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

[TRANSLATION]

Citation: *L. S. v Canada Employment Insurance Commission*, 2019 SST 456

Tribunal File Number: GE-18-3514

BETWEEN:

L. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 31, 2019

DATE OF DECISION: March 29, 2019

Canada

DECISION

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

OVERVIEW

[2] The Appellant worked as an educator at X (X, daycare centre, or employer) from February 6, 2018, to May 15, 2018, inclusive. The employer indicated that it had dismissed the Appellant because she left a child unattended in the backyard of the daycare centre and left the group of children for whom she was responsible unattended. After dismissing the Appellant, the employer changed its decision and imposed a 21-week suspension on her. The Respondent, the Canada Employment Insurance Commission (Commission) determined that the Appellant had lost her employment because of her misconduct and denied her Employment Insurance benefits. The Appellant explained that she had removed a child from the group because she had behavioural problems and then taken the child to the daycare centre's backyard so that she could take care of her. The Appellant indicated that she then returned to her group of children. She indicated that, a few minutes later, when she returned to see the child she had left in the backyard, the child was no longer there. The Appellant argued that the goal of the alleged acts was to use a new intervention method with a child from her group because of that child's behavioural problems. She explained that she had no wrongful intent toward that child. The Appellant explained that other educators sometimes leave their groups unattended. She said she does not understand why the employer fired her. On November 20, 2018, the Appellant challenged the Commission's reconsideration decision.

ISSUES

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

[4] To reach that conclusion, the Tribunal must address the following issues:

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 she knew or should have known that they were likely to result in her dismissal?

d) Did the Commission satisfy its burden of proving whether the Appellant's acts constitute misconduct?

e) Is the Appellant's misconduct the cause of her loss of employment?

ANALYSIS

[5] Section 29(b) of the Act states that, for the purposes of sections 30 to 33, loss of employment includes a suspension from employment.

[6] Section 30(1) of the Act states that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.

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

[8] In *Mishibinijima* (2007 FCA 36), the Court noted that there will be misconduct where the conduct of a claimant was willful, that is, in the sense that the acts which led to the dismissal were 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.

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

conduct 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 employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Lemire,* 2010 FCA 314).

[10] For the Tribunal to find 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).

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

[12] In *Locke* (2003 FCA 262), the appeal of the claimant, who had been dismissed for smoking marijuana on the work premises, was allowed. The Court in that case stated that, even if his behaviour was criminal in nature, in light of all the evidence before the Board, including the fact that other employees had not been dismissed after they had been caught smoking marijuana, his behaviour was not such a fundamental breach of the employer/employee relationship that any employee must have known that, if apprehended, he was likely to be dismissed without warning.

[13] In *Jewell* (A-236-94), the Court noted that, in the absence of the required mental element, the alleged conduct cannot be qualified as misconduct within the meaning of the Act.

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

[15] The Tribunal would like to clarify that, in this case, even though the employer decided to impose a suspension on the Appellant after initially dismissing her, the Commission's decision specifically concerns the Appellant's loss of employment because of her misconduct.

[16] On that point, the Commission explained that, after holding a mediation session with the Commission des normes, de l'équité, de la santé et de la sécurité du travail [Québec's labour

standards board] (CNESST), on October 15, 2018, the employer changed the reason for the separation from employment to show a suspension, following its consideration of new evidence. The Commission stated that, because it did not have the new information from the employer, the decision was made based on the facts on file. It submitted that loss of employment includes a suspension and that the legal test remained the same since the employment relationship was severed because of the Appellant's conduct. The Commission noted that, in the case of a suspension, there is disentitlement, not disqualification, for a set period (GD4-12).

[17] The Tribunal would like to clarify that it is giving a decision based on the one the Commission gave the Appellant on a loss of employment for misconduct. The fact that the Appellant was suspended rather than dismissed following the CNESST mediation session does not change the Commission's decision to disqualify the Appellant from receiving benefits because of her misconduct.

What are the Appellant's alleged acts?

[18] In this case, the Appellant's alleged acts are leaving a child for whom she was responsible unattended in the daycare centre's backyard and leaving her group unattended while she went into the backyard with that child.

