



[TRANSLATION]

Citation: *EF v Canada Employment Insurance Commission*, 2021 SST 583

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: E. F.
Representative: J. A.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (423165) dated May 19, 2021
(issued by Service Canada)

Tribunal member: Normand Morin
Type of hearing: Videoconference
Hearing date: August 31, 2021
Hearing participants: Appellant
Appellant's representative
Decision date: September 29, 2021
File number: GE-21-1068

Decision

[1] The appeal is allowed. I find that the Canada Employment Insurance Commission (Commission) has not proven that the Appellant lost his job because of misconduct.¹ This means that his disqualification from receiving Employment Insurance (EI) regular benefits from March 14, 2021, is not justified.

Overview

[2] From October 15, 2018, to March 11, 2021, the Appellant worked as a day labourer for the employer X (employer), a kitchen cabinet manufacturer, and stopped working for that employer after being let go. The employer explains that it dismissed the Appellant for being disrespectful to the director of human resources by using inappropriate language with her.

[3] On March 12, 2021, the Appellant made a renewal claim for EI benefits (regular benefits).² A benefit period was established effective March 14, 2021.³

[4] On April 13, 2021, the Commission informed the employer that it had approved the reason for separation of its former employee (the Appellant).⁴ The Commission told the employer that the hours and earnings shown on the Record of Employment it had issued in the Appellant's name would be considered for his claim for benefits.⁵

[5] On April 28, 2021, the employer made a request for reconsideration of an EI decision.⁶

[6] On May 19, 2021, following that reconsideration request, the Commission told the Appellant that he was not entitled to EI regular benefits from March 14, 2021, when

¹ See sections 29 and 30 of the *Employment Insurance Act* (Act).

² See GD3-3 to GD3-15 and GD4-1.

³ See GD3-3 to GD3-15 and GD4-1.

⁴ See GD3-20.

⁵ See GD3-20.

⁶ See GD3-21 to GD3-27.

his benefit period was reactivated, because he had stopped working for the employer on March 11, 2021, because of misconduct.⁷

[7] The Appellant says he did not lose his job because of misconduct. He says he had a discussion with the director of human resources to ask for a pay raise, given that his duties had been increased, and to find out why the employer did not recognize his qualification as a cabinetmaker. The Appellant explains that he was calm when he met with the director of human resources. He says that, when he asked her to explain why his work was not recognized as that of a cabinetmaker, she first raised her voice, and the discussion then escalated. The Appellant says he did not make the disrespectful comments the employer says he made. He explains that he was always a good employee and that he is not the argumentative type. On June 21, 2021, the Appellant challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[8] I have to decide whether the Appellant lost his job because of misconduct.

[9] To decide this, I have to answer the following questions:

- Why did the Appellant lose his job?
- Is the reason for the Appellant's dismissal misconduct under the *Employment Insurance Act (Act)*?

Analysis

[10] The Act does not define the term "misconduct." Federal Court of Appeal (Court) decisions set out the characteristics that describe the notion of misconduct.

[11] In one of its decisions, the Court said that, to be misconduct, "the act complained of must have been willful or at least of such a careless or negligent nature that one

⁷ See GD2-9, GD2-10, GD3-42, and GD3-43.

could say the employee willfully disregarded the effects his or her actions would have on job performance.”⁸

[12] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless that it “approach[es] wilfulness,” meaning that it is almost wilful.¹⁰ For their behaviour to be misconduct under the Act, the claimant does not have to have wrongful intent; in other words, they do not have to mean to be doing something wrong.¹¹

[13] There is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.¹²

[14] To determine whether the misconduct could result in dismissal, there must be a link between the claimant’s misconduct and the loss of their job. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment.¹³

[15] The Commission has to prove that the claimant lost their job because of misconduct. The Commission has to prove this on a balance of probabilities.¹⁴ This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.¹⁵

⁸ The Federal Court of Appeal (Court) established this principle in *Tucker*, A-381-85.

⁹ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

¹⁰ The Court established this principle in *McKay-Eden*, A-402-96.

¹¹ The Court established this principle in *Secours*, A-352-94.

¹² The Court established this principle in *Mishibinijima*, 2007 FCA 36.

¹³ The Court established this principle in *Lemire*, 2010 FCA 314.

¹⁴ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

¹⁵ The Court established this principle in *Bartone*, A-369-88.

