



[TRANSLATION]

Citation: *YS v Canada Employment Insurance Commission*, 2022 SST 476

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

Decision

Appellant: Y. S.
Representative: Sylvain Bergeron

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (444241) dated January 18, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference
Hearing date: March 22, 2022
Hearing participant: Appellant
Appellant's representative

Decision date: April 8, 2022
File number: GE-22-372

Decision

[1] The appeal is dismissed. I find that the Appellant lost his employment because of his misconduct.¹ This means that his disqualification from receiving Employment Insurance (EI) regular benefits as of August 22, 2021, is justified.

Overview

[2] From November 7, 2011, to August 17, 2021, inclusive, the Appellant was a branch director at Bank of Montreal (BMO or employer) and stopped working for this employer when it let him go. The employer says it let him go because he violated the bank's procedures, policies, and the employee code of conduct.

[3] On November 8, 2021, the Canada Employment Insurance Commission (Commission) told him that he is disqualified from receiving EI benefits as of August 22, 2021, since he stopped working for the employer on August 17, 2021, because of misconduct.²

[4] On January 18, 2022, after a request for reconsideration, the Commission informed the Appellant that it was upholding the November 8, 2021, decision.³

[5] The Appellant says he did not lose his employment because of misconduct. He argues that, while he did violate the employer's procedures, policies, and the employee code of conduct by asking an employee who reported to him to process his personal mortgage application, his goal was to have his file processed in the time required after the offer he made to buy a home was accepted. The Appellant says he has held no ill will or malicious thoughts towards the employer despite his alleged actions. He says he was not involved in the different stages of analysis for his file to get the mortgage he asked for or to gain an advantage. He did not know he could be let go for his alleged actions. On January 31, 2022, the Appellant challenged the Commission's

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

² See GD3-23 and GD3-24.

³ See GD3-80 and GD3-81.

reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[6] I have to determine whether the Appellant lost his job because of misconduct. To determine 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 Act?

Analysis

[7] The Act does not define the term "misconduct." Decisions by the Federal Court of Appeal (Court) describe the concept of misconduct.

[8] In one of its decisions, the Court said that, to constitute misconduct, "the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."⁴

[9] To be misconduct under the law, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it "approach[es] wilfulness," meaning that it is almost wilful.⁶ 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.⁷

⁴ The Court established this principle in *Tucker*, A-381-85.

⁵ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁶ The Court established this principle in *McKay-Eden*, A-402-96.

⁷ The Court established this principle in *Secours*, A-352-94.

[10] 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.⁸

[11] 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.⁹

[12] 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.¹⁰ This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.¹¹

Issue 1: Why did the Appellant lose his job?

[13] In this case, the employer says it let the Appellant go because he violated the bank's procedures and policies, which includes the employee code of conduct, by having an employee who reported to him process his mortgage application.¹²

[14] In a letter to the Appellant (subject: termination of employment) dated August 23, 2021, the employer told him it was letting him go for being in serious violation of the bank's procedures, policies, and code of conduct. The employer told him that the relationship of trust needed for him to keep his job at the institution has been definitively

⁸ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁹ The Court established this principle in *Lemire*, 2010 FCA 314.

¹⁰ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

¹¹ The Court established this principle in *Bartone*, A-369-88.

¹² See GD3-21 and GD3-30.

broken.¹³ In this letter, the employer tells him he admitted to doing the following, among other things:

- a) having an employee who reported to him (direct report) process his mortgage application
- b) bringing documents for the mortgage to be signed by his partner outside of the bank knowing that this is not permitted
- c) verifying his credit report using the “Pathway Connect” platform 11 times
- d) authorizing the reimbursement of his own notary fees of \$750 without getting permission from his regional vice president (RVP)
- e) having an employee who reported to him (subordinate) process the transaction using his partner’s name (the Appellant’s partner) in the notes to hide the fact that he was reimbursing his own fees
- f) authorizing the reimbursement of notary fees for customers, on multiple occasions, without getting the RVP’s permission¹⁴

[15] Also, the employer’s statements to the Commission show the following:

- a) The Appellant had worked there for over 10 years. He was a branch manager. He used his status as a branch manager to set up his personal mortgage by having an employee who reported to him process it. This is not allowed.¹⁵
- b) By having his mortgage documents at home, the Appellant could have had anyone sign them without his partner’s knowledge, allowing him to get a loan in her name.¹⁶

¹³ See GD3-30.

¹⁴ See GD3-30.

¹⁵ See GD3-21.

¹⁶ See GD3-21.

