



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. C. v Canada Employment Insurance Commission*, 2019 SST 819

Tribunal File Number: GE-19-2242

BETWEEN:

R. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: July 17, 2019

DATE OF DECISION: July 26, 2019

DECISION

[1] The appeal is dismissed. I find that the Appellant lost his employment because of his misconduct, under sections 29 and 30 of the *Employment Insurance Act* (Act).

OVERVIEW

[2] The Appellant worked as an industrial mechanic for the employer X (employer), from December 10, 2018, to February 6, 2019, inclusive. The employer stated that it dismissed the Appellant because he had broke the lockout rules of the plant in which he worked, by neglecting to turn off the electric power switch and to lock it, an action that prevents a machine from being turned on while it is being repaired or inspected.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), found that the Appellant had lost his employment because of his misconduct, and it denied him Employment Insurance benefits.

[4] The Appellant argued that he did not lose his employment because of his misconduct. He explained that he neglected to [translation] “lock himself out” a number of times but that his acts were not willful, deliberate, or intentional on his part. The Appellant indicated that he had not been able to manage his stress when completing his work. On June 6, 2019, the Appellant challenged the decision after the Commission reconsidered it. This appeal to the Tribunal concerns that decision.

ISSUES

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

[6] To reach that finding, I 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 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 proof to show that the Appellant's acts constitute misconduct?
- e) Are the Appellant's acts the cause of his dismissal?

ANALYSIS

[7] Although the Act does not define the term misconduct, the case law states 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.¹

[8] There will be misconduct where the conduct of a claimant was willful, that is, in the sense that the acts that 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.²

[9] For conduct to be considered "misconduct," under the Act, it must be willful or so reckless as to approach willfulness.³

[10] 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.⁴

¹ *Tucker*, A-381-85.

² *Mishibinijima*, 2007 FCA 36; *Lemire*, 2010 FCA 314.

³ *McKay-Eden*, A-402-96.

⁴ *Lemire*, 2010 FCA 314.

What are the Appellant's alleged acts?

[11] In this case, the Appellant's alleged acts are breaking the lockout rules in effect at the plant where he worked (X). These rules are that, when a mechanic is repairing or inspecting a machine, they must turn off the electrical power switch and lock it to prevent the machine from being turned on while it is being repaired or inspected.

[12] In a statement made to the Commission on March 23, 2019, the employer explained that the Appellant was dismissed for breaking the lockout rules in effect at the plant where he worked. It stated that he neglected to follow the lockout procedure three times, which led to his dismissal under the penalty-scale rule. The employer also indicated that the Appellant had also shown insubordination in challenging the disciplinary measures imposed on him after his breaches. A dismissal letter dated February 6, 2019, was sent to the Appellant.⁵

Did the Appellant commit the acts in question?

[13] Yes. The Appellant acknowledged committing the alleged acts. He indicated that he forgot to lock out three times (February 4, 5, and 6, 2019) and did not comply with the procedure in effect at the employer.⁶

[14] I must now determine whether those acts constitute misconduct.

Were the Appellant's 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?

[15] Yes. I consider the Appellant's alleged acts to be deliberate. His acts were conscious, deliberate, or intentional.⁷

[16] I take the position that, with regard to those acts and despite the explanations he provided, the Appellant breached an express or implied fundamental duty resulting from the contract of employment.⁸

⁵ GD3-18 to GD3-26.

⁶ GD3-17, GD3-27, GD3-30, GD3-31, and GD3-33.

⁷ *Mishibinijima*, 2007 FCA 36; *Lemire*, 2010 FCA 314.

⁸ *Lemire*, 2010 FCA 314.

