



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *S. E. v Canada Employment Insurance Commission*, 2019 SST 1016

Tribunal File Number: GE-19-2358

BETWEEN:

**S. E.**

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: September 12, 2019

DATE OF DECISION: September 13, 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 welder and a stationary equipment operator for the employer X (employer), from spring 2010 to September 21, 2018, inclusive. The employer indicated that it dismissed the Appellant because he was no longer available for work during the period in which he was incarcerated.

[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 argued that he did not lose his employment because of his misconduct. He argued that he had not been available for his employer because of his incarceration and that, failing that, he would have been available. The Appellant indicated that the employer rehired him on January 7, 2019. On June 19, 2019, the Appellant disputed the decision following the Commission's reconsideration. That decision is the subject of this appeal before the Tribunal.

## **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 make that finding, I must answer the following questions:

- a) What is the Appellant alleged to have done?
- b) Did the Appellant commit the alleged act?

- c) If so, was the Appellant's act conscious, deliberate, or intentional, of such scope that he knew or should have known that it would be likely to result in the loss of his employment?
- d) Did the Commission meet its burden of proving that the Appellant's act constitutes misconduct?
- e) Is the Appellant's act 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 wilful or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects their actions would have on job performance.<sup>1</sup>

[8] There will be misconduct where the conduct of a claimant was wilful, that is, 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>

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

[10] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged 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>

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

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

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

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

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

[11] In this case, the Appellant is alleged to have stopped being available for his employer to complete his work after he was incarcerated. The Appellant's incarceration arises from the fact that the police intercepted him on September<sup>o</sup>3, 2018, for driving his vehicle while impaired.<sup>5</sup>

[12] In a statement made to the Commission on April 17, 2019, the employer explained that it had dismissed the Appellant because of his incarceration. The employer stated that it did not have a choice, because it had to hire another employee to replace him.<sup>6</sup>

[13] In a letter dated September 6, 2019, the employer explained that, despite the Appellant's applications to be released so that he could return to work, he was not able to resume his work, which caused the termination of his employment. The employer indicated that, during his incarceration, the Appellant contacted it numerous times because he wanted to return to work. It stated that the Appellant was available after his release from prison in December 2018, but there was not enough work for him to be rehired at that time. The employer stated that it rehired the Appellant in January 2019.<sup>7</sup>

[14] The Record of Employment issued by the employer indicates that the Appellant stopped working for the reason "other" (Code K – other). The following comment appears in block 18 (comments) of the Record of Employment issued by the employer: [translation] "unavailability."<sup>8</sup>

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

[15] Yes. The Appellant acknowledged that he was unable to work for his employer during his incarceration from September 23, 2018, to December 11, 2018. He stated that the employer had replaced him because of his lack of availability and the business's needs.<sup>9</sup>

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<sup>5</sup> GD3-23 to GD3-25 and GD3-27.

<sup>6</sup> GD3-34.

<sup>7</sup> GD7-1.

<sup>8</sup> GD3-20 and GD3-21.

<sup>9</sup> GD3-24, GD3-25, GD3-27, and GD3-32.

[16] The Tribunal must now determine whether this act constitutes misconduct.

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

[17] Yes. I consider the Appellant's alleged act to have been wilful. His act was conscious, deliberate, or intentional.<sup>10</sup>

[18] The Tribunal finds that, regarding that act and despite the explanations he provided to that effect, the Appellant breached an express or implied fundamental duty arising from the contract of employment.<sup>11</sup>

[19] The Appellant's testimony and statements indicate the following:

- a) He did not lose his employment because of his misconduct;<sup>12</sup>
- b) In the statements he made to the Commission on January 16, 2019, February 11, 2019, and April 16, 2019, the Appellant explained that his employment stopped because he was incarcerated from September 23, 2018, to December 11, 2018 (80 days of imprisonment). His employer could not wait for him and replaced him with another employee because of his lack of availability and the business's needs (for example, production and delivery times);<sup>13</sup>
- c) When he indicated in his notice of appeal that the employer had not had enough work to replace him, this meant that it had found another employee in-house to fill his position, that the position had therefore been posted, and that the Appellant had then been replaced by another employee whose work schedule corresponded to his;<sup>14</sup>
- d) The Appellant was available to work. It was his incarceration that made him unavailable for his work. He made every necessary effort and met with all necessary authorities (for example, probation officers, appeal board member) to be released or

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<sup>10</sup> *Mishibinijima*, 2007 FCA 36.

<sup>11</sup> *Lemire*, 2010 FCA 314.

<sup>12</sup> GD2-2.

<sup>13</sup> GD3-22 to GD3-25, GD3-27, GD3-32, and GD7-1.

