[TRANSLATION]

Citation: *RC v Canada Employment Insurance Commission*, 2021 SST 237

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant	R. C.
Representative:	Line Lamy
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (409068) dated November 27, 2020 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	April 15, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	May 7, 2021
File number:	GE-21-349

Canada

Decision

[1] The appeal is dismissed. I find that the Appellant lost his job because of his misconduct.[1] His disqualification from receiving Employment Insurance regular benefits effective March 8, 2020, is therefore justified.

Overview

[2] The Appellant has worked as a tinsmith for the employer 9135-9901 Québec Inc. (X or employer) since 2013. From September 22, 2019, to March 2, 2020, inclusive, he completed a period of employment for that employer and stopped working for it because of misconduct.

[3] The employer says the Appellant was dismissed because he performed his work without wearing a safety harness after getting into a basket. As a result, he broke the occupational health and safety rules or procedures in place.

[4] On April 8, 2020, the Canada Employment Insurance Commission (Commission) informed the Appellant that he was still not entitled to other Employment Insurance regular benefits effective March 8, 2020, because he had stopped working for the employer on March 3, 2020, because of his misconduct.[2]

[5] The Appellant argues that he is not responsible for losing his job. He says he failed to wear a safety harness to perform his work while he was in a basket. The Appellant notes that it was an oversight on his part. He argues that his supervisor, who was with him at the time of the incident, should have told him that he was not wearing his harness. The Appellant also argues that the same is true for the person in charge of occupational health safety on the site where he was working. He submits that this person and his supervisor are also responsible for the fact that they did not warn him that he was not wearing his harness. The Appellant argues that his dismissal did not need to happen. According to him, he could have been given a reprimand, such as a

[1] See sections 29 and 30 of the *Employment Insurance Act* (Act).
[2] See GD3-19 and GD3-20.

week without pay or Employment Insurance benefits. The Appellant notes that the employer called him back to work in May 2020. The Appellant says that he was still in his job. On February 24, 2021, the Appellant disputed the Commission's reconsideration decision to the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[6] I must decide whether the Appellant lost his job because of his misconduct.

[7] To decide this, I must answer the following questions:

- Why did the Appellant lose his job?
- Is the reason for the Appellant's dismissal misconduct under the Act?

Analysis

[8] The term "misconduct" is not defined in the Act. Federal Court of Appeal (Court) decisions give characteristics describing the concept of misconduct.

[9] In one of its decisions, the Court mentions 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."[3]

[10] To be considered misconduct under the Act, the act must be wilful. In other words, it must be conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless as to "approach wilfulness,"[5] that is, it is almost wilful. For a behaviour to amount to misconduct under the Act, it is not necessary for the claimant to have a wrongful intent—in other words, to want to do something wrong.[6]

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[3] The 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.
[6] The Court established this principle in *Secours*, A-352-94.

[11] There is 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.[7]

[12] To determine whether the misconduct can lead to a dismissal, there must be a causal link between the alleged misconduct and the loss of employment. The misconduct must constitute a breach of an express or implied duty resulting from the contract of employment.[8]

[13] The Commission must prove that the Claimant lost his job because of his misconduct. The Commission has to prove this on a balance of probabilities.[9] This means that it has to show that it is more likely than not that the Appellant lost his job because of his misconduct.[10]

Issue 1: Why did the Appellant lose his job?

[14] In this case, the Appellant allegedly failed to wear a safety harness to perform his work while he was in a basket more than 10 feet from the ground.

[15] The employer's statements to the Commission indicate the following:

a) The Appellant worked at one of X aluminum smelter's sites in Sept-Îles, where the employer was carrying out a subcontract. While he was working at this site, the Appellant got into a basket without wearing a safety harness. While he was performing his work, he got out of the basket, leaving one of his feet in the basket and placing the other on the building structure to carry out his tasks. The employer says that the Appellant found himself [translation]

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[7] The Court established this principle in *Mishibinijima*, 2007 FCA 36.
[8] The Court established this principle in *Lemire*, 2010 FCA 314.
[9] The Court established or reiterated this principle in the following decisions: *Lepretre,* 2011 FCA 30; *Granstrom*, 2003 FCA 485.
[10] The Court established this principle in *Bartone*, A-369-88.