[19] In the May 15, 2018, dismissal letter addressed to the Appellant, the employer told her that, by choosing as an intervention method the removal of a child from her group to willfully take them outside—alone and without supervision—to the daycare centre's backyard and asking them to stay seated in front of the building's closed door or to run around the play set, she endangered the safety, psychological health, and welfare of that child in an alarming manner. Additionally, the employer explained that she had also left the rest of the group for which she was responsible unattended several times during her intervention. It stated that the Appellant had used an excessive, inappropriate, and degrading intervention method that includes abusive, humiliating measures that scare and harm the dignity and self-esteem of a child. The employer stated that the Appellant had violated sections 5 and 5.2 of the *Educational Childcare Act* and section 100 of the *Educational Childcare Regulation*, which provides for constant supervision of children. It also stated that she had not followed the daycare centre's internal rules, which state

that the establishment is careful to offer a warm, safe, and stimulating environment, as well as quality service that meets parents' expectations and reflects their values (GD3-24 and GD3-25).

[20] On October 19, 2018, in a letter addressed to the Commission (re: Letter explaining the amendment of termination grounds), the employer explained that, during the October 15, 2018, mediation session at the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), it was informed of new evidence that enabled it to reconsider the decision it made on May 15, 2018, to dismiss the Appellant. The employer stated that, in light of evidence (which evidence it failed to specify), a 21-week suspension was a sufficient consequence for the Appellant's acts and that that suspension had ended on October 15, 2018. It specified that, since that date, the Appellant could be called to work as a replacement within the corporation (GD3-42).

Did the Appellant commit the alleged acts?

[21] Yes. The Appellant acknowledged that she had committed the alleged acts. She explained that she removed a child from the group of children for whom she was responsible to take the child into the daycare centre's backyard and left that child alone for a few minutes, the time it took to return and check on her group. When she returned to the spot to take care of the child, she was no longer in the backyard. The Appellant also indicated that she had left her group of children unattended to take care of the child she had removed.

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

Were the Appellant's alleged acts conscious, deliberate, or intentional such that she knew or should have known that they were likely to result in her dismissal?

[23] No. Given the particular context in which the Appellant's alleged acts occurred, the Tribunal takes the view that those acts were not conscious, deliberate, or intentional and could not be likened to misconduct within the meaning of the Act (*Mishibinijima*, 2007 FCA 36; *Tucker*, A-381-85; *Locke*, 2003 FCA 262; *Jewell*, A-236-94).

[24] The Tribunal finds that the Appellant's credible testimony during the hearing provided a complete and highly detailed picture of the alleged acts leading to her loss of employment. The Appellant's testimony was detailed and free of contradictions. It put the alleged acts in context.

[25] While acknowledging that she committed an error by using an intervention method intended to remove a child with a behavioural problem from her group, the Appellant gave a number of explanations for her use of that method and about the fact that she was not the only educator to leave their group of children unattended.

[26] The Tribunal takes the view that that the Appellant's testimony provided clarification and an additional perspective on the nature of the alleged acts and the existing practice, at the employer, of educators leaving their groups of children unattended without having their employment jeopardized for that reason (*Locke*, 2003 FCA 262).

Appellant's position

[27] The Appellant explained that she admitted to making an error when, on May 8, 2018, she removed a child from her group to take her outside but that it was the first time such a situation had occurred or that she had put this solution into practice. She specified that nothing serious happened, that she had no wrongful intent in committing the alleged acts, and that she did what she thought was best for the children (GD3-34 and GD3-35).

[28] The Appellant argued that what happened on May 8, 2018, was not willful on her part because she was on top of things with the children and the parents were well aware of what was happening with their child. She explained that she had not wanted to do anything mean with the child by removing her from the group to take her to the daycare centre's backyard. The Appellant stated that she had not intended to harm the child but that she wanted to take time to play with her outside and establish a connection with that child. She said that she knew that she could not leave a child alone but that she had never had to sign any directive to that effect (GD3-34, GD3-35, and GD3-37).

[29] The Appellant specified that, even though she had to tell another educator when leaving her room (for example, during the children's nap), she was not the only one to leave without

telling someone. She submitted that she paid for all the employees who also left their rooms and often left their children unattended. The Appellant said she did not understand why she had been fired (GD2-3).

[30] She noted that there had not been a replacement educator because of cuts (GD3-34).

