



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *D. G. v Canada Employment Insurance Commission*, 2019 SST 820

Tribunal File Number: GE-19-2389

BETWEEN:

**D. G.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Normand Morin

HEARD ON: August 29, 2019

DATE OF DECISION: August 30, 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 a replacement on a bread production line for the employer X (employer), from June 12, 2001, to August 28, 2018, then from September 12, 2018, to January 18, 2019, inclusive. The employer indicated that it had dismissed the Appellant for insubordination because he did not comply with an order from his supervisor to go to the bread packaging section after his break to help his co-workers, since there was an equipment breakdown and the production line was down.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant had lost his employment because of his misconduct and refused to pay him Employment Insurance benefits.

[4] The Appellant explained that he replied to his supervisor's request, went to the section of the plant dedicated to bread packaging, and noticed that the breakdown had been repaired. He stated that he then participated in a union meeting while he did not have work to do. In addition to being a replacement, the Appellant is a union delegate. He argues that he was dismissed because of his union activities. The Appellant also argues that he was dismissed because he is a member of a visible minority group. On June 19, 2019, the Appellant challenged the decision following the Commission's reconsideration of it. That decision is the subject of this appeal before the Tribunal.

## **PRELIMINARY MATTERS**

[5] The Appellant was not present at the videoconference hearing on August 29, 2019. A notice of hearing, dated August 8, 2019, was sent to the Appellant to inform him that the hearing would be held on August 29, 2019. The Tribunal received proof from a delivery service that the notice of hearing addressed to the Appellant and dated August 9, 2019, was delivered.

[6] Satisfied that the Appellant had been notified that the hearing would be held on August 29, 2019, I proceeded in his absence, as permitted in such situations under section 12 of the *Social Security Tribunal Regulations*. I waited more than 45 minutes after the hearing began on August 29, 2019, to allow the Appellant to attend. Despite that waiting period, the Appellant did not make his presence known. During that period, I also called the Service Canada Centre where the Appellant was supposed to appear for his hearing to find out whether he was there. I did not receive notice from the Appellant before the hearing that he would not be able to attend.

## **ISSUES**

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

[8] To make this finding, I must address the following questions:

- a) What is the Appellant alleged to have done?
- b) Did the Appellant commit the act in question?
- c) If so, was the Appellant's act conscious, deliberate, or intentional, such that he knew or should have known that it was likely to result in the loss of his employment?
- d) Did the Commission meet its burden of proof to show that the Appellant's act constitutes misconduct?
- e) Was the Appellant's act the cause of his dismissal?

## **ANALYSIS**

[9] Although the Act does not define misconduct, the case law states that, to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on job performance.<sup>1</sup>

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<sup>1</sup> *Tucker*, A-381-85.

[10] There will be misconduct where the conduct of a claimant was wilful, 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.<sup>2</sup>

[11] For conduct to be considered “misconduct,” under the Act, it must be wilful or so reckless as to approach wilfulness.<sup>3</sup>

[12] 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.<sup>4</sup>

### **What is the Appellant alleged to have done?**

[13] In the dismissal letter dated January 28, 2019, and addressed to the Appellant, the employer indicated that it had dismissed the Appellant for insubordination. In that letter, the employer explained that, on January 18, 2019, the Appellant failed to comply with an order from his supervisor to go to packaging, after his break, to help his co-workers since there had been an equipment breakdown. The employer noted that it was only an hour after he received that order and after he was called over the intercom (interphone) that he finally went to the area (packaging section). The employer also told the Appellant that the August 28, 2018, disciplinary letter that it had sent him informed him that, should the behaviour—that is insubordination—re-occur, he would be subject to a dismissal without any further notice.<sup>5</sup>

[14] In statements made to the Commission on March 12 and 14, 2019, the employer explained that a penalty scale had been applied to the Appellant before he was dismissed. It indicated that the Appellant had previously received a 10-day suspension for placing a piece of paper on a managerial display when he had been told not to do so. The Appellant challenged that

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<sup>2</sup> *Mishibinijima*, 2007 FCA 36.

<sup>3</sup> *McKay-Eden*, A-402-96.

<sup>4</sup> *Lemire*, 2010 FCA 314.

<sup>5</sup> GD3-42 or GD3-99.

suspension through a grievance, but following a January 16, 2019, decision from the Tribunal d'arbitrage [the arbitration tribunal],<sup>6</sup> that grievance was dismissed. At 12:45 p.m. on January 18, 2019, the employer asked the Appellant to go and help the packaging employees because there was a breakdown on the bread roll production line. The Appellant went there at 1:40 p.m., when the production line was operational again. Although the Appellant stated that he was on break to explain his delay, he could not combine his lunch break with one of his 15-minute breaks. Although the Appellant also explained that he had attended a union meeting (January 18, 2019), he had not obtained leave to do so.<sup>7</sup>

**Did the Appellant commit the act in question?**

[15] Yes. Although the Appellant indicated that, on January 18, 2019, he went to the plant's packaging section where an equipment breakdown had been observed on the bread production line, I am of the view that he did not complete the work that the employer had asked him to do. The Appellant did not go to the packaging section until about an hour after the employer had asked him to do so.