Issue 1: Why did the Appellant lose his job?

[16] In this case, the Appellant allegedly made disrespectful comments to the company's director of human resources (director) and was let go because of that.¹⁶

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

- a) The Appellant was hired as a cabinetmaker more than two years ago. He was in that position for his first three months of work and was then transferred to the assembly department because he did not meet requirements or lacked the necessary skills, despite his diploma as a cabinetmaker. He worked as an assembler in the assembly department. According to the employer, the Appellant may have provided support to other employees in the assembly department. That is part of the responsibilities of all employees, regardless of their position. Also, supervisors may ask employees to perform more complex tasks, and this was not because the Appellant had a diploma as a cabinetmaker, but because he had shown over time that he was able to do them. On his pay stubs, the title of the position he held is [translation] "day labourer," which is the case for all kinds of positions, including that of director of human resources. When his employment ended, the Appellant had the pay of an assembler with 10 years' experience.¹⁷
- b) On March 11, 2021, the Appellant showed up at the director's office with an [translation] "air of dissatisfaction."¹⁸ He wanted to know why his pay stub said [translation] "day labourer" instead of "cabinetmaker." The director tried to give the Appellant an explanation, but he was not listening and was getting annoyed. She told him that pay stubs had said that for years. The Appellant told her in an aggressive tone that he wanted his diploma to be recognized.

¹⁶ See GD3-18, GD3-28, and GD3-29.

¹⁷ See GD3-28, GD3-29, GD3-37, and GD3-38.

¹⁸ See GD3-18.

The director told him to calm down, leave her office, and come back to talk when he was calmer.¹⁹

- c) The Appellant left the office and came back a few minutes later, just as [translation] “aggressive.” He then repeated that he wanted his pay stub to say [translation] “cabinetmaker,” not “day labourer.” The director told him to calm down, that she could not put up with being spoken to like that. The director tried to give the Appellant an explanation, but he cut her off by yelling. The Appellant told the director that she was racist, and she replied: [translation] “Come on, stop right there. This isn’t about racism, it’s about skill.”²⁰ The director advised him that, if he did not calm down, she would have to give him a written warning for being disrespectful. The Appellant left the office yelling: [translation] “Take your warning and shove it ...” or [translation] “shove it up [your] ass.”²¹
- d) Replying to the director [translation] “Take your warning and shove it” resulted in the Appellant’s immediate dismissal.²² The Appellant’s conduct shows an [translation] “ultimate lack of respect” or a “total lack of respect,” because he raised his voice, on top of being aggressive, rude, and vulgar in his altercation with the director.²³ In the Appellant’s case, it was not a simple [translation] “go to hell.”²⁴ The Appellant’s conduct undermined the director.²⁵
- e) The director called the factory manager. She told him that the Appellant had been let go and explained to him what had happened with him. When the Appellant met with the factory manager, he was in the same mood as when he had seen the director and lost his temper again, arguing with him for the same reasons as with the director. The manager then ended his conversation

¹⁹ See GD3-18, GD3-25, GD3-28, and GD3-29.

²⁰ See GD3-37 and GD3-38.

²¹ See GD3-18, GD3-28, and GD3-29.

²² See GD3-18, GD3-28, and GD3-29.

²³ See GD3-18 and GD3-21, GD3-25, GD3-28, and GD3-37.

²⁴ See GD3-28 and GD3-29.

²⁵ See GD3-28 and GD3-29.

- with the Appellant. The manager told him to give him his employee card, leave the premises, and never come back.²⁶ The employer says that, according to the manager, the Appellant told him that he was not respected, that his experience was not respected, and that he was laughed at.²⁷
- f) On March 11, 2021, when he met with the director, the Appellant did not express the desire to get a pay raise. The Appellant never went to see her to tell her that the supervisors considered him a cabinetmaker.²⁸
- g) The employer says that the Appellant had no disciplinary breaches on his record before the incident of March 11, 2021,²⁹ and that it never had any problems with him before then.³⁰
- h) The employer says it does not understand why seeing the position title [translation] “day labourer” on his pay stub made the Appellant aggressive on March 11, 2021. It explains that, if the Appellant wanted to go back to working as a cabinetmaker, as he did more than two years ago (when his job started), he just had to ask instead of making an [translation] “angry scene” to the point where it had no choice but to let him go.³¹
- i) The employer says it heard from other employees that the Appellant had a difficult personality.³² After the Appellant was let go, the employer also heard from employees that he wanted to get fired and that, possibly, he wanted his pay stub to show the title of cabinetmaker to be hired in that capacity elsewhere. The employer says it has no proof of such a motive on the Appellant’s part.³³

²⁶ See GD3-18, GD3-28, GD3-29, and GD3-30.