[31] The Appellant confirmed that she often asked the employer for help because the child required a lot of time, but that she did not have it. She said that she put out [translation] “SOSs” often enough. The Appellant explained that the situation she faced on May 8, 2018, happened because she had had enough. She argued that the employer could have given her more resources because there are more children with behavioural problems (for example, oppositional defiant disorder) (GD3-34, GD3-35, and GD3-37).

[32] The Appellant indicated that she had 18 years of experience as an educator, including 16 years at X. She explained that, as part of her work for the employer, she was responsible for eight children aged three and four. The Appellant stated that she worked from 7:30 a.m. to 4:15 p.m. and that she had a 30-minute break (one half hour) at 1:45 p.m. She specified that, around 12:45 p.m., after the children’s lunch hour, she prepared them for their nap (GD3-9 to GD3-11).

[33] The Appellant explained that the child that she removed from the group had behavioural problems and that the local community service centre (CLSC) was monitoring that child. She stated that the child’s behavioural problems arose mainly during naptime because she was agitated and disturbed the other children in the group (for example, getting up during naptime, going to get something, and having tantrums if the educator told her not to do something, which woke the other children) (GD3-34 and GD3-35).

[34] The Appellant explained that the CLSC offered tips to help her handle the child (for example, placing the child away from the group in a special corner of the room and giving her toys or books while the other children had to rest and nap in the dark). The Appellant stated that she set up a corner for that child so that the other children could not see or hear her. She explained that she had difficulty with that child because she always needed more.

[35] The Appellant explained that removing the child from the group, as she did on May 8, 2018, was a new situation because she had first discussed that intervention method with the director the week before. She stated that she had suggested removing the child from the group when she had behavioural problems during naptime, taking her outside, and giving her time (for example, running, going in the play set, and sitting with the child before returning to the group). The Appellant confirmed that the director fully approved of her proposal to take the child outside to give her time. She stated that she agreed with the director that time should be given to the child so that she could play outside during naptime. The Appellant stressed that she had previously tried the CLSC's recommendations for about two weeks before she experimented with taking the child outside (GD3-34 and GD3-35).

[36] The Appellant explained that, when a problem arose with the child in question, the director was usually always present to help if needed. The Appellant explained that the director was not as present at the daycare centre as before because of the merger of that daycare centre (X) with another (X). She stated that the director was absent from the daycare centre about 45% of the time. The Appellant specified that, in the past, the director had helped supervise the child in question at least once a week when she was removed from the group. As a result, the child could go to the director's office. The Appellant specified that, in the beginning, the director told her to put the child in the hallway, but that solution resulted in the child being alone and disturbing the other groups in that wing of the establishment. The Appellant explained that, before that child was her responsibility, the director had sometimes had to go to the group where the child was.

[37] The Appellant explained that, after lunch on May 8, 2018, when the children were starting their naps, the child in question did not want to take a nap and started to cause a disturbance. The Appellant stated that she decided to remove that child from the group and take her outside. The Appellant explained that she left her group of children, telling them to get ready for their nap (GD3-9 to GD3-11, GD3-21, GD3-34, and GD3-35).

[38] The Appellant explained that, after dressing the child, she then took the child to the director's office, believing that the director would be there and able to help her, which was

usually the case, while the Appellant returned to see to her group and find someone to watch them during her absence (GD3-9 to GD3-11 and GD3-21).

[39] The Appellant specified that, when she was in the hall with the child and noticed that the director was absent, she wanted to do what she had planned, which was to take the child outside. She stated that she was focused solely on that. The Appellant explained that she was too happy about the fact that she would be able to do something with the child, especially since the child was already dressed (GD3-21, GD3-34, and GD3-35).

[40] The Appellant explained that, when she left her group to take the child outside, she did not ask for help from the other educator in the room adjacent to hers because she did not want to disturb her. She stated that she could communicate with the other educator because of shared washrooms between the two rooms, through which they could talk without leaving either adjacent room. The Appellant explained that, if she had communicated with the other educator in the room adjacent to hers, it would have disturbed that educator's group of children because that group was also getting ready to take a nap and the other educator was already lying down with the group. The Appellant stated that she perhaps should have done it anyway, but she was at the point that she told herself she would disturb the other educator. She explained that she left her room without asking for another educator's help because, in her mind, she felt that she was still disturbing, given the behavioural problem of the child she had removed from the group (for example, hearing the child cry when she was removed from the room). According to the Appellant, she had to find solutions on her own. She stated that educators had already complained in the past about the situation created by the behavioural problems of the child in question. The Appellant specified that her other co-workers were not angry with her but that they told her to do something about the situation and to speak with the director.