[16] The Appellant gave the following information regarding this point:

- a) The Appellant worked on the bread production line but did not have a specific position. He was responsible for replacing each of the employees on the production line during their breaks. His schedule was as follows: Monday, 6:30 a.m. to 4:30 p.m. and Tuesday to Friday, from 8:45 a.m. to 4:15 p.m. The Appellant took a 15-minute break between 9:50 and 10:20 a.m. and another around 12:15 or 12:20 p.m.;<sup>8</sup>
- b) In his claim, the Appellant chose the answer [translation] "I refused to perform a specific task, shift, or overtime," in response to the question [translation] "which reason best describes why you were dismissed/suspended?"<sup>9</sup> In response to the question asking him to select the option best describing the last incident that led to his dismissal or suspension, the Appellant chose the following answer: [translation] "I

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<sup>6</sup> GD3-29 to GD3-38.

<sup>7</sup> GD3-23 to GD3-27.

<sup>8</sup> GD3-39 to GD3-41, GD3-102, and GD3-103.

<sup>9</sup> GD3-8.

refused to perform a specific task.”<sup>10</sup> The Appellant also answered no to the question [translation] “Was the work you were asked to do outside the scope of your usual tasks?”<sup>11</sup>

- c) On January 18, 2019, when the employer asked him to go to the packaging section, the Appellant went there immediately after his lunch break (12:10 or 12:15 p.m. until 12:40 or 12:45 p.m.). He did not go to that area until an hour later, as the employer stated. Once there, the Appellant noticed that the production line was operational again<sup>12</sup> (GD3-102 and GD3-103);
- d) The Appellant then participated in a union meeting since he did not have work to do. Although union leave had not been scheduled for handling grievance files, he believes that, as a union delegate, he had a role to play. He had to go to that meeting because he had filed the grievances on behalf of other employees and had background information. Since he had been told that there was no work for him, his handling of the grievance files was therefore justified. The Appellant used his break time to participate in the union meeting but did not specify how long he attended;<sup>13</sup>
- e) The Appellant suggested to his employer that he stop his timesheet so that he could go, but the employer refused because it had needed him on line 2 (packaging). The Appellant thought of [translation] “punching” his active time versus his leave time only later. His workday ended at 12:15 p.m. (January 18, 2019).<sup>14</sup>

[17] In a statement made to the Commission on May 3, 2019, X, a union representative at the employer, indicated that around 12:45 p.m. on January 18, 2019, the Appellant told the foreman, X, that he was going to smoke a cigarette and that he would see him after. The union representative stated that the Appellant returned to see him about the grievance files around 1:15 p.m. The representative stated that the Appellant spoke to the foreman and offered to stop his paid time and not be paid as of his lunch break so that he would not be accused of stealing time

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<sup>10</sup> GD3-9.

<sup>11</sup> *Ibid.*

<sup>12</sup> GD3-102 and GD3-103.

<sup>13</sup> GD2-4, GD3-3 to GD3-18, GD3-39 to GD3-41, GD3-56, GD3-95, GD3-102, GD3-103, and GD3-108.

<sup>14</sup> GD3-39 to GD3-41, GD3-102, and GD3-103.

or taking time to do something other than working or attending a grievance handling meeting. The representative indicated that the Appellant's presence was not required at the union meetings on January 18, 19, and 20, 2019. The representative had not requested leave for union delegates for those meetings.<sup>15</sup>

[18] In this case, I assign an overriding value to the employer's statements concerning the events of January 18, 2019, following its request to the Appellant to lend his co-workers a hand on the inoperative bread production line. I consider the employer to have provided a description of the Appellant's alleged act that was detailed and free of contradictions and to have outlined it in the dismissal letter sent to the Appellant, as well as in its statements to the Commission.<sup>16</sup>

[19] I consider the union representative's statements to also support the employer's claims that the Appellant did not go to the bread production line, despite its request for him to do so, but instead attended to other activities (for example, smoking a cigarette around 12:45 p.m. and speaking to the union representative around 1:15 p.m.).

[20] I find the Appellant's statements concerning the alleged act contradictory. Although the Appellant stated that he went to the production line immediately after his lunch break on January 18, 2019,<sup>17</sup> when explaining his dismissal in his claim, he stated that he had refused to perform specific work and answered no to the question asking him whether the work he had been asked to do was outside the scope of his usual tasks.<sup>18</sup>

[21] In statements he made to the Commission on March 15, 2019, and April 29, 2019, the Appellant acknowledged that the employer needed him in the afternoon of January 18, 2019, and that that was why he had refused to clock out so that he could go.<sup>19</sup>

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<sup>15</sup> GD3-104 and GD3-105.