- c) He consulted his personal mortgage file while it was being processed when he should have waited, like anyone else who applies for a loan. He had access to the notes when he should have waited for the credit report results, like any other customer.¹⁷
- d) He violated the employee code of conduct by having a conflict of interest and abusing his power. Every year, he signed the code of conduct (document entitled “BMO’s Code of Conduct”), agreeing to follow it.¹⁸

[16] The employer also submitted a copy of the following documents to the Commission:

- a) “BMO’s Code of Conduct”¹⁹
- b) “Managing Conflicts of Interest Operating Directive”²⁰
- c) document showing the training the Appellant had taken on the employer’s code of conduct²¹

[17] Some of the information from the document entitled “BMO’s Code of Conduct” includes:

- a) Anyone who violates the Code will face corrective measures up to and including termination of employment and legal action.²²
- b) Ensure personal and business affairs do not conflict – or appear to conflict – with BMO’s interests or the interests of BMO’s current or prospective customers, counterparties, and suppliers.²³

¹⁷ See GD3-21.

¹⁸ See GD3-21.

¹⁹ See GD3-32 to GD3-53.

²⁰ See GD3-58 to GD3-79.

²¹ See GD3-54.

²² See page 6 of the document about the consequences for violating the Code of Conduct – GD3-38.

²³ See page 19 of the document about managing conflicts of interests – GD3-51.

- c) Do not use your position or connection with BMO to benefit yourself or people with whom you have a relationship, such as family members, business associates, or colleagues. Do not use your employee banking privileges as a benefit for others or for personal profit.²⁴

[18] The document entitled “Managing Conflicts of Interest Operating Directive” includes the following information:

- a) To avoid all potential conflicts of interest, actual or apparent, an employee cannot process or authorize transactions or expenses, grant loans, manage relationships, or participate in any other activities on behalf of BMO to benefit themselves, immediate family members [...].²⁵
- b) All interests of this type have to be flagged to the employee’s manager, who will determine if the transaction can be made and, if so, under which conditions or restrictions. [...] Employees cannot use their position to influence another person to process their transactions. Also, employees are not allowed to try to influence other BMO sectors.²⁶
- c) To efficiently manage apparent, potential, or actual conflicts of interest, all employees have to seek approval of their personal financial transactions, external activities, and private investments. [...] Employees are not authorized to participate in an activity before all possible conflicts have been assessed and before getting a written notice of the final approval.²⁷
- d) Some activities relating to personal financial transactions are not allowed. The only way to get an exception to do these things is by getting approval from management and from the Compliance group.²⁸

²⁴ See page 20 of the document about managing conflicts of interest – GD3-52.

²⁵ See page 4 of the document about processing and approving transactions and expenses – GD3-61.

²⁶ See page 5 of the document about processing and approving transactions and expenses – GD3-62.

²⁷ See page 5 of the document about the disclosure and approval process – GD3-62.

²⁸ See page 6 of the document about the disclosure and approval process – GD3-63.

- e) The following specific provisions (a. personally borrowing or lending money or titles) are not allowed because they can cause actual or potential conflicts of interest.²⁹
- f) Not following the requirements in the operating directive can be considered a violation of BMO's Code of Conduct and could lead to disciplinary action or dismissal [...].³⁰

[19] The Appellant recognizes that he had an employee who reported to him process his mortgage application. By doing this, he violated the employer's policies, procedures, and the employee code of conduct.³¹ He argues that the context the actions were taken in has to be taken into account.

[20] The Appellant's representative says the Appellant does not deny having violated the code of conduct.

[21] I find that the Appellant lost his job because of the actions he took to have an employee who reported to him process his mortgage application.

[22] I must now decide whether the Appellant's actions constitute misconduct under the Act.

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

[23] I find that the Appellant acted to deliberately lose his job. The evidence on file shows that his alleged actions amount to misconduct under the Act.

²⁹ See page 7 of the document about personal financial transactions – GD3-64.

³⁰ See pages 16 and 17 of the document about [translation] "escalation processes and implementation" – GD3-73 and GD3-74.

³¹ See GD3-8, GD3-9, and GD3-22.