²⁷ See GD3-30.

²⁸ See GD3-28, GD3-29, GD3-37, and GD3-38.

²⁹ See GD3-18.

³⁰ See GD3-28 and GD3-29.

³¹ See GD3-28 and GD3-29, GD3-37, and GD3-38.

³² See GD3-28 and GD3-29.

³³ See GD3-28 and GD3-29.

- j) The employer explains that, according to what the manager told it, the same day the Appellant came to get his belongings, he reportedly told several people that he had managed to get what he wanted. In the employer's view, this means that the Appellant wanted to put himself out of a job.³⁴
- k) Employees sign the employee handbook when they are hired.³⁵ This document says that no disrespect will be tolerated. The Appellant signed this document, which confirms that he received it and read it.³⁶
- l) In the employer's view, there was misconduct on the Appellant's part. The relationship of trust with the Appellant was broken on March 11, 2021.³⁷ A dismissal letter was written on the day of the incident, that is, on March 11, 2021, and was sent to him the next day.³⁸

[18] The human resources assistant's statements to the Commission on May 18, 2021, indicate the following: The Appellant first showed up at the director's office, right next to the assistant's office, just after 3 p.m. on March 11, 2021. The assistant heard him yelling at the director, asking her why his pay stub said [translation] "day labourer." The director tried to calm the Appellant down and told him that pay stubs had said that for years. Since the Appellant was not calming down, the director told him to come back later. The Appellant came back a few minutes later to speak with the director again, and he was still angry. Because the Appellant was still yelling at the director, she told him that, if he carried on like that, he would get a disciplinary warning. The Appellant then replied: [translation] "Take your disciplinary warning and shove it." He left the director's office and was let go.³⁹

³⁴ See GD3-30.

³⁵ See GD3-26 to GD3-29, GD3-31, and GD3-32.

³⁶ See GD3-30.

³⁷ See GD3-28 and GD3-29.

³⁸ See GD3-25.

³⁹ See GD3-35.

[19] The Appellant, in turn, argues that he did not lose his job because of misconduct.⁴⁰ He says that, when he met with the director on March 11, 2021, he did not make the comments attributed to him. The Appellant explains that he was calm during that meeting with her because he wanted to ask her for a pay raise. He says it was the director who first raised her voice with him.

[20] The Appellant's representative explains that, even though the employer considers that it dismissed the Appellant because of misconduct, this does not necessarily mean that this dismissal is the result of misconduct under the Act.⁴¹

[21] I find that the Appellant lost his job as a result of the employer's allegation against him of being disrespectful to the director because of comments he reportedly made.

[22] I must now decide whether the act attributed to the Appellant amounts to misconduct under the Act.

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

[23] I find that the evidence on file does not show that the Appellant committed an act that amounts to misconduct under the Act, that is, making disrespectful comments to the director. I find that the Appellant did not act to deliberately lose his job.

[24] I find the Appellant's testimony credible and place the most weight on it. The Appellant provided a detailed picture of the circumstances that led to the end of his employment on March 11, 2021. He explained in detail the purpose of his meeting with the director, the content of their discussion, and the events that led to his dismissal.

⁴⁰ See GD2-5.

⁴¹ See GD6-3 and GD6-4.

[25] The Appellant argues that he lost his job through no fault of his own.⁴² His testimony and statements to the Commission indicate the following:

