



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *RP v Canada Employment Insurance Commission*, 2020 SST 519

Tribunal File Number: GE-20-1177

BETWEEN:

R. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: May 14, 2020

DATE OF DECISION: May 22, 2020

DECISION

[1] The appeal is allowed. I find that the Appellant did not lose his job because of his misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act). The Appellant's disqualification from Employment Insurance regular benefits as of December 8, 2019, is therefore not justified.

OVERVIEW

[2] The Appellant worked as a salesperson (sales clerk) for the employer X (employer) from October 1, 2015, to December 2, 2019, inclusive, and he stopped working for that employer because of a dismissal. The employer said that it terminated the Appellant's employment because he failed to respect the rules and requirements of the franchise (X) after several warnings and because of complaints about his behaviour.¹

[3] On February 21, 2020, the Respondent, the Canada Employment Insurance Commission (Commission), advised the Appellant that he was not entitled to Employment Insurance regular benefits as of December 8, 2019, because he had stopped working for the employer X on December 3, 2019, due to his misconduct.²

[4] The Appellant argues that he respected the employer's rules and requirements when performing his work. He explains that, when he made transactions to allow customers to take advantage of the sale price of an item before the sale came into effect, he was respecting the employer's rules and requirements to that effect. He says that the employer authorized him to make this type of transaction but that it gave this reason for dismissing him. The Appellant argues that the complaints about his behaviour are unfounded. He submits that the employer dismissed him because it wanted to get rid of him. On April 17, 2020, the Appellant disputed the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

¹ GD2-6, GD3-19, and GD3-20.

² GD2-7, GD3-25, and GD3-26.

ISSUES

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

[6] To make this 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 alleged acts conscious, deliberate, and intentional such that he knew or should have known that they were likely to result in the loss of his job?

ANALYSIS

[7] Although the Act does not define the term "misconduct," case law states that, to constitute misconduct, the alleged act must be 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.³

[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.⁴

[9] For conduct to be considered "misconduct" under the Act, it must be wilful or so reckless as to approach wilfulness.⁵

³ The Federal Court of Appeal (Court) established this principle in *Tucker*, A-381-85.

⁴ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁵ The Court established this principle in *McKay-Eden*, A-402-96.

[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.⁶

What are the Appellant's alleged acts?

[11] In this case, the Appellant's alleged acts are:

- non-compliance with franchise rules and requirements despite several warnings; and
- complaints about his behaviour.⁷

[12] In a statement to the Commission on December 2, 2019, S. F., the owner of X store (employer), explained that the Appellant was dismissed because of complaints from a store employee and a customer that he had sexually harassed them. She said she had warned the Appellant about this on several occasions and had suspended him. The employer notes that the latest incident, before the termination of the Appellant's employment, was about the fact that he had made transactions that were against company policy.⁸

[13] In her March 25, 2020, statement to the Commission, S. F. explained that, from the time she took over running the store at the end of May 2019, after the death of her husband, until the Appellant's dismissal, she had not stopped correcting his way of working and the fact that he ignores the procedures and rules. The employer notes that, on Monday (November 25, 2019), it realized that the Appellant had made sales totaling \$8,000.00. The employer found that strange and questioned the Appellant. It said that the Appellant explained that he had finalized sales related to the holiday promotion. The employer told him that it was illegal to sell products at the promotion price before it was in effect. The employer explained that the head office of X stores confirmed that what the Appellant had done was not allowed within the company because it was illegal. The employer said it lost more than \$2,000.00 because it was not reimbursed for the

⁶ The Court established this principle in *Lemire*, 2010 FCA 314.

⁷ GD2-6, GD3-19, and GD3-20.

⁸ GD3-21.

promotions. The employer added that, in addition, harassment complaints were made against the Appellant.⁹

[14] The employer sent the Commission documents related to the Appellant's employee file over the period from May 2019 to December 2019,¹⁰ including the following documents:

- a) A handwritten note from the employer on December 3, 2019, indicating that it dismissed the Appellant the same day. In the note, the employer explains how it imposed disciplinary measures on the Appellant on October 3 and 4, 2019. It notes that it imposed a two-week suspension, from October 21, 2019, to November 3, 2019. The employer explains that it met with the Appellant on October 30, 2019, to tell him what he needed to change but that the Appellant did not make any improvements. The employer says that the emails that X sent to it, on November 27 and 29, 2019,¹¹ provide explanations about the transactions the Appellant made and the losses incurred by the store.¹²
- b) A letter from the employer to the Appellant on October 17, 2019, summarizing his disciplinary record as of May 31, 2019, and stating that his employment was terminated on October 17, 2019.¹³
- c) A handwritten note from the employer on October 30, 2019, indicating that it met with the Appellant the same day. This note states requirements that the Appellant had to comply with. He showed his agreement by signing the note.¹⁴ These requirements are the following: contribute to a pleasant working environment, wear your uniform, respect employees and customers, sell the right products and avoid returns, follow the procedures, and do not harass. This document notes that the warnings and rules

⁹ GD3-29.

