



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. B. v Canada Employment Insurance Commission*, 2020 SST 604

Tribunal File Number: GE-20-1099

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: May 19, 2020

DATE OF DECISION: May 31, 2020

DECISION

[1] The Commission has proved that the Claimant lost her job because of misconduct. This means she is disqualified from receiving benefits.¹

OVERVIEW

[2] The Claimant lost her job as an assistant bank manager. Her employer said it dismissed her because she breached its integrity policies by removing a hold the bank had placed on a new account. She was waiting for funds from this account. Once she removed the hold and the money was in her account, she got a colleague to prepare a draft for her so she could pay her builder. The employer told the Commission that this type of policy breach leads to immediate dismissal.

[3] The Claimant says she acted in good faith according to long-standing bank practices. She says she had the authority to remove holds on funds where there was no risk to the bank. Asking a colleague to prepare a draft for her was also a common practice. She says she did not know her employer would dismiss her for her actions. In her mind, she was not breaching any policies.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct and disqualified her from receiving employment insurance (EI) benefits.

ISSUE

[5] Did the Claimant lose her job because of misconduct? To determine this question, I will first decide the reason why she lost her job.

ANALYSIS

Why did the Claimant lose her job?

[6] The evidence shows that the employer dismissed the Claimant because her actions breached the "Integrity in Safeguarding Trusted Assets" and "Culture of Integrity" sections of the bank's *Code of Conduct* (Code). She agrees that she lost her job for this reason.

¹ Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

Is the reason for the Claimant’s dismissal misconduct under the law?

[7] Yes. I find that the reason she lost her job is misconduct under the law since her actions met all the elements of the legal test for misconduct.

[8] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² There is misconduct if the Claimant knew or should have known that her conduct breached the duty she owed her employer and, as a result, dismissal was a real possibility.³

[9] The Commission has to prove it is more likely than not⁴ that the Claimant lost her job because of misconduct.⁵

What does the Commission say?

[10] The Commission says the Claimant was dismissed for breaching her employer’s integrity policies, as set out in its Code. These policies state that employees “must never use their access of information to benefit themselves, their families, or their friends.”⁶

[11] The Commission says the Claimant’s actions were wilful because she knew that removing the hold her employer had put on the new account would benefit her personally. She went ahead when her Branch Manager was unavailable because she needed the money urgently. The Commission says this was wilful conduct, which breached her duty to her employer.

[12] The Commission says that the Claimant did not know enough about the Savings Circle to conclude that all the money came from legitimate sources. She had only met the convenor of this enterprise once and did not know who the participants were. She could only estimate that 28 people contributed to the convenor’s account right after it was opened.

[13] The Commission also says that the Claimant provided no evidence that the bank tacitly approved the practice of getting a colleague to process your transactions for you.

² *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ *Mishibinijima*, see above.

⁴ The Commission has to prove this on a balance of probabilities, which means it is more likely than not that events happened as described.

⁵ *The Minister of Employment and Immigration v Bartone*, A-369-88.

⁶ Employer’s *Code of Conduct* (Code), found at GD3-52

[14] The Commission argues that the Claimant put herself into a position of conflict of interest by her actions. This breaches the employer's Code.⁷

[15] The Commission says the Claimant should have known she would be dismissed based on her knowledge of the Code, which emphasizes ethics and integrity in banking activities."⁸

What does the Claimant say?

[16] The Claimant says that there was no misconduct because her actions were based on accepted practices. She maintains that she had the authority to remove holds on even larger amounts of money, her actions were not fraudulent and the bank did not lose anything by what she did. She argues that it was common practice to ask a colleague to help process personal transactions. She says the Commission wrongly concluded that she ignored direct instructions not to proceed with her transactions since it misunderstood which departments she had contacted.

[17] The Claimant says each participant in the Savings Circle paid in \$400 a week and then could receive all the accumulated funds on a rotating basis. The convenor of the Savings Circle opened a new account with the bank where the Claimant worked, but at a different branch. The Claimant says it was her turn to receive the funds but the bank had put a five-day hold on the new account, which contained \$9,700.

[18] The Claimant argues that there was no risk to the bank since she knew it was Savings Circle money. She and her husband needed this money urgently to pay her builder who was also a client of the same bank. She says that it would inconvenience the builder if her cheque to him bounced because of insufficient funds in her account.

[19] The Claimant argues that she had always followed her employer's policies in the 22 years with the bank. She did not know her actions would lead to her dismissal since she thought she was following accepted bank policies and practices. She says she was trying to act in the best interests of everyone: the new client, the bank, herself and her builder. She believes that her dismissal was unfair.

⁷ The employer's Code, GD3-47.

⁸ GD4-7.