- a) The Appellant was hired on October 15, 2018, as a cabinetmaker and always worked in that capacity. After his three-month probation, at the beginning of his employment, he was transferred to the assembly department but remained a cabinetmaker. There were no cabinetmakers working in that department. He was never told that he had been transferred to the assembly department because of his lack of experience or because he lacked the necessary skills.⁴³ The employer told him that there was less work to do as a cabinetmaker and that he needed to go lend a hand to the assemblers. In addition to his duties as a cabinetmaker, the employer gave him other responsibilities, such as doing tasks the assemblers could not do.⁴⁴ The Appellant says that he could work in the assembly department if there was a need for it (for example, making installations). He points out that, when an assembler is away, everyone in the factory may have to pitch in to perform different duties, even the manager or the owner.⁴⁵ The increase in the Appellant's duties can also be attributed to three employees being fired.
- b) The employer evaluated the Appellant three times as a cabinetmaker. He points out that the employer has those evaluations but that they should be part of his file before the Tribunal. The Appellant never worked as an assembler.⁴⁶ He points out that, if he was an assembler as the employer says, the employer should also provide documents to prove it.
- c) When he was hired, the Appellant's wage was \$17.50. His wage was then increased to about \$18 per hour. When the Appellant was assigned to the assembly department, his wage stayed the same. If, after three months of

⁴² See GD2-5.

⁴³ See GD3-33 and GD3-34.

⁴⁴ See GD3-33 and GD3-34.

⁴⁵ See GD3-33 and GD3-34.

⁴⁶ See GD3-39 and GD3-40.

work, the employer had told him it was going to transfer him to the assembly department to work as an assembler, he would not have stayed on. He would have left his job. The fact that his pay stub said [translation] “day labourer” was not new.⁴⁷

- d) On March 10, 2021, after his last evaluation, completed about two months earlier, and given the increase in his duties due to three employees being fired, the Appellant met with the supervisor to ask him for a pay raise. The supervisor then referred him to the director, because he was not the one in charge of that.
- e) On March 11, 2021, the Appellant met with the director to explain to her the situation concerning his increased duties and to talk to her about the pay raise he wanted.⁴⁸ He wanted to get his qualification or his diploma as a cabinetmaker recognized to be paid accordingly.⁴⁹ When he went to see her, he was calm, given the purpose of his meeting. He was alone with the director during his meeting. When he explained his situation to the director and made his request to her, she gave him a weird look and told him that he was an assembler, not a cabinetmaker. The Appellant explains that it hurt him when the director said this to him, given the [translation] “tone” she used in doing so and in telling him he was not entitled to a raise. He points out that the way the director spoke to him was [translation] “unprofessional.” The Appellant says that, during that conversation, the director was the first to raise her voice. He indicates that he may have raised his voice too.⁵⁰ The Appellant also indicates that he was more [translation] “annoyed” after getting the director’s answer.⁵¹ Even though his April 9, 2021, statement to the Commission says that he had a [translation] “heated discussion” with the

⁴⁷ See GD3-33, GD3-34, GD3-39, and GD3-40.

⁴⁸ See GD3-33 and GD3-34.

⁴⁹ See GD2-5 and GD3-19.

⁵⁰ See GD3-19.

⁵¹ See GD3-33 and GD3-34.

director on March 11, 2021, the Appellant says that is not the expression he used to describe the conversation.⁵²

- f) During that conversation, the Appellant tried to find out why he was not considered a cabinetmaker but did not get an answer. He asked the director how she could say he was not a cabinetmaker when she had three evaluations where his supervisors all mentioned that he was a cabinetmaker, in addition to telling him that they were satisfied with his work. The Appellant asked her why he was now being told he was not one. He also asked her whether the school where he completed his cabinetmaking course had told her that he was not a cabinetmaker or whether she worked on the floor to make that assertion. The director answered “no” to his questions but told him that he was not a cabinetmaker, without explaining to him that he was unable to work in that capacity. Before the director made that comment to him, he did not know that the employer did not consider him a cabinetmaker. The Appellant asked the director why she had not told him sooner that he was not considered a cabinetmaker, and why he was finding out about it only when asking her for a raise. And why he was finding out that he was not entitled to one because he was an assembler, not a cabinetmaker. The Appellant explains that the director did not give him enough information to support that he was not a cabinetmaker. When he met with the director, the Appellant did not discuss the issue of putting [translation] “cabinetmaker” on his pay stubs. She did not tell him that all employees were identified as day labourers on pay stubs.
- g) After that meeting, the Appellant went to see his supervisor, who confirmed to him that he was a cabinetmaker when giving him his pay stub. This was the supervisor who had evaluated him as a cabinetmaker two months earlier. The Appellant points out that his supervisor, as well as the factory manager,

⁵² See GD3-19.

introduced him as a cabinetmaker when he went to work in the assembly department.⁵³