¹⁰ GD3-30 to GD3-51.

¹¹ GD3-47 to GD3-50.

¹² GD3-51.

¹³ GD3-44.

¹⁴ GD3-45 and GD3-46.

already communicated to the Appellant remain in effect and that the rules must be followed at all times.¹⁵

- d) Warnings given to the Appellant regarding the non-compliance with policies and procedures, disciplinary measures that were imposed, and documents related to complaints filed against him by a customer (August 23, 2019) and a store employee (October 14, 2019).¹⁶
- e) Email from R. M., vice-president of operations for X stores, to the employer on November 27, 2019, asking for explanations about the transactions the Appellant made between November 14 and 24, 2019.¹⁷
- f) Email from R. M. to the employer on November 29, 2019, in which he indicates that, according to the employees he met with on November 29, 2019, the Appellant's behaviour is totally inappropriate. He notes that, according to these employees, the Appellant is misogynist, racist, and sexist; makes totally unacceptable comments; and harasses, sometimes even in front of customers. R. M. says that, according to one employee (S.), the Appellant operates the store as if it were his own, gives regular discounts, and is suspected of helping himself to the cash register. He notes that, according to that employee, since the Appellant's two-week suspension, his behaviour has been worse than before, and she has been unable to control him. The Appellant does whatever he likes and ignores the rules. R. M. also explains that, on November 14, 2019, the Appellant sold razors at the sale price of \$149.00, before a planned promotion beginning on November 25, 2019, instead of selling them at the regular price of \$249.00. He notes that the Appellant set aside items at the sale price, had customers pay the full amount, gave them their razors, and finalized the transactions on November 26, 2019. R. M. indicates that this situation explains why sales totaling \$8,000.00 were made on November 26, 2019. He notes that the Appellant's practice is unacceptable and that X condemns it. R. M. explains to the

¹⁵ GD3-45 and GD3-46.

¹⁶ GD3-30 to GD3-51.

¹⁷ GD3-47 and GD3-48.

employer that it will not be reimbursed for those sales, as well as for other similar transactions made by the Appellant.¹⁸

[15] In a statement to the Commission on February 17, 2020, R. M. explained that the Appellant made transactions that cannot be approved by the industry. He said that the franchisee, S. F. (employer), was penalized financially for illegal transactions the Appellant made.¹⁹

Did the Appellant commit the acts in question?

[16] The Appellant acknowledges having made transactions so that customers could benefit from a sale price on the purchase of an item before the item was on sale at this price. He submits he received authorization to make this type of transaction.

[17] The Appellant says that the complaints about his behaviour are unfounded.

[18] I must now determine whether the Appellant's alleged acts constitute misconduct.

Were the Appellant's alleged acts conscious, deliberate, or intentional such that he knew or should have known that they were likely to result in the loss of his job?

[19] No. I find that the Appellant's alleged acts were not conscious, deliberate, or intentional and could not be likened to misconduct within the meaning of the Act.

[20] I find the Appellant's testimony credible. His testimony is accurate and without contradictions. He provided several details about the alleged transactions, which are supported by the evidence on file.²⁰

[21] The Appellant's testimony and statements to the Commission indicate the following:

- a) The Appellant says that the employer dismissed him on October 17, 2019.²¹ He met with the store owner, S. F., on October 30, 2019, and returned to his position on November 4, 2019. The Appellant was actually suspended from October 21, 2019, to

¹⁸ GD3-49 and GD3-50.

¹⁹ GD3-23.

²⁰ Table indicating the transactions the Appellant and other employees made for the period from November 14, 2019, to November 24, 2019—GD3-48.

²¹ GD3-44.