[41] The Appellant explained that she took the child to the backyard, opened the patio door, told her to wait for her on the balcony and that she would play with her, and then closed the door. The Appellant specified that she was gone for two minutes to check on her group of children. She explained that she was certain the child was safe because everything was locked in the yard (for example, there was a fence, a lock, and a chain) (GD3-9 to GD3-11, GD3-21, GD3-34, and GD3-35).

[42] The Appellant explained that, when she was returning outside to rejoin the child, she met an educator who was making copies in the director's office. The Appellant told that educator that she was going to play outside with the child and asked her if she had seen her, having noticed that the child was no longer in the backyard. The educator replied that she had not seen anyone. The Appellant explained that she then asked another educator to watch her group and returned outside to find the child (GD3-9 to GD3-11, GD3-21, GD3-34, GD3-35, and GD3-37).

[43] The Appellant explained that the child was found after about 15 minutes. She found the child in front of the establishment near the mailboxes. The Appellant stated that she went toward the child and took her in her arms (GD3-9 to GD3-11, GD3-21, GD3-34, and GD3-35).

[44] The Appellant explained that there was a chain and a lock on the fence of the daycare centre's backyard. She specified that, for some months, the employees had been asking for the broken fence to be repaired. The Appellant stated that she was sure the fence had been repaired because there was a chain and a lock and that there was no danger in taking the child into the backyard. She clarified that the gate was easy to open despite there being a lock. The Appellant noted that the director was waiting for the thaw to repair the gate but that a week after the events of May 8, 2018, the gate was repaired. According to the Appellant, leaving a fence broken in the daycare's backyard was a failure on the employer's part (GD3-9 to GD3-11, GD3-21, GD3-34, and GD3-35).

[45] The Appellant indicated that, following the events of May 8, 2018, she immediately called her director to explain what had happened. The Appellant stated that she was on leave with pay for a week before being dismissed on May 15, 2018, and that the director had been suspended for three days (GD3-21, GD3-34, and GD3-35).

[46] The Appellant stated that she disagreed with the employer's statement that she had willfully placed a child outside in the daycare centre's backyard because she [translation] "needed to breathe" (GD3-22 and GD3-23).

[47] The Appellant explained that she spoke with the parents of the child after her dismissal. She explained that the child's mother told her that she was angry at first but that, in hindsight, she understood her actions because she knew her child requires a great deal. The Appellant

explained that the mother also told her that she thought the employer had been very hard on her (GD3-34 and GD3-35).

[48] The Appellant sent the Tribunal a copy of a letter from the mother of the child she removed from the group. The letter dated August 7, 2018, included the following:

> [Translation]
>
> For two years, my daughter had attended this establishment, and all the educators agree: she's an angel, participates well in activities, helps everyone, and so on. But she refuses to nap. We had no objections to her not napping. I have tried to work with the director to find a solution so that X [the child] can do something else quietly (for example, looking at a book or colouring). But the response was that it was not the daycare centre's "policy," so she would have to sleep or lie down during the entire naptime! When forced to do that, she began throwing huge tantrums and "disturbing" everyone. When she reached L. S.'s [the Appellant's] group, the pattern started again. She raised red flags numerous times, saying that she did not know what to do or how to react. An outside resource came to "assess" the situation, and the advice was the same as ours: Let her play quietly! But once again, it was a "no" from the director! I was stunned to see how much stubbornness there was around wanting to make her sleep. Basically no support for the educators! About one week before the incident, we—my husband and I—were in X's [the director's] office to discuss the situation and asked (again) for her to be able to do something other than sleep during naptime. We gave her information about online training for L. S., which is also relevant for the other educators, to help her and equip her for interacting properly with our child and others. Unfortunately, nothing was done. One day at naptime, L. S. decided to take care of X outside. Leaving X alone outside for a time was indeed an error of judgement. I never let my children out of my sight! However, it's a daycare's backyard. It should still be safe ….
> (GD7-2, GD7-3, or GD8-1)

[49] The Appellant also sent the Tribunal copies of thank-you and support letters from another parent and co-workers (GD7-4 to GD7-7 or GD8-1 to GD8-3).