- h) The Appellant then went to see the director in her office again to tell her that the others, including his supervisor, did consider him a cabinetmaker, and to find out why she did not consider him one. During that discussion, the Appellant told the director that he was being discriminated against and that she was racist. He said this to her because of the way she had told him he was not a cabinetmaker and because of the tone she had used in doing so. The director then told him that she might give him a disciplinary warning. The Appellant then said to her: [translation] “OK [...] no problem, I have no problem with that [...] I don’t care [...] do what you want ...,” and he told her that he would go see the factory manager.
- i) The Appellant says he never said to the director: [translation] “Take your disciplinary warning and shove it” or “Shove it up your ass ...” as the employer says.⁵⁴ He indicates that he does not remember everything he said at that time and that he did not hear those words until his first appeal with the Commission.⁵⁵ The Appellant says that there were people near him and that he could not [translation] “hurl” that kind of comment or yell it out.⁵⁶ The office of the company’s vice-president is right next to the director’s office. The door to his office was open. The vice-president was with another person. The Appellant explains that, if someone may have heard what he said to the director and may have witnessed the incident, it is the vice-president, not the director’s assistant (human resources assistant). The Appellant points out that, if the vice-president had heard him make the disrespectful comments attributed to him, he would have intervened in his discussion with the director. The Appellant explains that the assistant’s office is also next to the director’s

⁵³ See GD3-33 and GD3-34.

⁵⁴ See GD3-33, GD3-34, GD3-39, and GD3-40.

⁵⁵ See GD3-33, GD3-34, GD3-39, and GD3-40.

⁵⁶ See GD3-33 and GD3-34.

office. The door to the assistant's office was closed, and the Appellant does not know whether she was there. He points out that the assistant did not even see him, though she says she witnessed the whole thing.

- j) The Appellant argues that he did not overreact in how he said things to the director, like telling her she was racist. The Appellant explains that he defended his profession, feeling that he had been [translation] "degraded" in his duties. He points out that he always did his job and never argued with anyone. The Appellant says that, on March 11, 2021, that was his first time at odds with the director.⁵⁷ The Appellant explains that he could have gotten a warning (for example, a disciplinary warning) instead of being let go.⁵⁸
- k) After he left the director's office, the Appellant went to see the factory manager to find out why he was telling him he was a cabinetmaker when the director was telling him this was not the case.⁵⁹ He explained to the manager that the manager had always told the other employees to go to him (the Appellant) if something came up, because he was a cabinetmaker. The Appellant asked him why he was now being told he was not a cabinetmaker. Since he did not get an explanation from him, the Appellant then told him that he was lying. The Appellant points out that, when the manager could not think of anything to say to him, he would explain to him that he was an [translation] "accountant" and that he did not know anything. The Appellant indicates that the manager may not have liked it when he told him he was lying. During that meeting, the manager did not talk to him about the comments attributed to him. It was the manager who dismissed him. He asked him to give him his employee card and leave. The Appellant took his belongings and went home.⁶⁰

⁵⁷ See GD3-33 and GD3-34.

⁵⁸ See GD3-19.

⁵⁹ See GD3-33 and GD3-34.

⁶⁰ See GD3-33 and GD3-34.

[26] The Appellant's representative argues as follows:

- a) The Appellant did not lose his job because of misconduct.
- b) Even though the employer considers that the Appellant's dismissal is the result of misconduct on his part, this does not mean that it is misconduct under the Act.⁶¹
- c) To prove that it is misconduct under the Act, the burden of proof is on the employer and the Commission to show that the Appellant knew or should have known that his behaviour was wrong and incompatible with his employment.⁶²
- d) Even if the discussion with his employer was heated, the Appellant never used threats or vulgar language.⁶³
- e) The letter from a former co-worker of the Appellant, still employed with X, indicates that the Appellant held the position of cabinetmaker in that employer's assembly department.⁶⁴

[27] In the matter before me, and based on the evidence, I find that the circumstances related to the Appellant's dismissal do not show that he deliberately chose to lose his job. His dismissal is not the result of a wilful act on his part. In my view, the evidence from the employer does not show that the Appellant lost his job because of misconduct.

⁶¹ See GD6-3 and GD6-4.