November 3, 2019. He says that, after meeting with the employer, he committed to following the instructions set out in the document that he signed on October 30, 2019.²² He says he did everything the employer asked him to do in connection with these requirements and had no instances of misbehaviour.²³

- b) The transactions that the employer accused him of making and that led to his dismissal involved setting aside items for customers and asking them for a deposit. This deposit corresponded to the sale price of the item in question when, later, this item would be on sale or discounted (for example, ask for a deposit of \$149.98 for a razor with a regular price of \$249.99).²⁴ The Appellant clarifies that customers were also able to leave with the item set aside, but that normally that was not the case. He explains that, after setting the item aside, he would finalize the sale when the discount on that item came into effect, as part of the promotion. The Appellant notes that he did not sell the items in question by giving the discount before the date of the promotion but that he took deposits. He says that this type of transaction was accepted to save sales. He notes that he previously owned a franchise, like the store where he worked, and that he had been making layaways for more than 30 years.²⁵
- c) The Appellant says that S. I, store manager and daughter of the owner, and the assistant manager of this store (M.), authorized him to set items aside and finalize transactions when those items went on sale. He notes that the manager and assistant manager gave him the go-ahead to do this and that layaways could be made as they had been the previous year (holiday season).
- d) The Appellant says that the owner herself had given the go-ahead to her daughter (the store manager) and to the assistant manager to manage the store. He notes that it was the manager who made all the decisions. She was always in the store, and if something happened, she could talk to her mother. He submits that the owner did not know how to manage the store or how it works. She relied on her daughter for

²² GD3-45 and GD3-46.

²³ GD2-9 to GD2-11, GD3-44 to GD3-46, and GD3-52 to GD3-54.

²⁴ GD3-48.

²⁵ GD3-22, GD3-27, and GD3-52 to GD3-54.

everything. The Appellant clarifies that the owner was not always at the store. She was there only once every four months. The Appellant says that the owner told him that, if he had questions, to ask her daughter. He says that this is what he did about the layaways he had made and that she told him yes.²⁶

- e) The Appellant says that he did not receive instructions or warnings from the owner about this type of transaction but that she gave that reason when she dismissed him. He says that, when he was dismissed, she explained to him that he was not allowed to make layaways like he had done—that is, two weeks before the date given by the head office. The employer also told him that he was not working the right way. The Appellant notes that he had made this type of layaway when he worked with the former store owner, before S. F. took over in May 2019. He explains that the owner had already told him not to cut prices on a product anymore, even if that product was not on sale, but that that was different from the layaways he had made.²⁷
- f) The Appellant says that the manager and assistant manager also made layaways like the ones he made, as shown in the table of transactions made between November 14, 2019, and November 24, 2019.²⁸ He notes that this table indicates that, for the same product (for example, razor), transactions were made by clerks with the employee numbers 35002 and 35137, while his number is 35321. The Appellant notes that this table indicates that he also set aside coffee makers (product number X), while the assistant manager made these transactions. He says that the head office then changed the way they did things but that he took the blame.²⁹
- g) The Appellant explains that, when he finalized transactions after a promotion came into effect (for example, November 25, 2019), the store did not lose money for the layaways made earlier (for example, from November 14 to 24, 2019).³⁰ According to him, the owner must be paid for the sales that he finalized. The Appellant explains

²⁶ GD2-9 to GD2-11 and GD3-52 to GD3-54.

²⁷ GD2-3, GD2-9 to GD2-11, GD3-22, and GD3-52 to GD3-54.

²⁸ GD3-48.

²⁹ GD2-9 to GD2-11, GD3-27, GD3-48, and GD3-52 to GD3-54.

³⁰ GD3-48.

that the owner was on his case and that she accused him of stealing but that there was never any money missing. He notes that he did not make the alleged transactions to make the owner lose money or steal from her, but to make her money.³¹

- h) The Appellant argues that the sexual harassment accusations or complaints against him are not valid. He notes that the owner asked an employee to write a complaint about his behaviour so that she could dismiss him. The Appellant says that this complaint was about the functioning of customer orders. He notes that the employee told him that the owner had forced her to write that complaint.³²
- i) The Appellant submits that the employer wanted to get rid of him and that it was a wrongful dismissal. He says that the employer had reduced his work hours to give hours to another employee. According to him, the parent company X arranged to get rid of him because it wanted to buy this store. He notes that this store makes significant sales and that it is third in a chain of 60 stores. He submits that the parent company has had it out for him since 2015, when a franchise X, which he owned, closed. As a result, he owed \$16,000.00 to the franchisor.³³

[22] Regarding the Appellant's alleged acts, I find that the Appellant did not breach an express or implied fundamental duty resulting from the contract of employment.