[50] The Appellant explained that, following her dismissal, a mediation session was held with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) on October 15, 2018. She explained that, at the session, she made it clear to the employer that she did not commit the alleged acts willfully. The Appellant explained that, during that meeting, the employer and the lawyer representing it told her that they saw that she was honest in her work. She noted that the employer's representative told her that she knew that the Appellant was not the only educator who left their room without telling someone. The Appellant stated that, during

that session, the employer also stated that it had perhaps been too severe in terms of the penalty it applied to her and that it was prepared to take her back with some conditions. The Appellant explained that she returned to work for the employer but first had to sign a contract, which resulted in her starting over because she could do replacement work only, and that she could not act as a replacement for more than two consecutive days in a room. She clarified that she signed her contract on October 15, 2018, and that, by the end of October 2018, she had done only two days of replacement work. The Appellant indicated that she did three days of replacement work in November 2018. She stated that she left the daycare centre because she did not feel good and had started to work as an educator for a school board (GD2-1 to GD2-6, GD3-40, and GD3-41).

[51] The Appellant explained that, following the mediation session at the CNESST, her employer issued a new Record of Employment on which it changed the reason leading to the termination of her employment and sent a letter to that effect (re: Letter explaining the amendment of termination grounds) to the Commission (Service Canada), with the date October 19, 2018 (GD2-1 to GD2-6, GD3-40, and GD3-41).

Evidence gathered from the employer

[52] The employer explained in a statement to the Commission dated June 19, 2018, that it dismissed the Appellant because of the poor decision she made on May 8, 2018, by taking a child outside into the daycare centre's backyard. It stated that the Appellant had committed this act because she needed to breathe. According to the employer, it was an error of judgement that could have lead to disastrous consequences for that child. It explained that the Appellant had difficulty with that child and did not seek help from other educators. The employer explained that the behavioural problems of that child were known and that she was being monitored by a specialist team from the CLSC that was working with the child's parents. It explained that the child escaped from the yard through the gate of the defective fence and was found in the road. The employer clarified that it was waiting for the thaw to repair the fence and that all personnel, including the Appellant, were aware of that fact. It indicated that there is a procedure to follow in keeping with the provincial legislation for daycare centres (employee manual) in this type of situation. The employer explained that it met with the Appellant on May 15, 2018, and gave her a dismissal letter. It mentioned that the Appellant had approached the CNESST (labour

standards). The employer indicated that the Appellant had regularly had warnings, but nothing serious. It noted that the Appellant has a voice that carries, that she had a tendency to speak loudly, and that it had to intervene a few times to resolve the situation (GD3-22 and GD3-23).

[53] In a statement made to the Commission on August 22, 2018, the employer explained that the Appellant had been dismissed for applying an improper practice. In response to the Commission's question about whether the Appellant had agreed with the director to give the child in question time to play outdoors during naptime, the employer indicated that it was not aware of such an agreement but that, if that was the case, it was an improper practice because, if the educator was outside with the child, there would be no one to take care of the other children in her group who were napping inside. It explained that, on the day of the incident, the director was away from the daycare centre but that, if the Appellant needed help with the child, she should have asked another educator. The employer indicated that its investigation showed that the Appellant had not informed the educator in the next room (the two rooms adjoin) that she was going out for a few minutes and did not ask her to watch the children in her room, which she should have done. It noted that the directive in effect was that educators had to inform a co-worker when leaving their rooms temporarily. The employer explained that, when the Appellant left the child outside, she met another educator who told her that she could not leave the child alone outside. It indicated that the Appellant did not consider her co-worker's words and still left the child unattended in the backyard. The employer clarified that the Appellant was well aware of the directive on child supervision because that information is given during educator training and is also available online. It indicated that it did not know whether the Appellant had signed a document containing that directive when she was hired because she had been hired about 15 years before (GD3-36).

[54] The evidence on file indicates that the employer first issued a Record of Employment dated May 30, 2018, stating that the Appellant had stopped working because of a dismissal (code M – dismissal) (GD3-19 and GD3-20).

[55] The employer then issued an amended or replacement Record of Employment dated October 18, 2018, indicating that the Appellant had stopped working for another reason (code K – other) and that the expected date of recall was October 15, 2018. The following

comment appears in box 18 (Comments) of that record: [translation] “see enclosed letter – suspension reason” (GD3-40 and GD3-41).