[17] The evidence on file and the Appellant's testimony and statements show the following:

- a) The alleged acts do not constitute misconduct. Those acts were not willful, deliberate, or intentional. They were not premeditated either;⁹
- b) The Appellant knew that he had to lock out and knew the lockout procedure to follow. He also knew that the employer had a policy to that effect and that he risked dismissal for the third offence;¹⁰
- c) The Appellant never had lockout problems when he worked at the employer's plants in X and X. He received calls, sometimes several at the same time, to perform repairs and was fairly used to this type of stress;
- d) The X plant, where he worked from December 2018 to February 2019, before he was dismissed, is a planing mill, not a sawmill like the X and X plants. The Appellant had never worked in that type of plant (planing mill) before. There were specialists at the X plant because several experienced mechanics could not solve that planing mill's problems. The Appellant worked alone at that location and could receive several (three or four) calls at the same time. The lockouts do not all work the same way because, in the plants, the lockout is done in one place, but at the X plant, it is done in two places. The Appellant forgot to lock out at this plant three times. His failure to follow the safety rules (for example, locking out) was not intentional, although the rules have been the same at all the plants where he has worked. He disregarded those rules and forgot to lock out because of stress (for example, new complex machine to adjust, pressure from the boss to finish the repairs quickly to get the mill running as soon as possible, having to perform other repairs to other equipment, presence of company bosses at the X plant during his last days of work, that is from February 4 to 6, 2019). The Appellant did not feel that stress when he worked at the X and X plants because he was familiar with that type of plant and knew what he had to repair, but that it was different at the X plant where the

⁹ GD2-4, GD3-30, GD3-31, and GD3-33.

¹⁰ GD3-17, GD3-27, and GD3-33.

atmosphere was also rather different. For example, the foreman walked around the mill with his sunglasses to pressure him. After the Appellant adjusted the planer, the foreman went behind him and made adjustments of his own to make sure that he had adjusted it properly;¹¹

- e) The Appellant was dismissed for neglecting to lock out. He received three disciplinary notices¹² at the same time and therefore did not serve the suspensions (three or five or more days) set out in the first two disciplinary notices he received before being dismissed. He did not receive the dismissal letter. He was dismissed verbally in the employer's office in the presence of the plant manger and the foreman. The union representing the Appellant told him that there was not much it could do about the alleged acts. The Appellant did not file a grievance to challenge the suspensions imposed on him or his dismissal;¹³ and
- f) The Appellant knew that not locking out before performing his repair or maintenance work was dangerous. He is not one to not lock out. He would not enter an area that could pose a risk (a dangerous area) without doing so. He would never voluntarily risk injuring himself. The Appellant has already given classes or training sessions on workplace health and safety to mechanics (X plant). In the past, he never received a warning from the employer for not locking out or for any other reason, except at the Xplant. The Appellant is an honest, hard-working family man. He always gave the employer his all.¹⁴

[18] The evidence on file indicates that disciplinary measures (documents entitled [translation] "Record of Disciplinary Measures") were imposed on the Appellant for not complying with the lockout procedure when completing his work on February 4, 5, and 6, 2019.¹⁵

¹¹ GD2-4, GD3-17, GD3-27, GD3-30, GD3-31, and GD3-33.

¹² GD3-20 to GD3-22.

¹³ GD2-4, GD3-17, GD3-20 to GD3-22, and GD3-27.

¹⁴ GD2-4 and GD3-17.

¹⁵ GD3-20 to GD3-22.

[19] Three- and five-day suspensions were imposed on the Appellant for not locking out on February 4 and 5, 2019, respectively. The following comment appears in the February 6, 2019, [translation] “Record of Disciplinary Measures” document issued to the Appellant, because he did not lock out to complete his work on February 5, 2019: [translation] “Consequences in the event of inability to improve the behaviour or to correct the conduct: dismissal.”¹⁶ A similar document dated February 6, 2019, was issued to the Appellant because he had not locked out when completing his work on that day either. It indicates that he was dismissed.¹⁷

[20] The Appellant signed the three documents in question.¹⁸

[21] The document entitled [translation] “Disciplinary Measure Scale Chart” also states that non-compliance with the lockout procedure results in a minimum suspension of three days (suspension of one to four days), one of five or more days, or even dismissal.¹⁹

[22] I consider that, in neglecting to follow the lockout procedure for completing his mechanic work three times on February 4, 5, and 6, 2019, the Appellant consciously chose to disregard the standards of behavior which the employer has the right to expect of him and to ignore a fundamental requirement of his employment.²⁰ In acting this way, the Appellant broke the relationship of trust between him and his employer.