<sup>16</sup> GD3-23 to GD3-27, GD3-42, and GD3-99.

<sup>17</sup> GD3-102.

<sup>18</sup> GD3-8 and GD3-9.

<sup>19</sup> GD3-39 to GD3-41, GD3-102, and GD3-103.

[22] In his notice of appeal and several statements he made to the Commission, he stated that, since he did not have any work to do, he took the initiative of attending a union meeting for which he had not obtained leave.<sup>20</sup>

[23] Furthermore, the Appellant did not specify how long the union meeting lasted after the employer asked him to go to the inoperative production line.<sup>21</sup>

[24] I find on a balance of probabilities that the Appellant committed the alleged act. The Appellant did not follow up on the employer's directive to go work on the production line where the breakdown occurred until about an hour later and after deciding on his own initiative to participate in a union meeting for which he had not obtained leave.

[25] I must now determine whether the Appellant's alleged act constitutes misconduct.

**Was the Appellant's act conscious, deliberate, or intentional, such that he knew or should have known that it was likely to result in the loss of his employment?**

[26] Yes. I consider the Appellant's alleged act to be wilful. His act was conscious, deliberate, or intentional.<sup>22</sup>

[27] I find that, regarding this act and despite his explanations to that effect, the Appellant breached an express or implied fundamental duty resulting from the contract of employment.<sup>23</sup>

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

- a) He was dismissed because of his union activities. On January 18, 2019, the Appellant participated in a union meeting when he had no work to do. The Appellant had been a union delegate since 2014, and, in his view, the fact that he was confronting management (the employer) for irregularities is the cause of his dismissal. The Appellant had been the employer's target ever since he became a union delegate. He was standing up for situations related to workplace safety and, for these reasons, the employer did everything it could to dismiss him so that it could better control the

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<sup>20</sup> GD2-4, GD3-39 to GD3-41, GD3-56, GD3-95, GD3-102, GD3-103, and GD3-108.

<sup>21</sup> GD3-39 to GD3-41.

<sup>22</sup> *Mishibinijima*, 2007 FCA 36.

<sup>23</sup> *Lemire*, 2010 FCA 314.



employees' problematic situations concerning the application of the collective agreement. The employer (management) and the union agent are acting in bad faith because they do not want to resolve the existing problems at the plant (for example, cases under the jurisdiction of the Commission des normes, de l'équité, de la santé et de la sécurité du travail [the labour standards commission] (CNESST), grievances, grey areas in the collective agreement, training, occupational health and safety, and discrimination). To stop people from being informed, the employer punishes union delegates (for example, dismissal);<sup>24</sup>

- b) The Appellant was dismissed because he is a member of a visible minority group. The employer is demonstrating racism. The Appellant is the third delegate who is a member of a visible minority group to have been dismissed in a short period. They are reprisals because the delegates are demanding or protecting their rights;<sup>25</sup>
- c) The Appellant was not trained to work on the roll production line, and the request for him to do so did not comply with the collective agreement;<sup>26</sup>
- d) The Appellant lost his case before the Tribunal d'arbitrage about the 10-day suspension the employer imposed on him, on August 28, 2018;<sup>27</sup>
- e) The Appellant lodged a complaint to challenge his dismissal and be reinstated to his employment.<sup>28</sup>

[29] The evidence on file also indicated that, in a decision given on January 16, 2019,<sup>29</sup> the Tribunal d'arbitrage dismissed the Appellant's grievance seeking to challenge the 10-day suspension the employer had imposed on him, on August 28, 2018.<sup>30</sup>

[30] This arbitration award also gives the following clarifications concerning the disciplinary measures the employer imposed on the Appellant in the past: the Appellant received a one-day

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<sup>24</sup> GD2-4, GD3-3 to GD3-18, GD3-39 to GD3-41, GD3-43, GD3-56, GD3-58, GD3-95, GD3-102, and GD3-103.

<sup>25</sup> GD3-39 to GD3-41; GD3-43, and GD3-56; GD3-58, and GD3-95.

<sup>26</sup> GD3-43.

<sup>27</sup> GD3-28 to GD3-38.

<sup>28</sup> GD3-102, GD3-103, and GD3-108.

<sup>29</sup> *Boulangerie Canada Bread Limitée c BCTM, section locale 55*, 2019 CanLII 1602 (QC SAT).