Commission’s position

[56] The Commission determined that the Appellant’s acts in leaving her group of children alone, when they were in her care, and in leaving a child alone outside constituted misconduct within the meaning of the Act. The Commission argued that this constitutes professional misconduct that breaks the bond of trust between the employer and the employee. It explained that the Appellant willfully left her group of children alone in the room and a child alone outside in the backyard when they were in her care and that she had to ensure constant supervision according to the established rules. According to the Commission, the acts were conscious and deliberate (GD4-11).

[57] The Commission explained that, even though the Appellant argued that she had left her group alone for only two minutes, the duration of her absence from the children is not a determinative factor that can justify her acts because, according to the *Educational Childcare Act* and the *Educational Childcare Regulation*, she should never leave a child alone under any circumstances (GD4-9).

[58] Concerning the Appellant’s argument that she was not the only educator to leave their group alone and that she had paid for the employees who also left their rooms and often left their children unattended, the Commission argued that it had to give a decision based on the facts presented to it and not based on other employees’ files. It explained that it did not know the details of other employees and did not have to determine whether other employees’ acts constituted misconduct. The Commission noted that there was only the Appellant’s file, not a group of files (GD4-9 and GD4-10).

[59] The Commission argued that the fact that other employees do not follow the directives does not give the Appellant permission to break them and to go against the employer’s values. It indicated that this situation cannot justify the Appellant’s acts. The Commission submitted that nothing indicates that the Appellant received authorization from the employer to leave a child

alone. It stressed that the employer mentioned that this attitude and those methods were not at all accepted at the daycare centre (GD4-10).

[60] The Commission explained that, following the October 15, 2018, mediation session with the employer, the reason for the separation from employment was changed to indicate a suspension and that the employer had stated that it had reconsidered that decision in light of new evidence (GD3-42). On that point, the Commission indicated that it did not have the new information from the employer and that it had given its decision based on the facts on file (GD4-12).

Tribunal's decision

[61] The Tribunal takes the view that, even though the Appellant's acts in leaving a child alone outside and in also leaving her group of children unattended are reprehensible, those acts do not constitute such a fundamental breach of the employer/employee relationship that she should have known that she could be dismissed, given that other employees had not been dismissed for conduct similar to hers (*Locke*, 2003 FCA 262; *Tucker*, A-381-85).

[62] The Tribunal is of the view that the Appellant's alleged acts must be considered based on the work context in which she was employed and the explanations she gave to that effect.

[63] The Tribunal finds that, in this case, the fact that the Appellant left a child unattended outside for a few minutes and, at the same time, left her group of children also unattended refers to the same principle or to the same rule that children must be constantly supervised (for example, section 100 of the *Educational Childcare Regulation*). The Tribunal notes that the employer also referred to the fact that the Appellant did not follow the daycare centre's internal rules but did not indicate how she could have broken the rules of the establishment where she worked (GD3-24 and GD3-25).

[64] The Appellant's testimony, which was not contradicted, indicates that she was not the only educator to leave their group of children unattended and that other educators could also leave their rooms and leave their children unattended without having a situation like that lead to dismissal (*Locke*, 2003 FCA 262).

[65] On that point, the Tribunal notes that, in its argument, the Commission indicated that the fact that other employees do not follow the directives did not give the Appellant permission to break them and could not justify her acts, but it did not question the Appellant's statement that other educators could leave their groups unattended (GD4-10).

[66] The Tribunal is of the view that, based on the Appellant's statement, everything leads it to believe that there was a practice at the employer, which resulted in the rule that a child or group of children should be under constant supervision not always being upheld or followed by the daycare centre's employees.

[67] Nothing in the evidence on file shows that the Appellant's employment could be jeopardized, given the existence of such a practice and even though the employer mentioned in its dismissal letter to her that she had breached the provisions of the *Educational Childcare Act* and the *Educational Childcare Regulation*, which state that children must be constantly supervised (GD3-24 and GD3-25) and that the Appellant was well aware of the directive to that effect (GD3-36) (*Locke*, 2003 FCA 262).