⁶² See the Court's decisions in the following cases: *Meunier*, A-130-96; *Mishibinijima*, 2007 FCA 36; *Jones*, 2007 FCA 333; *Fakhari*, A-732-95; *Joseph*, A-636-85; and *Crichlow*, A-562-97—GD6-3 and GD6-4.

⁶³ See GD6-3.

⁶⁴ See the letter from a former co-worker of the Appellant, still employed with X, indicating that the Appellant worked as a cabinetmaker in the employer's assembly department. In this letter, the former co-worker explains that his supervisor and the factory manager confirmed to him that the Appellant held a cabinetmaker position—GD6-3.

[28] In this case, I place more weight on the Appellant's explanations regarding his reasons for meeting with the director on March 11, 2021, what was said at that meeting, and the description of what happened before he was let go.

[29] In my view, the Appellant could not have foreseen that the events from his March 11, 2021, meeting with the director would lead to his dismissal.

[30] I find that the employer's statements that it had heard from other employees that the Appellant had a difficult personality⁶⁵ or that he wanted to get fired, and its statement that, possibly, he wanted his pay stub to show the title of cabinetmaker to be hired elsewhere,⁶⁶ do not support the notion that he wilfully or intentionally acted to lose his job. The same applies to the employer's statement that the factory manager had told it that, the day the Appellant came to get his belongings, he told several people that he had managed to get what he wanted, which shows that he wanted to be out of a job.⁶⁷ In my view, these statements actually show the employer's willingness to impute motives to the Appellant to the effect that he wanted to end his employment and voluntarily acted to that end.

[31] I also find these statements contradictory, given that the employer said that it had never had any problems with the Appellant before March 11, 2021,⁶⁸ and that he had had no disciplinary breaches on his record before that incident.⁶⁹

[32] I am not persuaded by the employer's statements that it did not understand why, when he met with the director on March 11, 2021, the Appellant was disrespectful to her over a simple title on a pay stub and that, if he wanted to go back to working as a cabinetmaker, he just had to ask instead of making an [translation] "angry scene."⁷⁰

⁶⁵ See GD3-28 and GD3-29.

⁶⁶ See GD3-28 and GD3-29.

⁶⁷ See GD3-30.

⁶⁸ See GD3-28 and GD3-29.

⁶⁹ See GD3-18.

⁷⁰ See GD3-28 and GD3-29.

[33] Regarding the Appellant's reasons for meeting with the director on March 11, 2021, I find his version of the facts more plausible than the employer's.

[34] I accept that the Appellant's goal was to meet with the employer to ask it for a pay raise, given that his duties had increased. I am of the view that, in the circumstances, it was not the Appellant's intention or desire to confront the employer to get his pay stub to say that he was a [translation] "cabinetmaker" and not a "day labourer."

[35] I do not find plausible the employer's statement that the Appellant showed up at the director's office with an [translation] "air of dissatisfaction" to ask her why his pay stub said [translation] "day labourer" instead of "cabinetmaker,"⁷¹ without the subject of a pay raise being brought up. In that same statement, the employer also indicated that this document had said [translation] "day labourer" "for years" and that this term was used for all employees.⁷² The employer's statements do not contain a compelling explanation as to why the Appellant met with the director when he did, given that he had been getting pay stubs saying [translation] "day labourer" for years.

[36] Although the employer's statements indicate that the Appellant worked as an assembler, not a cabinetmaker, the employer has provided no evidence to support this, given his statements that he had always worked as a cabinetmaker and had been evaluated as such several times. On this point, I also note that the Appellant's statement about holding a cabinetmaker position and not an assembler position is supported by the written statement of one of his former co-workers, who still works for the employer.⁷³

⁷¹ See GD3-28 and GD3-29.

⁷² See GD3-28 and GD3-29.

⁷³ See the letter from a former co-worker of the Appellant, still employed with X, indicating that the Appellant worked as a cabinetmaker in the employer's assembly department. In this letter, the former co-worker explains that his supervisor and the factory manager confirmed to him that the Appellant held a cabinetmaker position—GD6-3.

[37] Even though the employer's statements also indicate that the Appellant did not ask it for a pay raise,⁷⁴ I consider that it is a perfectly plausible reason to explain what led to the meeting between him and the director on March 11, 2021.

[38] I find that, during that meeting, there was a misunderstanding about the nature of the Appellant's position and that his discussion with the director then turned sour.