"half in the air," 11 feet from the ground, without his harness. The Appellant's foreman was with him in the basket during the incident.[11]

b) The Appellant's act was witnessed by a person from occupational health and safety assigned to supervise the company X's site. Following this observation, the site stopped its activities for a week and a half.[12]

c) The employer says that the Appellant admitted that his foreman had advised him to attach his harness. It says that the Appellant acknowledged that it was his fault that he had not followed the occupational health and safety rules.[13]

d) The employer says that the Appellant's act was [translation] "unacceptable" and that he is guilty of [translation] "serious misconduct," which led to his dismissal. It says that it was poor judgement on the Appellant's part and that he did not follow the procedures. He knew he could not do that, and he acknowledged it. The Appellant knew that not following the occupational health and safety rules or procedures could lead to disciplinary action up to and including dismissal. The employer notes that the Appellant put his life in danger.[14]

e) The employer says it did not apply a penalty scale to the Appellant for what he did. The employer says it made its decision based on the company X's managers.[15]

f) The Appellant received several occupational health and safety trainings. He had all the necessary equipment to follow the rules in this regard.[16]

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[11] See GD3-16, GD3-17, and GD3-26.
[12] See GD3-16 and GD3-17.
[13] See GD3-16 and GD3-17.
[14] See GD3-16, GD3-17, GD3-26, and GD3-32.
[15] See GD3-32.
[16] See GD3-16, GD3-17, and GD3-26.

g) When they are hired, employees, including the Appellant, sign a commitment regarding their occupational health and safety obligations.[17] The Appellant signed this document on March 17, 2017.[18]

h) The employer explains having to reimburse the costs of the other contractors working at the site, since it was held responsible for its closure because of the Appellant's act, given that the Appellant was its employee. The employer notes that this [translation] "mistake" cost it more than $25,000 after negotiations with the company X. The employer says that this company refuses to allow the Appellant, and the foreman who was with him, to work on their sites. The company X asked the employer to dismiss them. The employer thinks that the company wanted to make an example of them. The employer notes that its company is now considered a [translation] "high-risk" company and that this has repercussions for it.[19]

i) The employer says it rehired the Appellant with [translation] "certain conditions" after he came back to see it and acknowledged his mistake.[20]

[16] For his part, the Appellant says he lost his job for not wearing his safety harness after getting into a basket to perform his tasks.

[17] His testimony and statements to the Commission indicate that he was dismissed for this reason.[21] The Appellant argues that it was an oversight or a mistake on his part.

[18] The Appellant's representative says she understands that the employer indicated that it had dismissed the Appellant. However, according to her, it was not a dismissal,

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[17] See GD3-26 and GD3-31. See also the document entitled [translation] "Employee–Employer Commitment," indicating the employer's expectations of its employees, including those relating to equipment and tools an employee must use and the occupational health and safety rule they must comply with—GD3-36 to GD3-43. This document indicates, among other things, the following rule: [translation] "When working at heights on an elevated platform or in a basket, employees are required to wear their harness and lanyard. They must be attached before even boarding the equipment."—GD3-40.
[18] See GD3-36 to GD3-43.
[19] See GD3-16, GD3-17, and GD3-26.
[20] See GD3-26 and GD3-31.
[21] See GD3-21 to GD3-24, GD3-27, GD3-28, and GD3-33.

but rather a disciplinary action taken against the Appellant.[22] She says that the Appellant was called back to work in May 2020, after the lockdown measures associated with the COVID-19 pandemic were lifted.[23] The representative notes that those measures had, among other things, interrupted construction industry activities from March 15, 2020.

[19] Despite the representative's arguments on this point, I find that the Appellant was indeed dismissed by the employer on March 3, 2019. The Appellant acknowledges that the employer dismissed him, even though he disagreed with this decision.

[20] The Record of Employment the employer issued indicates that the Appellant was dismissed.[24] The employer's statements to the Commission are also clear on this point.[25]

[21] I find that the Appellant lost his job because he did not wear his safety harness when he got into a basket to perform his tasks on a construction site where the employer was carrying out a contract.

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

Issue 2: Is the reason for the Appellant's dismissal misconduct under the Act?

[23] I find that, by failing to wear a safety harness to perform his work after getting into a basket, the Appellant wilfully lost his job. What he did amounts to misconduct under the Act.

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[22] See GD3-29 and GD3-30.
[23] Coronavirus disease 2019.
[24] See GD3-14 and GD3-15.
[25] See GD3-16, GD3-17, GD3-26, and GD3-32.