[68] In this context, the Tribunal takes the view that the Appellant could not have anticipated losing her employment if she broke the rule that children for whom she was responsible must be constantly supervised, given the existing practice at the employer and the fact that other employees had not been dismissed for conduct similar to hers (*Locke*, 2003 FCA 262; *Tucker*, A-381-85).

[69] The Tribunal is also of the view that the Appellant's alleged acts do not have the mental dimension required to establish an association with misconduct within the meaning of the Act (*Jewell*, A-236-94).

[70] The Tribunal takes the view that the Appellant did not commit conscious, deliberate, or intentional acts to reduce her workload but rather to meet a specific need of a child in her group who had a behavioural problem.

[71] The Appellant acknowledged that she committed an error by leaving a child from her group unattended in the daycare centre's backyard.

[72] The Tribunal finds that this error is not the result of deliberate or willful acts on the Appellant's part that could reflect her carelessness or negligence or that she willfully disregarded the effects her acts would have on job performance (*Tucker,* A-381-85).

[73] The Tribunal takes the view that that the Appellant's alleged acts are part of the pedagogical approach in which she engaged to find a solution to the recurring behavioural problem of a child in her group.

[74] The Tribunal notes that, in *Tucker* (A-381-85), the Court indicated that the courts seem to be prepared to accept that employees are human and they may make mistakes under pressure or through inexperience.

[75] Despite the fact that the Appellant erroneously implemented a new intervention method by leaving a child for whom she was responsible without adequate supervision and by also leaving her group unattended, she could not anticipate that the alleged acts could lead to her dismissal, given the pedagogic goal she was pursuing by experimenting with that intervention method (*Mishibinijima*, 2007 FCA 36; *Tucker*, A-381-85).

[76] Although the method the Appellant used when she decided to remove the child from the group and take her outside was completely inappropriate because that child was found unattended outside and because she also left her group unattended, the purpose of that method was first and foremost to address one of that child's needs, to find a solution to her recurring behavioural problem, and also to respond to a specific request expressed by the parents of that child.

[77] In that sense, the Tribunal is of the view that, in essence, the Appellant's intention was pedagogical and was intended for the good of the child whose behavioural problems were known and required special monitoring (for example, the CLSC's team of specialists).

[78] The Tribunal cannot gloss over the fact that, after trying several intervention methods with that child during naptime (for example, setting up a corner in the room so the child could amuse herself with toys, look at books, or colour), the Appellant wanted to try another intervention method to find an effective solution for that child.

[79] The Tribunal also found as fact the Appellant's testimony that she agreed with the daycare centre's director, about one week before the events on May 8, 2018, to put into practice the intervention method of removing the child in question from her group and taking her outside. The Tribunal notes that, although the employer indicated that it would consider that method inappropriate, it stated that it was not aware of the existence of an agreement between the daycare centre's director and the Appellant about experimenting with that method.

[80] The Tribunal also considers the fact that it was the first time that the Appellant was putting that intervention method into practice and that she believed she would have the director's help in that regard.

[81] The Tribunal notes that, when the child's behavioural problem arose on May 8, 2018, the Appellant clarified that she was concentrating solely on the situation because she wanted to find an effective intervention method for the behavioural problem.

[82] Given the context in which the Appellant committed the alleged acts, the Tribunal takes the view that the evidence gathered from the employer does not show that she [translation] "used an excessive, inappropriate, and degrading intervention method that includes abusive, humiliating measures that scare and harm the dignity and self-esteem of a child," as the dismissal letter addressed to her states, based on the elements of section 5.2 of the *Educational Childcare Act* (GD3-25).

[83] The Tribunal also considers that, in addition to having no malicious intent toward to the child she removed from her group to take outside or toward the group for whom she was responsible, the Appellant was faced with the fact that she was not able to count on a resource who usually came to her aid, namely the daycare centre's director, when the child in question was having a serious behavioural problem.

[84] On May 8, 2018, the director was away, and the Appellant was not able to count on her support, as was the case when such a situation had arisen previously.

[85] The Tribunal considers the Appellant's statement that the director was more present in the past to help educators manage the behavioural problems of the daycare centre's children but

that later she was away nearly half of the time (45% of the time) for administrative reasons (merger of two daycare centres). The Appellant also noted that there was no replacement educator because of cuts (GD3-34).