[20] It is not my role to determine whether the employer dismissed the Claimant unfairly. I can only consider whether the actions that led to her dismissal met the legal test for misconduct.⁹

My Findings

[21] I find that the Commission has proved that there was misconduct, because the Claimant's actions were wilful and breached her duty to her employer. As well, she should have known her employer would dismiss her for removing a hold on an account where she had a personal interest in the funds. I accept her submission that she meant no harm, but there does not have to be wrongful intent for her behaviour to be misconduct under the law.

[22] I find that the Commission did not show that the Claimant's actions amounted to misconduct where she asked a colleague to prepare a bank draft for her. The Commission says the Claimant has not proved such requests were common practice but I find that the Commission, not the Claimant, has that burden of proof. I accept her submission that it was common practice.

[23] However, I find that the Commission has shown, on a balance of probabilities, that there was misconduct when the Claimant removed a hold on a new account because she needed the funds from the account.

[24] I agree with the Commission's submission that this action was wilful because it was conscious, intentional and deliberate. This is the first part of the test to show misconduct. The Claimant did not make a careless mistake. Her actions were intentional. I do not give significant weight to her testimony that she removed the hold solely to help a new client and ensure she was satisfied with her banking experience. This is because the Claimant had a personal stake in these funds.

[25] I find that she should have waited to speak to her Branch Manager to verify her belief that her actions were in line with the bank's policies. She argues that she tried calling other bank departments but did not get proper direction. However, I find that she made a conscious decision not to wait to speak to her Branch Manager because of her urgent need for the funds.

⁹ *Attorney General of Canada v McNamara*, 2007 FCA 107.

[26] I find that the Claimant's action breached her duty to her employer since she violated the bank's policies. These policies emphasize that employees "must never use their access of information to benefit themselves (*sic*)."¹⁰ The Claimant breached this policy when she removed the hold on the account since this action clearly benefitted herself. This is the second part of the test to show misconduct.

[27] I give low weight to the Claimant's testimony that her actions were not misconduct since there was no fraud and the bank did not suffer any monetary loss. She argues that this proves her judgment call to remove the hold on the account was right.

[28] I find that an acceptable end result does not justify failing to follow an employer's policies. The Claimant took a risk when she removed the bank's hold on the new account since she knew very little about the Savings Circle. She had only met the convenor once and did not know the other participants. She was vague about how many there were. She estimated that 28 people paid in money to the new account right after it was opened. Removing a hold in these circumstances based on her personal need for these funds breached her employer's Code.

[29] I find that the Claimant should have known her employer would dismiss her based on her knowledge of the employer's Code. This is the third part of the test for misconduct. She was aware of the bank's policy that employees should not do transactions that benefit themselves, their family or their friends. She confirmed that she participated in an annual review of the Code.

[30] I find that the employer clearly outlined the consequences of breaching its policies: "If an employee breaches the Code, he or she will be subject to corrective or disciplinary action. Corrective or disciplinary action ... can range from reprimands and impact on performance ratings and compensation, to termination of our working relationship."¹¹

[31] The Claimant argues that termination was too harsh. She says she had no prior incidents in her 22 years with her employer. It is not my role to comment on whether dismissal was the correct level of discipline. It was the employer's choice to go straight to termination without reprimands or warnings. Its policies did not guarantee progressive discipline before termination.

¹⁰ Employer's Code found at GD3-52

¹¹ Employer's Code, found at GD3-39.

[32] Based on these factors, I find it more likely than not that the Claimant was dismissed because of misconduct.

[33] Before making this finding, I considered the Claimant's concerns that the tone of the investigation changed when it moved from her Branch Manager to the bank's investigation unit. She says the investigators made comments linking her as a Black woman with criminality. However, as noted above, it is not my role to consider whether the employer treated her unfairly when it dismissed her, but only whether her actions met the test for misconduct.

[34] I also considered the Claimant's statement that she had previously made a discrimination complaint when working in a different branch. She therefore moved to a new branch, and this branch was also nearer her home. I asked her whether she felt that complaint was a factor in the bank's decision to dismiss her over a breach of its integrity policies. However, she said her relationship with the new branch and its Branch Manager had been good. I gave her the opportunity to submit additional information after the hearing about her discrimination complaint if she felt it was a factor in her dismissal but she did not submit anything further.

[35] To sum up, I find that the Commission met its burden to show, on a balance of probability, that the employer dismissed the Claimant because of misconduct. Her actions were wilful, they breached her duty to her employer and she should have known she would be dismissed.

CONCLUSION

[36] The appeal is dismissed. This means that the Claimant is disqualified from receiving EI benefits.

Lilian Klein
Member, General Division - Employment Insurance Section

HEARD ON:	May 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. B., Appellant Mika Imai, Representative for the Appellant