[24] The Appellant says his alleged actions do not amount to misconduct under the Act. His testimony and statements indicate the following:

- a) The Appellant and his partner wanted to buy a new home. Around mid-February 2021, the Appellant signed an offer to purchase. After signing the offer, he applied for a mortgage. The Appellant wanted to make sure that his mortgage application would be processed quickly or within the time required. He says, towards the end of winter 2021, because of the COVID-19 pandemic,³² there was an [translation] “overheated real estate market.” It was difficult to find a home and to have access to services offered by financial institutions. Staff shortages, processing times, and the particular context of the real estate market led him to make the most logical choice under the circumstances.³³
- b) He first applied with a mortgage specialist at the branch where he worked. She was a colleague and he was not her immediate supervisor. So, she was not one of his subordinates. The Appellant asked her to process his mortgage application knowing what her response would be since she was overwhelmed with work. He says the prevailing context at the time meant that there was an enormous demand for processing mortgages. After telling him she could not process his mortgage application because she was overwhelmed, the specialist suggested he talk to one the advisors on his team. That is what the Appellant did.³⁴
- c) At the branch where he was working, only one advisors out of four who reported to him were licensed to handle mortgages. So, he applied for a mortgage with this advisor.³⁵

³² Coronavirus disease 2019.

³³ See GD3-8, GD3-22, GD3-27, and GD3-28.

³⁴ See GD3-22, GD3-27, and GD3-28.

³⁵ See GD3-27 and GD3-28.

- d) The consultant who processed the application contacted the Appellant's partner to tell her he was going to bring home documents to sign. The Appellant says it is a legal practice as long as the partner is informed by the advisor that there will be documents to sign. So, the Appellant brought documents home for his partner to sign. He says he would not have applied for a mortgage without his partner knowing like the employer said in one of its statements to the Commission.³⁶ He says it would be difficult for a partner to apply for a mortgage without their partner knowing, and then going to a notary without their partner present. Both partners must be present and identified.³⁷
- e) He recognizes that he violated the employer's code of ethics and policies.³⁸ He says he was aware of the employer's policy and that he did not follow it. The Appellant says while the employer has a policy concerning his [translation] "offence," many loan applications are processed by colleagues with a reporting relationship because of the staff shortage and the COVID-19 pandemic.³⁹
- f) He argues that he applied for a mortgage without any ulterior motives. No malicious thoughts, undue pressure, or incentives were directed at the advisor who processed his application to manipulate or persuade her into not following the standards and procedures in place.⁴⁰ At no time did he intervene in the analysis process for his mortgage application. He could not have intervened in the decision concerning his mortgage even if he wanted to because the documents provided with his application are verified.⁴¹ The rules and procedures in place for this type of application are so effective that there

³⁶ See GD3-21.

³⁷ See GD3-27 and GD3-28.

³⁸ See GD3-22.

³⁹ See GD3-9 and GD3-22.

⁴⁰ See GD3-8.

⁴¹ See GD3-27 and GD3-28.

is no chance of anything being manipulated. It would difficult to manipulate someone or the system, since everything is verified.

- g) Concerning the Appellant allegedly accessing his mortgage application, he says the advisor who processed his file had a technical problem. So, the Appellant used his application to see if the technical problem had been resolved. He argues that even if he wanted to see his application's status, he would not have been able to do anything to his file since it would be verified.⁴²
- h) Every year, he signed the employee code of conduct.⁴³ He was given time to read over that document.⁴⁴ The document has many pages and taking the time to read each one would take hours.⁴⁵ While he took yearly training on ethics and compliance, he cannot remember all of the information about it.⁴⁶
- i) The issue related to the reimbursement of notary fees does not fall under any directive from the employee code of conduct. It is not a standard or specific procedure. It is the RVP's prerogative. She is the one who grants or authorizes the reimbursement of notary fees for customers and employees. It was a new directive of the RVP in office. The Appellant says for employees, it was [translation] "a given" that reimbursements would be accepted. He says many notary fees have been reimbursed by directors who applied for permission afterwards. The Appellant says things worked this way because in the negotiating process to get a mortgage, customers are demanding and want a quick response for their application.
- j) Although in the termination of employment letter, the employer says he authorized the reimbursement of his own notary fees without the RVP's⁴⁷ authorization, this means that he did not get her [translation] "prior"

⁴² See GD3-27 and GD3-28.

⁴³ See GD3-22.

⁴⁴ See GD3-27 and GD3-28.

⁴⁵ See GD3-27 and GD3-28.

⁴⁶ See GD3-9, GD3-27, and GD3-28.

⁴⁷ See GD3-30.

authorization to get the reimbursement like she required. Nobody gave “prior” authorization. He says he got authorization around June or July 2021, several months after his mortgage application was approved and after the transaction had been made. He knew that the RVP would authorize it.

