

[79] Regarding another contract completed for X (X location), the Appellant's business issued an invoice dated October 13, 2017, for $2,278.24 (GD2-30). The employer's business then invoiced the Appellant's business, that same day, for an identical amount and for the same types of services (GD2-31). Documents entitled [translation] "Desjardins – Bill Payments – Immediate Payments" and [translation] "Desjardins – Transaction Summary," dated December 20, 2017, also indicate that a $2,278.24 payment was made to the employer's business X (GD2-32 and GD2-33).

[80] In this context, the Tribunal is of the view that the fact that the Appellant used the name of his business to invoice the employer's clients after completing contracts for them does not constitute a breach of a specific express or implied requirement arising from the contract of employment, given the employer's practice for invoicing clients (*Tucker*, A-381-85; *Lemire*, 2010 FCA 314).

[81] The Tribunal takes the position that the Appellant did not fail to observe the standards of behaviour that the employer had the right to expect of him (*Tucker*, A-381-85).

[82] The Appellant did not wilfully or wantonly disregard his employer's interests or manifest wrongful intent toward it (*Tucker*, A-381-85).

[83] The Tribunal takes the position that the examples the Appellant provided about the existence of an invoicing procedure at the employer's business and the documentary evidence he presented disproves the employer's allegations that the Appellant acted disloyally and dishonestly toward it (for example, using the employer's materials, using the employer's employees, receiving profits from the completed contracts).

[84] The Tribunal notes that, in the dismissal letter addressed to the Appellant, the employer mentioned the names of a number of other clients besides X for whom the Appellant completed contracts (GD3-25 to GD3-27). However, despite that list, the employer provided no physical evidence (for example, copies of contracts, proof of payment) that could prove that the Appellant completed contracts for the clients in questions and that he had received all the profits.

[85] On this point, the Tribunal notes that the evidence on file contains only one invoice issued by the Appellant's business to one of the clients the employer mentioned, X. In this case, it was the Appellant who submitted this invoice, among others, to show the employer's method of invoicing clients.

[86] The Tribunal also notes that the employer told the Commission that, other than the $550.00 invoice (X), it had no other evidence regarding locations where the Appellant supposedly worked on his own behalf with the business's materials and that, for the other contracts, it had only verbal evidence (GD3-41).

[87] Furthermore, there are no documents showing that the Appellant advertised his services or his business online, as the employer claimed in one of its statements, to prove that the Appellant failed to comply with the non-competition clause set out in his agreement with the employer.

[88] The Tribunal takes the position that the evidence gathered by the employer does not show how the Appellant's acts, in using the name of his business to invoice the employer's clients for completed work, could constitute conscious, deliberate, or intentional acts and be categorized as misconduct (*Crichlow*, A-592-97; *Meunier*, A-130-96; *Joseph*, A-636-85).

[89] The Tribunal is of the view that the Appellant's alleged acts were not of such scope that they would be likely to result in his dismissal. Although he violated the non-competition clause included in the agreement with his employer, the Appellant could not know 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 because he completed work for clients and used the name of his business to invoice them (*Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36).

[90] The Tribunal finds that there is no evidence that the Appellant unfairly competed with his employer. The Tribunal takes the position that the Appellant did not complete work for the employer's clients, while using the employer's employees and equipment, and keep the profits from the completed contracts. There is no evidence proving that the Appellant advertised his line marking services or business online, either. The Tribunal takes the position that the Appellant did not fail to discharge his duty of loyalty and honesty to the employer.

Did the Commission meet its burden of showing that the Appellant's acts constitute misconduct?

[91] The Court has reaffirmed the principle that the onus is on the Commission to show that a claimant lost their employment because of their misconduct (*Bartone*, A-369-88; *Davlut*, A-241-82; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485).

[92] The Tribunal is of the view that, in this case, the Commission has not met its burden of proof in this regard (*Bartone*, A-369-88; *Davlut*, A-241-82; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485).

[93] The Tribunal takes the position that, in its analysis, the Commission did not show how the Appellant's alleged acts were conscious, deliberate, or intentional, given that he had obtained his employer's authorization to complete contracts for clients and to invoice them using the name of his business instead of the name of the employer's business.

[94] The Tribunal takes the position that the evidence the Commission gathered does not support its finding that the Appellant breached the clauses in his contract of employment stipulating that he must not receive a direct or indirect interest from a business with the same activities as or activities similar to those of the employer's, that he must not work in the road marking industry in Québec for a period of five years, and that he must act loyally and honestly toward the employer (GD4-4).

[95] The Tribunal takes the position that the Commission was satisfied with the employer's statements that the Appellant had breached the non-competition clause he had agreed to with the employer, without taking into account the existing practice that the Appellant could complete contracts for clients and invoice them through his own business.

[96] The Tribunal notes that the Commission did not compare the invoices issued by the Appellant’s business and those issued by his employer. This comparison shows that those invoices describe the same work or the same service for the employer’s clients.

[97] The Tribunal considers the evidence gathered by the Commission to be insufficient, despite the Appellant’s alleged acts, and this evidence to be insufficiently detailed to find, on a balance of probabilities, that the Appellant lost his employment because of his misconduct (*Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485; *Crichlow*, A-592-97; *Meunier*, A-130-96; *Joseph*).

Is the Appellant’s misconduct the cause of his dismissal?

[98] No. Although the Appellant lost his employment, the cause of the loss of his employment is not misconduct within the meaning of the Act.

[99] The decisions made in *Cartier* (A-168-00) and *MacDonald* (A-152-96) confirm the principle established in *Namaro* (A-834-82) that it must also be established that the misconduct was the cause of the claimant’s dismissal.

[100] The Appellant argued that the employer wanted to get rid of him by using the invoice issued for X to catch him breaching the non-competition clause he had to follow and to dismiss him.

[101] Without overestimating the merits of the Appellant’s claims about the causes of the termination of his employment, the Tribunal takes the position that he was not dismissed because of acts committed willfully, deliberately, or intentionally (*Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36).

[102] The Appellant did not lose his employment because of his misconduct under sections 29 and 30 of the Act (*Namaro*, A-834-82; *MacDonald*, A-152-96; *Cartier*, A-168-00; *Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36).

[103] As a result, the Commission's decision to disqualify the Appellant from receiving Employment Insurance benefits under sections 29 and 30 of the Act is not justified in the circumstances.

CONCLUSION

[104] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	December 6, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	A. G., Appellant