<sup>14</sup> GD2-2.

to reduce his incarceration period so that he would be able to resume his work as soon as possible. However, his applications to be released were denied. It was the authorities he met with who made him unavailable. The Appellant did everything in his power to return to the labour market, but he remained in detention. He contacted his employer to inform it that he wanted to resume his work and that he had made efforts (for example, multiple appeals) to secure his release;<sup>15</sup>

- e) The Appellant found himself in a bind when he was arrested for impaired driving. During his imprisonment, he had no income despite his family responsibilities (for example, shared custody of his four children). The Appellant lost a lot after what happened to him; and
- f) The Appellant was entitled to benefits for the period between his release on December 11, 2018, and his return to work on January 7, 2019, because he was no longer detained and, as a result, was available to work. The employer rehired him on January 7, 2019, on a night schedule (4:00 p.m. to 2:30 a.m.) instead of a day schedule like the one he had had before he lost his employment.<sup>16</sup>

[20] In this case, I find that, when he stopped going to work because of his imprisonment, the Appellant was no longer able to meet an essential condition of his contract of employment, that of performing his work, because he was no longer available to his employer.

[21] Even if the Appellant argues that he was no longer available for work because of his incarceration and that, failing that, he would have been available, the fact remains that his imprisonment results from the prohibited act he committed, namely impaired driving.

[22] The Appellant's behaviour led to his imprisonment and therefore to the loss of his employment because he found himself unable to perform his work. The loss of his employment is entirely attributable to him.

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<sup>15</sup> GD7-1.

<sup>16</sup> GD2-2, GD3-23 to GD3-25, GD3-27, and GD3-32.

[23] Through his own action, the Appellant could no longer perform the services required of him under his employment contract.

[24] The case law tells us that the performance of services is an essential condition of the employment contract and that an employee who, through their own actions, can no longer meet that condition and as a result loses their employment, cannot force others to bear the burden of their unemployment, no more than someone who leaves their employment voluntarily.<sup>17</sup>

[25] The case law also tells us that, when an employee who cannot work because they are incarcerated is dismissed, the dismissal arises out of the fact that the employee is not available, which is itself an inescapable consequence of the deprivation of liberty lawfully imposed on an employee who has committed a prohibited act. Every incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability. It is a loss of employment because of misconduct.<sup>18</sup>

[26] I find that, in not being able to go to work and perform his services because of his incarceration, the Appellant wilfully disregarded the standards of behaviour that his employer had a right to expect of him.<sup>19</sup>

[27] I am of the view that the Appellant could have avoided jeopardizing his employment by avoiding a situation in which he would no longer be able to go to work.

[28] 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 duties he owed to his employer and that there was a real possibility that he would be dismissed for not going to work.<sup>20</sup>

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<sup>17</sup> *Lavallée*, 2003 FCA 255.

<sup>18</sup> *Borden*, 2004 FCA 176; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc.*, 2003 SCC 68.

<sup>19</sup> *Tucker*, A-381-85.

<sup>20</sup> *Lemire*, 2010 FCA 314; *Mishibinijima*, 2007 FCA 36.

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

[29] Yes. I am of the view that, in this case, the Commission has met its burden of proving that the Appellant's act constitutes misconduct.

[30] The case law informs us that the Commission must prove the existence of evidence of a claimant's misconduct.<sup>21</sup>

[31] The evidence shows that, given his imprisonment, the Appellant was no longer available for his employer, while he would have been able to continue in his employment by avoiding that situation.

**Is the Appellant's misconduct the cause of his dismissal?**

[32] Yes. I am of the view that the causal link between the Appellant's act and his dismissal has been shown.

[33] The case law indicates that it must be established that the misconduct constitutes the cause of the Claimant's dismissal.<sup>22</sup>

[34] The evidence shows that the fact that the Appellant was no longer able to go to work is the real cause of his dismissal.

[35] The employer explained that it dismissed the Appellant for that reason.<sup>23</sup>

[36] The Appellant indicated that he was dismissed for that reason.<sup>24</sup>

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<sup>21</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>22</sup> *Cartier*, A-168-00; *MacDonald*, A-152-96; *Namaro*, A-834-82.

<sup>23</sup> GD3-34.

<sup>24</sup> GD3-22 to GD3-25, GD3-27, and GD3-32.



[37] In summary, I find that the Appellant was dismissed because of an act he committed wilfully and deliberately.<sup>25</sup>

[38] That is why the Tribunal finds 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 act of which he was accused.<sup>26</sup>

[39] 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 justified in the circumstances.

[40] Concerning disqualification because of misconduct or leaving without just cause, I note that section 30(1) of the Act states, among other things, that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct, unless the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits, or the claimant is disentitled under sections 31 to 33 in relation to the employment.

## CONCLUSION

[41] The Appellant lost his employment because of his misconduct, under sections 29 and 30 of the Act.

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<sup>25</sup> *Lavallée*, 2003 FCA 255; *Borden*, 2004 FCA 176; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc.*, 2003 SCC 68; *Tucker*, A-381-85; *McKay-Eden*, A-402-96; *Mishibinijima*, 2007 FCA 36.

<sup>26</sup> *Namaro*, A-834-82; *MacDonald*, A-152-96; *Cartier*, 2001 FCA 274.

[42] The appeal is dismissed.

Normand Morin  
Member, General Division – Employment Insurance Section

HEARD ON:	September 12, 2019
METHOD OF PROCEEDING:	In person
APPEARANCE:	S. E., Appellant