[24] I find 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.

[25] The Appellant argues that he is not responsible for losing his job. His testimony and statements to the Commission indicate the following:

a) The incident that led to the loss of his job occurred on March 2, 2020, when he was working at one of X aluminum smelter's sites. He showed up for work with all his equipment and tools, including his "PPE."[26] The Appellant notes that he has to have all the equipment required to do his work with him when he enters a worksite like the company X's.

b) During his workday on March 2, 2020, his supervisor was with him. His supervisor was in charge of him and gave him instructions for the work that had to be done. To complete his tasks, the Appellant had to get into a basket (Cisolift). Before getting in, the Appellant took out all his equipment to ensure his safety. He notes that [translation] "everything was there." The Appellant says his supervisor asked him to go take measurements. He says he then said to the supervisor: [translation] "Wait a minute. I'm going to put on my harness […]," but the supervisor told him: [translation] "Come here, we're going to go measure […]."[27] The Appellant says it is the supervisor who runs the show. The Appellant then got into the basket without putting on his harness. His supervisor then told him: [translation] "Hold the tape and carry it a little further […]."

c) The Appellant says that he forgot to wear his harness at the time and that everything happened [translation] "really fast." He says he knows the occupational health and safety rules, including wearing a harness to do the task he was doing. It was truly an oversight on his part not to wear it at that

[26] Employer-provided equipment including, among other things, the following: harness, slide, lanyard, lifeline, hearing protection, visor, and cut-resistant gloves—GD3-40.
[27] This statement can be found at minute 31 of the hearing recording.

moment. He says he made a [translation] “mistake” and that anyone can make a mistake. The Appellant says that he was not required to wear a harness while getting into the basket but that he then forgot to put it on to perform the work.[28] In his April 8, 2020, statement to the Commission, the Appellant said that, even though he was not wearing his harness and was not attached when he was in the basket, it would have been impossible to fall from the place where he came out. He also says that he acknowledged his [translation] “mistake” because he knew he should have been attached but that he was not required to be attached while he was in the basket—just while he was getting out of it.[29]

d) The Appellant says that an inspector or occupational health and safety prevention officer from the company X witnessed his manoeuvre while he was in the basket without his harness. The inspector then told him to get out of the basket. The Appellant says that she then asked him to leave the site and then [translation] “kicked him out” of the site.

e) The Appellant says he does not believe his supervisor that he allegedly told him three times to wear his harness. The Appellant says that, if that were the case, he did not hear him. According to the Appellant, his supervisor made this statement to defend himself.

f) The Appellant argues that, if he was at fault because he was not wearing his harness, it was up to his supervisor to tell him or to make sure he came down from the basket to put it on, before continuing the work. The Appellant notes that it was his supervisor who was leading the operations and who had control over the basket.[30]

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[28] See GD3-18, GD3-27, GD3-28, and GD3-33.
[29] See GD3-18.
[30] See GD3-33.

g) In his November 12, 2020, statement to the Commission, the Appellant said that he [translation] “failed to wear his harness and [that] when he realized [it], he was already set up, so he did the manoeuvre.”[31] In this statement, he also said that he got out of the basket without his harness and that, according to him, there was no danger.[32] He said that he knew he should not do that and that, if his foreman had warned him to put on his harness, he had not heard him.[33] At the hearing, the Appellant said he did not remember having said what was reported by the Commission in that statement. The Appellant argues that his statement to the Commission was misinterpreted or that he used the wrong words. According to him, there was an error or “ambiguity” in the summary of this statement. The Appellant says that, when he talked to a representative for the Commission, on November 12, 2020, he was on a jobsite, and his employer was waiting for him to get back to work. The Appellant says that he could not say exactly what he said to the representative for the Commission at that moment, but he told her that he had forgotten to wear his harness. He says that no one told him he had forgotten to put on his harness, despite what was reported in his November 12, 2020, statement. According to the Appellant, it is incorrect to say that he continued to work knowing that he should put on his harness.

h) The Appellant says that the employer decided to dismiss him [translation] “in a fit of anger.” According to the Appellant, a week after dismissing him, the employer changed its mind and still wanted to employ him. The Appellant argues that his dismissal did not need to happen. He could have been given a reprimand, such as a week without pay or a week without the right to receive Employment Insurance benefits. The Appellant did not want to lose his job for his alleged act.[34]