[23] Despite the reasons the Appellant gave concerning the alleged acts (for example, new machine to repair with which he was not familiar, pressure from the employer, the Appellant’s stress), he had to make sure that he was complying with the procedure established by the employer concerning the fact that he had to lock out to complete his work.

[24] I am of the view that the Appellant could have avoided jeopardizing his employment by applying that procedure. The Appellant could not disregard such a fundamental requirement. He

¹⁶ GD3-21.

¹⁷ GD3-22.

¹⁸ GD3-20 to GD3-22.

¹⁹ GD3-25.

²⁰ *Tucker*, A-381-85.

also indicated that he knew that he had to lock out when working on machines and he knew the procedure to follow.²¹

[25] I am of the view that the Appellant's alleged acts were of such scope that he could normally expect that they would be likely to result in his dismissal. The Appellant knew that his conduct was such as to impair the performance of the duties owed to his employer and that dismissal was a real possibility for neglecting to lock out when completing his repair or maintenance work at the plant where he worked.²²

[26] The Appellant knew that the employer had a policy on this matter and that he was risking dismissal at the third offence, which occurred on February 6, 2019. The fact that the Appellant received the three disciplinary notices concerning non-compliance with the lockout procedure at the same time changes nothing in this situation. He knew the rules and the procedure in effect and knew that he had to comply to protect his employment.

[27] I find that the Appellant willfully disregarded the effects those omissions would have on job performance.²³

Did the Commission meet its burden of proof to show that the Appellant's acts constitute misconduct?

[28] Yes. I am of the view that, in this case, the Commission met its burden of proof to show that the Appellant's acts constitute misconduct. The case law states that the Commission must prove the existence of evidence of a claimant's misconduct.²⁴

[29] The evidence shows that the Appellant did not comply, on a number of occasions, with the employer's policy stipulating that he lock out before completing his work, although he could have continued to perform his employment by complying with that fundamental workplace

²¹ GD3-17, GD3-27, and GD3-33.

²² *Lemire*, 2010 FCA 314; *Mishibinijima*, 2007 FCA 36.

²³ *Tucker*, A-381-85.

²⁴ *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485.

health and safety rule. The Appellant chose to disregard a legitimate requirement of his employer.

Was the Appellant's misconduct the cause of his dismissal?

[30] Yes. I am of the view that the causal link between the Appellant's acts and his dismissal has been shown. The case law tells us that it must be established that the misconduct was the cause of a claimant's dismissal.²⁵

[31] The evidence shows that the fact that the Appellant broke the rules concerning the lockout procedure on a number of occasions was the real cause of his dismissal.

[32] The employer explained that it dismissed the Appellant for those reasons because he neglected to follow the lockout procedure on three occasions, which led to his dismissal under the penalty-scale rule.

[33] The Appellant indicated that he was dismissed for those same reasons.²⁶

[34] In summary, I find that the Appellant was dismissed because of acts committed willfully and deliberately.²⁷

[35] That is why I find that those acts constitute misconduct within the meaning of the Act and that the Appellant lost his employment through his own fault. His dismissal is the direct consequence of his alleged acts.²⁸

[36] As a result, the Commission's decision to exclude the Appellant from receiving Employment Insurance benefits, under sections 29 and 30 of the Act, is justified in the circumstances.

²⁵ *Cartier*, 2001 FCA 274; *MacDonald*, A-152-96; *Namaro*, A-834-82.

²⁶ GD3-17, GD3-27, and GD3-33.

²⁷ *Tucker*, A-381-85; *McKay-Eden*, A-402-96; *Mishibinijima*, 2007 FCA 36.

²⁸ *Cartier*, 2001 FCA 274; *MacDonald*, A-152-96; *Namaro*, A-834-82.

CONCLUSION

[37] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	July 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	R. C., Appellant