[86] The Appellant's testimony and statements show that she often asked the employer for help and sent her [translation] "SOSs" so that the director would give her more resources to handle the difficulties caused by the child's behaviour, but, despite those requests, she did not receive the help she counted on.

[87] On that point, the Tribunal notes that, in her written statement, the child's mother explained that, because of her daughter's behaviour, the Appellant had [translation] "raised red flags" on numerous occasions, stating that she did not know what to do or how to react with that child (GD7-2, GD7-3, and GD8-1).

[88] The Tribunal finds that the fact that there were no other resources available other than calling on educators who already had groups of children for whom they were responsible also explains why the Appellant's acts were not conscious, deliberate, or intentional and could not represent carelessness or negligence showing that she willfully disregarded the effects her actions would have on job performance (*Tucker*, A-381-85).

[89] The Tribunal notes that the employer's statement that the Appellant should have asked another educator for help does not indicate how that other educator could have helped the Appellant while continuing to supervise her own group of children.

[90] The employer revised its position by imposing a 21-week suspension on the Appellant, after it had dismissed her, because it had considered new facts (without specifying which ones) after she explained at the October 15, 2018, mediation session held by the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST). The Tribunal considers that act to support the fact that the Appellant's acts were not willful, deliberate, or intentional. The Tribunal takes the view that, during that session and even though the employer did not clarify the new facts it considered, the employer took into account the Appellant's version of the facts about the alleged acts.

[91] On that point, the Tribunal also considers truthful the Appellant's statement that, during that mediation session, the employer told her that it would consider her an honest person and that it knew that she was not the only educator to leave her group of children unattended. The Appellant also stated that, during that meeting, she made the employer understand that the alleged acts were not willful on her part but because of the aim she was pursuing with the child she had removed from her group.

[92] The Tribunal takes the view that the Appellant did not willfully and wantonly disregard the employer's interests or manifest wrongful intent toward the employer because of the pedagogical aim she was pursuing in committing the alleged acts (*Tucker*, A-381-85).

[93] The Tribunal is of the view that the Appellant's alleged acts were not of such scope that she could normally foresee that it would be likely to result in her dismissal. Although the Appellant committed reprehensible acts by leaving a child unattended in the daycare centre's backyard and by also leaving her group unattended, she could not know that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility, given that other employees with conduct similar to hers did not receive such a sanction (*Locke*, 2003 FCA 262; *Mishibinijima*, 2007 FCA 36; *Jewell*, A-236-94; *Tucker*, A-381-85).

Did the Commission satisfy its burden of proving whether the Appellant's acts constitute misconduct?

[94] The Court has reaffirmed the principle that the Commission must prove 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).

[95] The Tribunal is of the view that, in this case, the Commission did not satisfy 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).

[96] The Tribunal takes the view that the Commission did not consider in its decision the existing practice at the employer of educators being able to leave their children unattended, without that situation resulting in their dismissal for that reason. The Commission did not

consider that, in that context, the Appellant could not expect to be dismissed, despite her acts (*Locke*, 2003 FCA 262; *Mishibinijima*, 2007 FCA 36; *Tucker*, A-381-85).

[97] The Tribunal finds that, the Commission did not consider in its analysis the pedagogical aim underpinning the Appellant's acts or the context in which those acts were committed, either. It also failed to take into account the fact that those acts did not have the mental dimension required to establish an association with misconduct (*Jewell*, A-236-94).

[98] The Tribunal is also of the view that the Commission was not able to consider the employer's findings, as the Appellant reported them in her testimony, after the mediation session with the CNESST.

[99] The Tribunal takes the view that, despite the Appellant's acts, the evidence the Commission gathered is insufficient and that this evidence is not sufficiently detailed to find, on a balance of probabilities, that the Appellant lost her employment because of her misconduct (*Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485; *Crichlow*, A-592-97; *Meunier*, A-130-96; *Joseph*, A-636-85).

Is the Appellant's misconduct the cause of her loss of employment?

[100] No. The cause of the Appellant's loss of employment does not constitute misconduct within the meaning of the Act.

[101] The decisions given 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.

[102] The Tribunal finds that the Appellant did not lose her employment because of willful, deliberate, or intentional acts (*Tucker*, A-381-85; *Mishibinijima*, 2007 FCA 36).

[103] The Appellant did not lose her employment because of her 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).

[104] Therefore, 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

[105] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	January 31, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	L. S., Appellant