[39] The Appellant's testimony, which was not contradicted, indicates that the director was the first to raise her voice during his discussion with her. Because of this, the meeting's atmosphere deteriorated to the point where the Appellant told the director that she was racist by raising a question of discrimination.

[40] I find that the Appellant's inappropriate comments in this regard were a knee-jerk reaction on his part—given the turn his discussion with the director had taken—rather than a wilful intention to act to lose his job.

[41] I also find that, when the director advised the Appellant that he might get a disciplinary warning because of his uncalled-for comments about racism and discrimination, the evidence from the employer does not show that he went so far as to say to her: [translation] "Take your disciplinary warning and shove it."

[42] The Appellant says that he did not say such a thing. Although the employer's statements indicate that it was his making that comment to the director that resulted in the Appellant's immediate dismissal,⁷⁵ I cannot find, in light of the evidence on file, that he made such a comment.

[43] The evidence on file does not support the employer's statements that the Appellant had been [translation] "aggressive" toward the director,⁷⁶ that he had made an [translation] "angry scene,"⁷⁷ or that he had undermined the director.⁷⁸ Also, the words

⁷⁴ See GD3-28, GD3-29, GD3-37, and GD3-38.

⁷⁵ See GD3-28 and GD3-29.

⁷⁶ See GD3-25, GD3-28, and GD3-37.

⁷⁷ See GD3-29.

⁷⁸ See GD3-28.

the employer used to describe the Appellant's behaviour or attitude when he met with the director are not described in measurable or observable terms.

[44] The Appellant's statements, which were not contradicted, indicate that the company's vice-president, whose office is right next to the director's, witnessed his discussion with the director. When he testified, the Appellant pointed out that, if the vice-president had witnessed him making the disrespectful comments attributed to him, he would have intervened with him and the director.

[45] In my view, the human resources assistant's claims about witnessing what had happened between the director and the Appellant add nothing new to the employer's version of events. I also note from the Appellant's testimony that the assistant was in her office and did not see anything that happened.

[46] I do not accept the Commission's argument that the facts of the case show that the employer has a witness—the human resources assistant—who has corroborated its version of events and that, as a result, credence was given to this witness.⁷⁹ The Commission then determined, on that basis, that the Appellant had made rude comments during the altercation with the director.⁸⁰

[47] In my view, the assistant's statements lend no credence to the employer's statements concerning the act attributed to the Appellant. I point out that the employer added the assistant's statements to its reconsideration request, that is, after the Commission had initially determined that Appellant had not lost his job because of misconduct and that he would be able to get benefits. I place more weight on the Appellant's direct testimony than on the assistant's statements, which only repeat almost verbatim what the employer said.

⁷⁹ See GD4-6.

⁸⁰ See GD4-6.

[48] I find that the Appellant could not have known that his conduct was a breach of his duties toward his employer and that dismissal was a real possibility, given the discussion he had with the director.

[49] In summary, I find that the Appellant did not commit acts that were conscious, deliberate, or intentional and that can be considered misconduct.

[50] The Commission has failed to prove that the Appellant intentionally lost his job. I am of the view that, in this case, the Commission has not met its burden of proof of showing that the Appellant's act amounts to misconduct.

[51] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.⁸¹

[52] I consider that the Commission's evidence is inadequate and not detailed enough to find, on a balance of probabilities, that the Appellant lost his job because of misconduct.

[53] Even though the Commission found that the Appellant's making rude comments during an altercation with the director amounted to misconduct under the Act because he had been warned that such behaviour could result in action up to and including dismissal, the evidence on file does not show that he made the disrespectful comments attributed to him.⁸²

[54] I find that the Commission has failed to take into account the Appellant's version of events, including his credible, specific, and detailed testimony, regarding all the circumstances that led to his dismissal.

⁸¹ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁸² See GD4-7.

[55] The Court also tells us that it must be established that the claimant was let go because of misconduct.⁸³

[56] I find that the Appellant was not let go because of an act he committed wilfully and deliberately.

[57] The reason for the Appellant's dismissal is not misconduct under the Act.

Conclusion

[58] The Commission has not proven that the Appellant lost his job because of misconduct.

[59] This means that the Commission's decision to disqualify him from receiving EI regular benefits from March 14, 2021, is not justified.

[60] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

⁸³ 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; and *Granstrom*, 2003 FCA 485.