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

[TRANSLATION]

Citation: *G. L. v Canada Employment Insurance Commission*, 2019 SST 1515

Tribunal File Number: GE-19-2601

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: September 26, 2019

DATE OF DECISION: October 7, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant was an intervention officer for X. He was dismissed on February 15, 2019. The employer alleges that he slept while he was working the night shift at a youth centre. It also alleges that he lied about arrangements made between the night shift officers whereby they split up the working time into one or two hours each. The employer said that it ultimately decided to dismiss the Appellant because he did not acknowledge the seriousness of his actions, which led the employer to believe that the incident might very well reoccur and which broke the relationship of trust with the employer.

[3] The Appellant acknowledges that he initially lied to the employer about the dividing of time between officers, but he denies having slept during his shift. He believes he was photographed unknowingly as he was blinking his eyes.

ISSUES

[4] The Tribunal must decide the following issues:

a) Did the Appellant commit the alleged acts?

b) Do the alleged acts constitute misconduct under the Act?

ANALYSIS

[5] I must determine whether the Appellant should be disqualified from receiving Employment Insurance benefits for an indefinite period, under sections 29 and 30 of the *Employment Insurance Act* (Act), because he lost his employment due to his own misconduct.

Issue 1: Did the Appellant commit the alleged acts?

[6] To conclude that there was misconduct, I must have relevant facts and sufficiently detailed evidence, first, to be able to know how the employee behaved and, second, to decide

whether such behaviour was reprehensible.[1] Similarly, it must be established whether the Appellant committed the alleged acts. The Commission has the burden of proving on the balance of probabilities that there is evidence of the alleged misconduct.[2]

[7] Based on the evidence and for the reasons that follow, I find that the Commission met the burden of proving that the Appellant committed the acts of which the employer accuses him.

[8] Regarding the first accusation, the Appellant admitted that he lied to his employer on one occasion. At the beginning of the employer's investigation, the Appellant lied about the arrangement he had with the other night shift officers, to split up their work hours and rounds, so as not to cause problems for his co-workers.

[9] The Appellant denies the second accusation, that of having slept while on duty. Based on my analysis of the evidence, I doubt the Appellant's credibility. On the one hand, he says he had personal problems and insomnia during the day, which made him very tired during his night shifts, suggesting that he could have fallen asleep. But on the other hand, he categorically denies ever having slept at work, despite his long breaks. I find that the Appellant's credibility is also undermined by the fact that he did not realize he had been photographed but still denies that he was sleeping and that someone could have made noise around him without him waking. I am of the opinion that a person knows when they are being photographed, unless the photo is taken behind their back, which was not the case here. If the Appellant did not notice that a co-worker had taken his picture, it is because he was not in a necessary state of consciousness to be vigilant and fulfill his obligations as an employee. If he was only blinking, like he said in his testimony, he would have clearly seen the other person taking his picture.

[10] During his testimony, the Appellant stated with certainty that he had not slept while on duty. However, at a different time, he made an analogy to a person who falls asleep at the wheel, stating: [translation] "If I fall asleep, it is like a driver falling asleep at the wheel and ending up in the ditch. It isn't because the driver wanted to fall asleep." On the one hand, he expresses

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[1] *Meunier*, A-130-96; *Joseph*, A-636-85.
[2] *Crichlow*, A-562-97.

strongly that he did not sleep; on the other, he admits his own doubt about having unintentionally slept. In my view, his version of the facts is therefore inconsistent.

[11] I note that, in their discussion with the Commission, the Appellant's union representative revealed that the union expected the Appellant to be suspended because he was caught sleeping at work. Although not determinative in itself, this evidence still argues in favour of the fact that the Appellant slept and even acknowledged it at one point.

[12] Given the serious consequences of a finding of misconduct for an Employment Insurance claimant, I must analyze the facts independently of the employer's decisions.[3] I am not bound by the way in which the grounds for dismissal are qualified by the employer, the Appellant, or a third party. Instead, I must base my own conclusions on the evidence and the application of the law.

[13] In this case, I find that the evidence on file goes beyond the subjective opinion of the employer. I note that the employer not only reported its findings, but it also provided documents relating to its internal investigation. I find that the documents related to the employer's investigation show on the balance of probabilities that the Appellant did indeed sleep while on duty. The evidence includes written statements from four witnesses who confirm the fact that the Appellant sometimes slept at work, having been a direct witness or having heard other co-workers talking about this problem. I find that the photo submitted by the employer is pretty telling and shows that in all probability the Appellant was sleeping. It shows a man comfortably reclined with his eyes closed, his head titled to the side, and his arms crossed over his chest. The Appellant admits that it is indeed a photo of him.

[14] I give little weight to the Appellant's argument about the damaged chairs that titled backwards on their own. Although it is possible and although the employer said it replaced the chairs afterwards, this fact only distracts from the specific question and fails to convince me that the Appellant was awake when his photo was taken.

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[3] *Ibid*.