[23] I find that the Appellant did not breach the employee's directives, rules, or policies when he carried out transactions that he describes as [translation] "layaways" and that allowed customers to buy an item (for example, razor) at a sale price before that item was offered at that sale price as part of a promotion. Even though the Appellant acknowledges that he was dismissed for that reason, it does not mean that he broke the employer's rules about this.

[24] The Appellant's testimony, which was not contradicted, indicates that other employees, including the store manager (owner's daughter) and the assistant manager, also made this type of

³¹ GD2-9 to GD2-11 and GD3-22.

³² GD2-3, GD2-9 to GD2-11, and GD3-22.

³³ GD2-9 to GD2-11, GD3-22 and GD3-27, and GD3-52 to GD3-54.

transaction. I am of the view that the employer had authorized this form of [translation] “layaway.”

[25] I note that a document provided by the employer—that is, a table displaying transactions for the period from November 14, 2019, to November 24, 2019, shows that the Appellant (employee number X) and other employees (numbers X and X) sold or set aside items, including items similar to those sold by the Appellant, at a lower price than the regular price (calculated price), before the beginning of a promotion on those items.³⁴

[26] I find as fact the Appellant’s explanations that the store manager and the assistant manager had authorized him to make transactions so that customers could benefit from a discount on an item before a promotion providing that same discount on the item came into effect. I also find as fact the Appellant’s claims that the store manager and her assistant manager had the required authority to make store management decisions and that they had [translation] “free rein” to do this.

[27] I am of the view that the Commission overlooked information contained in the table displaying the store’s transactions for the period from November 14 to 24, 2019, which shows that several employees made layaways like those the Appellant made.³⁵ This document supports the Appellant’s claims that he could make this type of transaction.

[28] I do not accept the Commission’s argument that the Appellant did not have the right to make such transactions³⁶ and that the facts and evidence on file show that he lost his job because he failed to respect the company’s policy and requirements.³⁷

[29] I find that the evidence gathered from the employer does not show that the Appellant violated the instructions and directives related to the transactions he made in the period from November 14 to 24, 2019.³⁸

³⁴ Table indicating the transactions the Appellant and other employees made for the period from November 14, 2019, to November 24, 2019—GD3-48.

³⁵ GD3-48.

³⁶ GD4-10.

³⁷ GD4-9.

³⁸ GD3-48.

[30] Even though, in its statements to the Commission, the employer was very explicit about the Appellant's alleged acts (the transactions he made over the period from November 14 to 24, 2019), explaining that this type of transaction was not allowed, the directives and rules that it gave the Appellant before are far from clear.

[31] On that point, I note that, when the employer met with the Appellant on October 30, 2019, after dismissing him a first time on October 17, 2019,³⁹ he signed a document describing the conditions that he had to respect from then on, including one indicating that he had to respect [translation] "X procedures." However, with the exception of that statement, this document does not give any specific information about these procedures and their application.⁴⁰ I note that, despite the large file that the employer sent the Commission about the Appellant's job, no document allows us to assess the content of the procedures to which it refers.

[32] I find that the table displaying the store's transactions over the period from November 14 to 24, 2019, shows that the procedures to which the employer refers allow employees to make transactions like the ones it accused the Appellant of making.⁴¹

[33] Even though the Commission argues in its submissions that the head office as well as company managers are allowed to impose the rules that they want in their company,⁴² I am of the view that these rules must be clearly established at the outset before a complaint can be made against an employee for failing to respect them. I find that this was not the case for the employer's accusations against the Appellant.

[34] I find that the Appellant respected the conditions the employer established when he returned to work for it on November 4, 2019, after he was dismissed a first time on October 17, 2019.

[35] I am of the view that the Appellant did not wilfully disregard the effects his alleged acts would have on job performance.

³⁹ GD3-43 and GD3-44.

⁴⁰ GD3-45 and GD3-46.

⁴¹ GD3-48.

⁴² GD4-10.

[36] I find that the Appellant did not wilfully or wantonly disregard his employer's interests by making this type of transaction.

[37] The Appellant could not know that his conduct was such as to impair the performance of the duties owed to his employer and that there was a real possibility that he would be dismissed for making the transactions that the employer accused him of.

[38] The employer also cited as reason for dismissal the fact that it received complaints about the Appellant's behaviour.