<sup>30</sup> GD3-29 to GD3-38.

suspension on September 25, 2017, following a failure to appear at work despite the employer's refusal of leave. A second three-day suspension was imposed on the Appellant on December 11, 2017, because of his failure to appear at work despite the fact the employer had denied him union leave. A five-day suspension was also imposed on the Appellant on March 6, 2018. This sanction resulted from the Appellant's refusal to replace one of his co-workers during a break despite the express requests of his line supervisor. Another five-day suspension was imposed on the Appellant on June 6, 2018. This suspension followed the Appellant's failure to attend a brief daily meeting because he considered it unimportant and he had to attend to union activities. All of these sanctions were challenged through grievances, but they were withdrawn on December 27, 2018.<sup>31</sup>

[31] I consider that, in failing to go to the roll production line when the employer asked him to do so, the Appellant consciously chose to disregard the standards of behaviour that the employer had a right to expect of him, and to ignore a fundamental requirement of his employment.<sup>32</sup>

[32] I find that the Appellant did not comply with a legitimate request that the employer clearly expressed. In doing so, the Appellant broke the relationship of trust with his employer.

[33] I am of the view that the Appellant could have avoided jeopardizing his employment by agreeing to go on the inoperative production line when the employer asked him to do so. The Appellant could not disregard such a fundamental requirement, that of completing his work according to his schedule and performing the tasks for which he was paid.

[34] I find that the Appellant's alleged act was of such scope that he could normally expect that it 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, as a result, dismissal was a real possibility.<sup>33</sup>

[35] I note that the information given by the employer, which has not been contradicted, specifies that a penalty scale was applied to the Appellant before he was dismissed and that he

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<sup>31</sup> GD3-32 and GD3-33.

<sup>32</sup> *Tucker*, A-381-85.

<sup>33</sup> *Lemire*, 2010 FCA 314; *Mishibinijima*, 2007 FCA 36.

was warned that, in the event of a recurrence after his 10-day suspension on August 28, 2019, because of his insubordination, he could be dismissed without further notice.<sup>34</sup>

[36] I find that Appellant's failure to respond to his employer's order shows that he wilfully decided to disregard the effects that omission would have on his job performance.<sup>35</sup>

**Did the Commission meet its burden of proof to show that the Appellant's act constitutes misconduct?**

[37] Yes. I am of the view that, in this case, the Commission met its burden of proof to show that the Appellant's act constitutes misconduct. The case law informs us that the Commission must prove the existence of evidence showing a claimant's misconduct.<sup>36</sup>

[38] The evidence shows that the Appellant chose to disregard a legitimate requirement of his employer when he could have continued his employment by following up when the request was made.

**Was the Appellant's act the cause of his dismissal?**

[39] Yes. I am of the view that the causal link between the Appellant's act and his dismissal was shown. The case law states that it must be established that the misconduct was the cause of the claimant's dismissal.<sup>37</sup>

[40] The evidence shows that the fact the Appellant did not go to the inoperative production line, when the employer asked him to do so, was the real cause of his dismissal.

[41] The employer explained that it dismissed the Appellant for that reason after applying a penalty scale to him.<sup>38</sup>

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<sup>34</sup> GD3-25 to GD3-27, GD3-42, and GD3-99.

<sup>35</sup> *Tucker*, A-381-85.

<sup>36</sup> *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.

<sup>37</sup> *Cartier*, A-168-00; *MacDonald*, A-152-96; *Namaro*, A-834-82.

<sup>38</sup> GD3-25 to GD3-27, GD3-42, and GD3-99.

[42] In an uncontradicted statement made to the Commission on March 14, 2019, the employer also indicated that the Appellant had lodged complaints for racism before his dismissal but that he had withdrawn all of them.<sup>39</sup>

[43] I do not accept the Appellant's argument that he was dismissed because he is a member of a visible minority group and that the employer was displaying racism. I find that the Appellant's allegations on this point are not supported by evidence that can show, in measurable and observable terms, that the employer dismissed him because he is a member of a visible minority group or that the employer displayed racism.

[44] In summary, I find that the Appellant was dismissed because of a wilful and deliberate act he committed.<sup>40</sup>

[45] That is why I find that this act constitutes misconduct within the meaning of the Act and that the Appellant lost his employment by his own fault. His dismissal is the direct consequence of the action of which he was accused.<sup>41</sup>

[46] Therefore, the Commission's decision to disqualify the Appellant from receiving Employment Insurance benefits, under section 29 and 30 of the Act, is justified in the circumstances.

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<sup>39</sup> GD3-25 to GD3-27.

<sup>40</sup> *Tucker*, A-381-85; *McKay-Eden*, A-402-96; *Mishibinijima*, 2007 FCA 36.

<sup>41</sup> *Namaro*, A-834-82; *MacDonald*, A-152-96; *Cartier*, 2001 FCA 274.

**CONCLUSION**

[47] The appeal is dismissed.

Normand Morin  
Member, General Division – Employment Insurance Section

HEARD ON:	August 29, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	D. G., Appellant, did not attend the hearing  Canada Employment Insurance Commission, Respondent, did not attend the hearing