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[31] See GD3-27 and GD3-28.
[32] See GD3-27 and GD3-28.
[33] See GD3-27 and GD3-28.
[34] See GD3-23, GD3-24, GD3-27, GD3-28, and GD3-33.

i) The Appellant says he knows what his act cost the employer. The Appellant says he apologized to the employer and told it he had not done it [translation] “on purpose.”

j) The Appellant says he can no longer work on a site of company X, because this company [translation] “banned him for life.” He says his boss was also [translation] “shut out” of this company. It was not his boss’s company that ended the contract with the aluminum smelter, but another subcontractor. According to the Appellant, that is why the employer did not take him back a week after the incident that led to his dismissal.

k) The Appellant says he returned to work for the employer on May 11, 2020, after the lockdown measures in the construction industry due to the COVID-19 pandemic were lifted and activities in this industry resumed.[35]

[26] The Appellant’s representative made the following arguments:

a) The representative argues that the Appellant is not solely responsible for the alleged act of not wearing his harness. It is also the responsibility of the Appellant’s supervisor and the company X’s occupational health and safety officer or inspector, who were both on site when the act was committed. These two people had the responsibility of informing him that he could not work without his harness and telling him to go get it and put it on before continuing his work. These two people were negligent in this regard. The representative says that the Appellant may be at fault for not wearing his harness, but his supervisor was on site and did not point out his oversight.

b) The representative argues that, in the construction industry, according to the *Occupational Health and Safety Act*, you do not get dismissed [translation] “on the spot” for that reason. You are asked to go get it. Whether it is inspectors from the *Commission des normes, de l’équité, de la santé et de la*

[35] See GD3-23, GD3-24, GD3-27, GD3-28, and GD3-33.

sécurité du travail [Quebec's labour standards commission] who visit construction sites, the employer, or the immediate supervisor of an employee, they tell the offending employees to go get their harness if they are not wearing it and to then return to work after correcting their mistake.

c) In the Appellant's case, he was dismissed [translation] "on the spot" because he was not wearing his harness. Considering the Appellant's alleged act, there was no [translation] "basis for dismissal," according to her. His dismissal was not justified or may have been [translation] "a bit excessive." The representative is of the view that the employer was pressured, either by the company X or by the contractor that subcontracted the employer, to dismiss the Appellant.

d) The employer could have taken disciplinary action against the Appellant, like a suspension of a few days or a week, instead of dismissing him, considering the Appellant's years of service and the fact that he holds a competency certificate from the *Commission de la construction du Québec* [Quebec's construction commission] indicating that he is a [translation] "preferred worker." The fact that he is a [translation] "preferred worker" means that he has worked for the employer for a long time—more than seven years in his case—and that he can work anywhere in Quebec. The Appellant is a good employee. He has never before been suspended for not wearing his harness.

e) The Appellant started working for the employer again on May 11, 2020. The representative is of the view that the Appellant did not return to work for the employer earlier because, from March 15, 2020, to May 10, 2020, inclusive, construction industry activities were interrupted, given the COVID-19 pandemic lockdown measures in effect.

[27] I find that, by failing to wear his safety harness to complete the task he had to do from the basket he was in, the Appellant consciously chose to ignore the standards of behaviour that the employer had the right to expect of him.

[28] The Appellant ignored a fundamental requirement of his job. In doing so, he broke the relationship of trust between him and the employer.

[29] I am of the view that the Appellant could have avoided jeopardizing his job by wearing his harness, as he should have.

[30] The Appellant knew the occupational health and safety rules and knew that he had to comply with them. He signed a document to that effect.[36] This document notes the following: [translation] “When working at heights on an elevated platform or in a basket, employees are required to wear their harness and lanyard. They must be attached before even boarding the equipment.”[37]

[31] The Appellant had all the necessary equipment and tools to complete his work safely on the site where he was working on March 2, 2020.

[32] I do not accept the Appellant’s argument that his failure to wear his harness after getting into a basket to do the required task was an oversight on his part.

[33] I find this statement contradictory given that the Appellant testified that, when his supervisor asked him to go [translation] “take measurements,” before getting into the basket, he told the supervisor the following: [translation] “Wait a minute. I’m going to put on my harness […]” and that the supervisor then said: [translation] “Come here, we’re going to go measure […].”[38]

[34] I find that this statement shows that, right before getting into the basket and completing the task at height, several feet from the ground, the Appellant knew he should wear his harness. He voluntarily decided not to wear it.