[15] I also retain from the evidence on file and the Appellant's testimony that he constantly plays with words and questions the definition of sleep versus what he actually did, going from [translation] "doze off," [translation] "nod off," drift off, close his eyes, have heavy eyes, feel drowsy, etc. At times, he seems to admit that it is possible that he fell asleep, saying that it was not at all wilful or reckless; at other times, he categorically denies the possibility that he fell asleep. These contradictions undermine the Appellant's credibility. I find that he was attempting to create doubt about the fact that he was really sleeping. However, the Commission does not have to show beyond all reasonable doubt that the Appellant was sleeping. It has to show it on a balance of probabilities.

[16] The Appellant's representative also submits that the evidence does not show that the Appellant was in a deep sleep and therefore makes it unclear whether he was sleeping, dozing off, or closing his eyes. I reject that argument, which attempts once again to overshadow the determination of the facts on the balance of probabilities. It is not a question of determining the degree of the Appellant's sleep, but rather of determining whether his nodding off compromised his vigilance and the safety of the youth centre users. I note from reading the statements that four of the witnesses do not deny that the Appellant sometimes fell asleep at work and that two of the four witnesses state unequivocally that the Appellant was sleeping despite the noises around him.

[17] I give significant weight to these statements. Although they are indirect evidence, I find that the statements are credible. They are signed by the witnesses and there is no evidence that they made their statements under duress or with any interest in lying. I also give weight to the fact that the employer reports that several users of various facilities claim to have seen the Appellant sleeping at work. The employer's investigation seems comprehensive to me as it questioned several people from various angles. The Appellant's habits were established through a diligent investigation concluding that the Appellant frequently slept during his shifts.

[18] For this case, I therefore find, based on all the evidence and on the balance of probabilities, that the Appellant did indeed sleep while on duty during a night shift on January 26, 2019.

[19] The employer also accuses the Appellant of breaking the relationship of trust by not admitting to his actions and not demonstrating a willingness to take the necessary measures to improve his behaviour. Breaking the relationship of trust is not a concrete action that the Appellant allegedly committed, but rather a question of attitude regarding the overall situation. The employer submits that it is the Appellant's denial that broke the relationship of trust. If the Appellant had admitted to his behaviour and shown an openness to discuss possible accommodations to correct his weaknesses and remedy the sleep situation during his night shifts, the decision to dismiss him would likely have been different. The employer finds that the Appellant lacked judgement in failing to acknowledge the seriousness of his actions. I noted during the Appellant's testimony that, when he did not deny having nodded off, he tried to minimize his actions. The Appellant did not acknowledge having jeopardized the safety of the users of the youth centre and of his co-workers. Instead, he made several complaints against the organization and its administration, which shows that he was not focused on his own issues and his own provision of services at work. He also pointed to other employees who had been caught sleeping on duty and who did not face any consequences. I find that the Appellant showed an attitude of detachment from his behaviour and no remorse, which may have broken the relationship of trust with the employer.

Issue 2: Do the alleged acts constitute misconduct under the Act?

[20] Generally, section 30 of the Act provides that a claimant who loses their employment because of their misconduct is not entitled to receive benefits. Each case is a specific one and must be analyzed based on its particular facts. In terms of misconduct, the burden of proof rests on the Commission, which must prove, on the balance of probabilities, that the evidence supports the alleged misconduct.[4]

[21] The word "misconduct" is not defined as such in the Act, but the courts have established principles to guide decision-makers throughout case law. It is largely a question of circumstances.[5] In *Tucker*,[6] the Court sets out what constitutes misconduct. The Court

[4] *Crichlow*, A-562-97.
[5] *Bedell*, A-1716-83.
[6] *Tucker*, A-381-85.

established 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 his or her actions would have on job performance."

[22] I am of the opinion that lying to his employer and sleeping while on duty are reprehensible conduct. An employer should be able to expect that its employees will not lie to it during an investigation and that they will ensure the provision of a service without sleeping on the job. I also agree with the Commission that, since the Appellant's job was to watch over the users, sleep is incompatible with his duties.

[23] However, reprehensible conduct does not automatically lead to a finding of misconduct.[7] To arrive at a finding of misconduct, the Tribunal must analyze the facts and reach the conclusion that the alleged breach is of such scope that its author could normally expect that it would be likely to result in dismissal.[8] The Federal Court of Appeal has ruled on a number of occasions on the concept of misconduct and the requirement that there be a mental element.[9]

[24] I therefore asked myself whether the Appellant knew or should have known that by lying to his employer and sleeping during his shift he risked losing his employment. My conclusion is yes.

[25] The Appellant submits that he could never have imagined being dismissed. He also submits that being tired to the point of nodding off must be taken into consideration since he was nearing the end of a series of six 12-hour nights.

