



Tribunal de la sécurité
sociale du Canada

Social Security
Tribunal of Canada

[TRANSLATION]

Citation: *RP v Canada Employment Insurance Commission*, 2019 SST 1764
Tribunal File Number: GE-19-2405

BETWEEN

R. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: July 31, 2019

DATE OF DECISION: July 31, 2019

DECISION

[1] The appeal is dismissed because the Appellant lost his job because of misconduct.

OVERVIEW

[2] The Appellant, R. P., worked for a few years as a scraper at X in X. He lost his job on July 3, 2018.

[3] The employer accuses him of smoking a cigarette near explosives in a moving wagon inside the mine.

[4] The Appellant applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) reviewed this application and determined that the Appellant had lost his job because of misconduct. So, he was denied access to benefits.

[5] The Appellant is now challenging the Commission's decision before the Tribunal. He says that the employer did not follow its own penalty escalation policy and that he is the victim of a personality conflict with a supervisor. He also says that the employer wanted to get rid of him because of medical problems.

PRELIMINARY ISSUES

[6] The Appellant did not attend the hearing. This was my second attempt to hold a hearing with the Appellant. The first hearing, scheduled for July 24, 2019, was adjourned because the notice of hearing was not claimed. A new notice of hearing was then sent to the Appellant at the contact information he had given the Tribunal himself, and the Registry contacted him by phone twice to advise him of a new hearing. A voice message was left with all the information he needed to attend. I am satisfied that the Appellant was notified of the hearing. So, I proceeded in his absence.¹

¹ In accordance with section 12(1) of the *Social Security Tribunal Regulations*.

ISSUE

[7] Did the Appellant lose his job at X because of misconduct?

ANALYSIS

Concerning the notion of misconduct

[8] A claimant who loses their job because of misconduct is disqualified from receiving EI benefits.²

[9] The principles around misconduct are well established by case law. To determine whether the Appellant lost his job because of misconduct, I have to answer the following questions:

- a) Did the Appellant commit the alleged act?³
- b) Was the act wilful or deliberate? Or, was it the result of such recklessness or negligence that it approaches wilfulness?⁴
- c) Did the Appellant know or should he have known that he could be let go by acting as he did?⁵
- d) Is there a causal link between the alleged act and the dismissal? In other words, is the act in question the actual reason for the dismissal?⁶

[10] The Commission has to prove that the Appellant lost his job because of misconduct.⁷

² Section 30 of the *Employment Insurance Act* (Act)

³ *Attorney General of Canada v Crichlow*, A-562-97

⁴ *Attorney General of Canada v Tucker*, A-381-85

⁵ *Mishibinijima v Canada (Attorney General)* 2007 FCA 36; and *Meunier v Attorney General of Canada*, A-130-96

⁶ *Canada (Attorney General) v Nolet*, A-517-91; and *Attorney General of Canada v Brissette*, A-1342-92

⁷ *Minister of Employment and Immigration v Bartone*, A-369-88; and *Attorney General of Canada v Davlut*, A-241-82

Did the Appellant commit the alleged act?

[11] The employer accuses the Appellant of just one serious act: He smoked a cigarette near dynamite in a moving wagon inside the mine. He was caught red-handed by a supervisor. According to the employer, when he was caught, the Appellant laughed and took one last puff of his cigarette before throwing it away.

[12] The supervisor provided a written statement to the Commission, in addition to a detailed oral version of what happened.⁸

[13] The Appellant admits to smoking in the mine, but he says that there were no explosives nearby.

[14] I give more weight to the employer's version of events. This version is credible, consistent, and supported by a key witness—the supervisor who caught the Appellant in the act.

[15] In addition, the Appellant's version of events contains significant contradictions that affect his credibility as a witness. For example, in one of his first conversations with the Commission, the Appellant denied having smoked in a prohibited or unsafe place on the site.⁹ A few weeks later, in another conversation, he admitted to smoking inside the mine knowing that it was prohibited.¹⁰ He also initially denied having any disciplinary record with his employer, even though the employer's evidence shows that this is totally false.¹¹

[16] I find that the Appellant did commit the alleged act.