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[36] See the document entitled [translation] “Employee–Employer Commitment”—GD3-36 to GD3-43.
[37] See GD3-40.
[38] This statement can be found at minute 31 of the hearing recording.

[35] I find that this statement also confirms his November 12, 2019, statement to the Commission, in which he said he failed to wear his harness and that, when he realized it, he was already set up and got out of the basket to do the task without wearing it.[39]

[36] Despite the Appellant's explanations at the hearing that his November 12, 2020, statement had not been properly reported, he has not demonstrated this. Given his statement that, right before getting into the basket, he told his supervisor to wait a minute so that he could put on his harness to then get in without wearing it does not show that he simply forgot to do it.

[37] I also note that, in his April 8, 2020, statement, the Appellant also said that he knew he should have worn his harness and been attached to get out of the basket he was in, that he acknowledged his mistake, but that, according to him, it was impossible to fall from the place where he came out.[40]

[38] I do not accept the argument that the Appellant's supervisor or the inspector or occupational health and safety officer for the company X must take some responsibility for not informing the Appellant that he could not work without his harness and not telling him that he had to wear it to do his work.

[39] I find that it was primarily the Appellant's responsibility to make sure that he could do his job in accordance with the occupational health and safety rules and procedures in place. But he chose not to and to ignore a legitimate requirement of the employer.

[40] I find that the Appellant cannot avoid responsibility for the act he committed voluntarily by blaming his supervisor or the occupational health and safety inspector or prevention officer.

[41] I also do not accept the representative's argument that an employee first receives a warning if they violate a health and safety rule, like not wearing a harness. Nothing indicates that, in the document [translation] "Employee–Employer Commitment"

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[39] See GD3-27 and GD3-28.
[40] See GD3-18.

[41] that the Appellant signed, or that under the *Occupational Health and Safety Act*, he could not be dismissed for the act he committed and that he should have first received a warning to correct the issue of not wearing his harness for his health or safety. Nothing indicates either that the Appellant challenged his dismissal for that reason.

[42] I find that the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that dismissal was a real possibility if he was not wearing his harness.

[43] I am of the view that the Appellant's act was of such scope that he could normally expect that it would be likely to result in his dismissal.

[44] I also do not accept the argument that the employer should have taken disciplinary action against the Appellant, other than dismissal, such as a suspension of a few days or a week, without pay, or a week without Employment Insurance benefits.

[45] On this point, I note that my role as a Tribunal member is not to assess whether the severity of the sanction imposed by the employer was justified or whether the Appellant's act constituted a valid ground for dismissal, but whether the act constituted misconduct within the meaning of the Act.[42]

[46] The fact that the Appellant returned to work for the employer in May 2020 does not change the nature of his act that led to the loss of his employment.

[47] In summary, I find that the Appellant's act—failing to wear a safety harness to perform his work while he was in a basket—was conscious, deliberate, or intentional and can be considered misconduct.

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

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[41] See GD3-36 to GD3-43.
[42] The Court established or reiterated this principle in the following decisions: *Marion*, 2002 FCA 185; *Fakhari*, A-732-95; *Langlois*, A-94-95; *Jewell*, A-236-94; *Secours*, A-352-94; *Namaro*, A-834-82.

[49] The Court tells us that the Commission must prove the existence of evidence showing a claimant's misconduct.[43]

[50] The evidence gathered by the Commission shows that the Appellant voluntarily violated the occupational health and safety rules in place at the employer by deciding not to wear his harness to complete his tasks while he was in the basket. The Appellant could have stayed in his job by following this basic occupational health and safety rule.

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

[52] The Court also tells us that it must be established that the misconduct was the cause of a claimant's dismissal.[44]

[53] The evidence shows that the Appellant's failure to wear his harness as he should have is the real cause of his dismissal. The employer explained that it dismissed the Appellant for that reason. The Appellant indicated that he was dismissed for that same reason.

[54] According to the Act, the reason for the Appellant's dismissal is misconduct.

Conclusion

[55] The Appellant lost his job because of his misconduct.

[56] As a result, the Commission's decision to disqualify the Appellant from Employment Insurance regular benefits effective March 8, 2020, is justified.

[57] The appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance section

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[43] The Court established this principle in *Mishibinijima*, 2007 FCA 36.
[44] The Court established or reiterated 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.