[26] I find that the nature of the employment, the work environment, and the people involved are elements that are largely part of the relevant context of this case and that must be taken into consideration. In this case, I find that, as an intervention officer, the Appellant was responsible for the safety of a group of minor children with diverse needs and issues. That should not be taken lightly. Safety issues are serious issues, and I am of the opinion that they are even more so when vulnerable minors are involved. In this context, I find that, as an intervention officer at a

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[7] *Locke*, 2003 FCA 262.
[8] *Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96.
[9] *Tucker*, A-381-85, and its principles reaffirmed in *Canada (Attorney General) v Hastings*, 2007 FCA 372.

youth centre, the Appellant knew or should have known that sleeping during his shift was such as to impair the performance of the duties owed to his employer.[10]

[27] The fact that he had made arrangements with his co-workers to split up the rounds of the user's wings allowed the Appellant and his co-workers to remain at their station for long periods doing other things, such as watch movies or even leave the station to go make a meal in the kitchen, etc. This version of the facts explained by the Appellant implies that the officer that was not doing rounds for an hour or two behaved as if they were on break, and their presence did not seem to be required at the station. Based on the evidence, I find that it was in this spirit that the Appellant felt comfortable closing his eyes and dozing off. However, this arrangement meant that only one intervention officer out of two was alert and vigilant when two officers are on the schedule during the night.

[28] I am of the opinion that, if the employer schedules two officers, it is not so they can alternate their provision of service, it is because two people are actually needed. The Appellant knew or should have known that failing to meet his responsibility for long periods of time intermittently with his co-workers did not meet the requirements of his position. The fact that he ignored these requirements and allowed himself to sleep on the job outside of his breaks shows a certain recklessness on his part.

[29] I find that not being allowed to sleep at work is implicit for most types of employment and contracts. It is all the more implicit when your job is to watch over and ensure the safety of a group of vulnerable people. By not taking steps to prevent himself from falling asleep, the Appellant wilfully disregarded the repercussions his actions would have on his job performance and continued employment. The Appellant acknowledged that he experienced certain sleep difficulties during the day, which made him very tired during his night shifts. I find it difficult to understand how someone who has difficulty staying awake could sit in a reclined chair and close their eyes during their night shift. The risk of fatigue is very real for all those who work night shifts and they must take the necessary steps to ensure the provision of their service. I have difficulty understanding the Appellant's reasoning for remaining seated for long periods of time

[10] *Tucker*, A-381-85.

rather than getting up regularly to do his rounds, which would help him stay awake. I find that making himself vulnerable to the temptation of sleep without putting in place actions to combat sleep shows negligent and deliberate behaviour.

[30] The fact that the Appellant was on his sixth 12-hour night shift in a row does not change the responsibilities he had to fulfill as an intervention officer. If he could no longer fulfill his obligations, he should have let his employer know rather than making arrangements allowing him to sleep during the night. However, he failed to address his difficulties staying awake with his employer and to take steps to improve his ability to stay awake all night. I find that allowing himself to fall asleep at his work station was conscious, deliberate, or intentional. That type of behaviour constitutes misconduct under the Act.[11] I therefore find that the Appellant himself brought about the risk of finding himself in an unemployment situation because he ignored the repercussions that his sleeping could have on his employment.

[31] The Appellant also submits that a change in the decision-making structure of the centre meant that a person from human resources made the decision even though the centre's managers would have kept the Appellant employed despite his conduct. He also submits that the employer was well aware of the agreement between employees to split up the rounds and that only the Appellant suffered the consequences of this agreement when others were also caught sleeping.

[32] I note that the issue is not whether the penalty was justified.[12] It may be that the employer has an entirely valid reason to end an individual's employment without there being misconduct in terms of Employment Insurance and vice versa. Therefore, I will not decide on the consistency or severity of the penalty. If the Appellant finds that he was reprimanded too severely, he can pursue the remedies he has through other tribunals that have jurisdiction on that matter, which he has already done.

[33] As for the other employees who engaged in the same type of conduct, I cannot comment on cases that are not before me. Each case is a specific one and misconduct on the part of other

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[11] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] *Fakhari*, A-732-95.

employees does not release a claimant from their employee obligations and from not provoking the risk of unemployment.

[34] I note that the Appellant was dismissed on cumulative grounds. I have already concluded that I have difficulty understanding how an intervention officer could not expect to be dismissed simply for being caught sleeping on his shift. In this case, however, I must also consider that, in addition to sleeping, the Appellant lied and minimized his actions, contributing to the breach of the relationship of trust leading to dismissal. Considering all of his conduct surrounding the events of January 26, 2019, and during the employer's investigation, I can only find that the Appellant acted in such a way that he should have expected the possibility that the employer would impose serious consequences. The absence of admission, remorse, and the expression of a desire to find solutions indicates a certain recklessness that approaches misconduct under the Act.

[35] Based on all the evidence and the arguments raised by the parties, I am satisfied that the Commission fulfilled its burden of proof on the balance of probabilities and find that the Appellant lost his employment because of his own misconduct under the Act. Therefore, a disqualification applies under sections 29 and 30 of the *Employment Insurance Act*.

CONCLUSION

[36] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	September 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. L., Appellant Maxime Charest-Cauchy, Representative for the Appellant