⁸ GD3-91, 121-122

⁹ GD3-57

¹⁰ GD3-95, 125

¹¹ GD3-95

Was the act wilful or deliberate? Or, was it the result of such recklessness or negligence that it approaches wilfulness?

[17] There is no doubt in my mind that lighting and smoking a cigarette in a prohibited or unsafe place is wilful. There is every indication that the Appellant acted of his own free will and was fully aware of what he was doing when he committed this act.

Did the Appellant know or should he have known that he could be let go by acting as he did?

[18] First, it is appropriate to address the Appellant's disciplinary record with this employer. In the appeal file, I counted no fewer than 10 disciplinary measures with the Appellant's name. These measures were issued for various acts and omissions by the Appellant in the course of his duties, ranging from a simple warning to a final dismissal. It should be noted that the Appellant was suspended several times, including once for a breach that was considered serious.

[19] So, the Appellant had an extensive disciplinary record. The employer also says that the Appellant was close to being let go, even before he committed the inexcusable act that caused him to lose his job.¹²

[20] About the act itself, the employer's policies and health and safety laws are clear that it is prohibited to smoke—or even to have a lighter or a match—in a mine when there is a risk of explosion. There are signs about this at the entrance to the mine,¹³ the employer's policy refers to this,¹⁴ and the *Règlement sur la santé et la sécurité du travail dans les mines* [Mining occupational health and safety regulations] says this in black and white.¹⁵

[21] Also, [translation] “*not smoking near explosives*” is not a direction that the employer should have to repeat to its employees. Common sense dictates that it is an extremely dangerous

¹² GD3-120

¹³ GD3-102

¹⁴ GD3-73

¹⁵ Section 171 of the *Règlement sur la santé et la sécurité du travail dans les mines (Quebec)* [Quebec mining occupational health and safety regulations] applies if methane is present in the mine (which seems to be the case, since the employer referred the Commission to this section: GD3-92 and 94). See also section 408 of the same regulation, which prohibits smoking within 8 metres of explosives.

act. In addition, the Appellant was in a moving wagon when he did this, which adds an additional layer to the dangerousness and seriousness of his act.

[22] To justify his act, the Appellant says that other employees also smoked in the mine.

[23] In my view, the wrongful acts of another employee do not justify the Appellant's wrongful acts. It is likely that these other employees were also breaking the employer's rules by smoking in the mine. But this does not allow the Appellant to break the rules too, especially when it comes to everyone's safety, as is the case here. In addition, the Appellant did not just smoke a cigarette in the mine: He smoked a cigarette in the mine, near explosives, in a moving wagon. While other employees may have smoked in the mine, there is no evidence that they smoked in such risky circumstances.

[24] In the circumstances, given the seriousness of the Appellant's act, I find that the Appellant knew or should have known that he would be let go by acting as he did.

[25] I find that it was not necessary for the employer to issue a new warning or escalated penalty to the Appellant for his behaviour to be considered misconduct. This is particularly true given the many warnings he had already received for various breaches in recent years.

Is the act in question the actual reason for the dismissal?

[26] In closing, I have seen the Appellant's various allegations against his employer. The Appellant says that he is the victim of a personality conflict with one of his managers. He also says that the employer wanted to get rid of him, since he had taken long periods of sick leave in recent months.

[27] When I consider a misconduct case, I am required to focus on the Appellant's conduct, not the employer's. The question is not whether the employer was guilty of misconduct by letting the Appellant go (so the dismissal would be unjustified), but rather whether the Appellant was guilty of misconduct and whether this misconduct resulted in him losing his job.¹⁶

¹⁶ *Canada (Attorney General) v McNamara* 2007 FCA 107; and *Canada (Attorney General) v Fleming* 2006 FCA 16

[28] In my view, the evidence and the sequence of events in this case clearly show that the Appellant committed a serious act and was let go almost immediately after he did so. I find that the Appellant lost his job because of the alleged acts.

[29] I find that the Appellant did commit misconduct and that he lost his job as a result.

CONCLUSION

[30] The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	July 31, 2019
TYPE OF HEARING:	Teleconference
APPEARANCES:	Neither party attended the hearing