[39] On that point, I find that the Appellant's alleged acts refer to events that would have occurred before he was dismissed a first time on October 17, 2019,⁴³ and before he met with the employer on October 30, 2019, and signed, at that time, a document describing the conditions he had to respect from then on if he wanted to return to work.⁴⁴ The Appellant returned to work for the employer on November 4, 2019.

[40] I also note that, in its submissions, the Commission stated that the employer addressed the various complaints against the Appellant,⁴⁵ as did the Appellant.⁴⁶ The Commission argues that these incidents were not the reason for the Appellant's dismissal and that they happened earlier. The Commission explained that it did not address these incidents because they were not the reason for the dismissal of December 3, 2019.⁴⁷

[41] Even though the Commission did not assess the complaints, the fact remains that, in its statements of December 2, 2019, and March 25, 2020, the employer referred to the complaints as the reason for the Appellant's dismissal.⁴⁸

⁴³ GD3-43 and GD3-44.

⁴⁴ GD3-45 and GD3-46.

⁴⁵ GD3-19, GD3-21, GD3-29, GD3-35 to GD3-37, GD3-41, and GD3-42.

⁴⁶ GD2-3, GD2-9, and GD3-22.

⁴⁷ GD4-8.

⁴⁸ GD3-21 and GD3-29.

[42] The Record of Employment issued by the employer on December 10, 2019, also specifies the following as the reason for the dismissal: [translation] “Behaviour complaints and non-compliance with the rules and requirements of the franchise after several warnings.”⁴⁹

[43] I am of the view that the questions about the Appellant’s behaviour and the complaints against him must also be assessed to determine whether the Appellant lost his job because of his misconduct, since the employer argues these are the reasons for his dismissal.

[44] However, I do not give weight to the employer’s statements about this.

[45] I note that the employer’s statements about this were made on December 2, 2019, and March 25, 2020⁵⁰—that is, after the Appellant was dismissed a first time on October 17, 2019, and after he returned to work in November 2019, under certain conditions, including one specifically on harassment.⁵¹

[46] I find that, in its statements, the employer is only repeating its earlier accusations to the Appellant before the Appellant returned to work. The employer did not report any other incident, described in measurable and observable terms, that could be harassment on the part of the Appellant, after he returned to work in November 2019.

[47] I find that the employer’s statements do not show that the Appellant committed acts that could constitute conscious, deliberate, or intentional acts that could be categorized as misconduct under the Act.

[48] I also do not accept the statements of R. M (vice-president of operations for X stores) in the email to the employer on November 29, 2019, according to which employees that he met with that day told him that the Appellant’s behaviour was totally inappropriate, that he was misogynist, racist, and sexist, that he made totally unacceptable comments, and that he was harassing them, sometimes even in front of customers.⁵²

⁴⁹ Box 18 of the Record of Employment (observations)—GD3-19.

⁵⁰ GD3-21 and GD3-29.

⁵¹ GD3-45 and GD3-46.

⁵² GD3-49 and GD3-50.

[49] First, these statements do not come directly from the employees in question. They were reported by R. M. He did not say he was a witness to the incidents he reported. Second, these statements were not described in measurable and observable terms. They do not provide details about the specific context in which this behaviour occurred. I do not give these statements much weight.

[50] In summary, I find that neither the transactions the Appellant made for customers nor his behaviour show that he wilfully disregarded the repercussions his actions would have on job performance.

[51] I am of the view that the Appellant's alleged acts were not of such scope that they would be likely to result in his dismissal on December 3, 2019.

[52] I find that, in this case, the Commission did not meet its burden of proving that the Appellant's acts constitute misconduct.

[53] Case law tells us that the Commission must prove the existence of evidence showing a claimant's misconduct.⁵³

[54] I find that the evidence the Commission gathered is not detailed enough to find, on a balance of probabilities, that the Appellant lost his job because of his misconduct.

[55] Although the Appellant lost his job, the cause of the loss of his job is not misconduct within the meaning of the Act.

[56] Case law tells us that it must be established that the misconduct was the cause of a claimant's dismissal.⁵⁴

[57] The Appellant was not dismissed because of acts he committed wilfully and deliberately.

⁵³ The Court established this principle in the following decisions: *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.

⁵⁴ The Court established this principle in the following decisions: *Cartier*, A-168-00; *MacDonald*, A-152-96; *Namaro*, A-834-82.

CONCLUSION

[58] I find that the Appellant did not lose his job because of his misconduct under sections 29 and 30 of the Act.

[59] 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 not justified in the circumstances.

[60] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	May 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	R. P., Appellant