- k) The Appellant says he was not the one who authorized the reimbursement of the notary fees. He requested it. He says he did not [translation] “take \$750 in petty cash.” The application was signed by two other people. To get the reimbursement, a particular document must be filled out. In his case, the document was filled out in his partner’s name. The Appellant did not want the person processing his file, a customer service representative from the branch where he worked, to have access to his file or his [translation] “profile” since he worked at that branch. He could not sign the document himself.
- l) In the Appellant’s December 23, 2021, statement to the Commission, he said he authorized the reimbursement of notary fees when normally, it is the RVP who would authorize it. He said while the RVP always authorizes this type of [sic] fee and that she was very busy, he thought he was doing the right thing by authorizing his own reimbursement.⁴⁸
- m) Once he got his mortgage, he told the RVP that he had an employee who reported to him process his application. The Appellant says after his discussion with the RVP, she sent him an email saying that the next time he had a personal application to make, to avoid having it processed by an employee who reports to him. Rather, someone who is not his subordinate should process it. The Appellant replied that he would comply with her request. He can’t find the email that the RVP sent him.⁴⁹
- n) He did not know he would be let go because of the actions he took.⁵⁰ It is only after having been told by his supervisor (RVP) that he understood the gravity

⁴⁸ See GD3-27 and GD3-28.

⁴⁹ See GD3-27 and GD3-28.

⁵⁰ See GD3-27 and GD3-28.

of his actions.⁵¹ The Appellant says he doesn't know what happened [translation] "internally" and why there was a change that resulted in an investigation into his file. When an investigator and the RVP met with him to ask him questions, he was only expecting for this meeting to be about his file, considering the discussion that he had had with the RVP.

- o) The Appellant was first suspended with pay from August 10, 2021, to August 16, 2021, and he was told of his dismissal on August 17, 2021.⁵² On August 23, 2021, the employer wrote him a termination of employment letter.⁵³

[25] The Appellant's representative argues the following:

- a) The Appellant's alleged actions do not amount to misconduct under the Act.⁵⁴ Before determining if it is misconduct, I must analyze the gravity of the situation.
- b) The representative says, "Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest."⁵⁵ The Appellant did not intend to harm the employer.
- c) The four criteria the Commission uses to analyze a misconduct case (for example, a particular incident happened, the behaviour had actual and negative consequences for the employer, the behaviour violated the employer/employee relationship, the behaviour was voluntary and/or wilful on the part of the Appellant)⁵⁶ do not show that the Appellant lost his job because of misconduct.

⁵¹ See GD3-9.

⁵² See GD3-27 and GD3-28.

⁵³ See GD3-30.

⁵⁴ See GD3-26.

⁵⁵ See the Court decision in *Tucker*, A-381-85.

⁵⁶ See GD3-27 and GD3-28.

- d) Objectively, the Appellant's alleged actions did not result in a negative outcome for the employer. The employer will [translation] "pocket" the interest of the mortgage granted to the Appellant. He's another customer; that's not a negative.⁵⁷
- e) Even if the code of conduct says, "Do not use your position or connection with BMO to benefit yourself,"⁵⁸ no profit was made in the Appellant's case. He followed the mortgage application process.
- f) While the Commission says it has [translation] "evidence that the Claimant [Appellant] took money from BMO, an amount of \$750, to pay for his own notary fees,"⁵⁹ the reimbursement of notary fees for employees was "a given."
- g) The representative argues that the employer's statements where it says the Appellant [translation] "could have had anyone sign the document without his partner's knowledge, allowing him to get a loan in her name"⁶⁰ is not credible.

[26] In this case and based on the record, I find that the circumstances relating to the Appellant's dismissal show that he deliberately chose to lose his job. His dismissal is the result of deliberate actions on his part.

[27] The Appellant recognizes that he violated the employer's policies, procedures, and the code of conduct he was subject to.

[28] I am of the view that the Appellant could predict that he could be let go by violating them.

⁵⁷ See GD3-27 and GD3-28.

⁵⁸ See GD3-52.

⁵⁹ See GD4-6.

⁶⁰ See GD3-21.

[29] The provisions in the code of conduct and those in the document on the employer's operating directive both specify that, if an employee breaches or violates them, they are subject to disciplinary action up to and including dismissal.⁶¹

[30] Although the Appellant argues there was no ill will behind his alleged actions and that the context they were taken in has to be taken into account, the fact remains that he knowingly breached the employer's procedures, policies, and code of conduct.

[31] He could have avoided being let go by following procedures and policies and the provisions from the code of conduct.

[32] Although the Appellant also argues that he did not [translation] "take \$750 in petty cash" to reimburse the notary fees related to buying his home and that he was reimbursed for those fees, he does not show that he got prior authorization from his RVP to carry out that reimbursement.

[33] Also, I find that the Appellant's explanations on this point are contradictory.

[34] At the hearing, he said nobody gave [translation] "prior" authorization for the reimbursement of notary fees. He says the RVP gave him authorization to that end around June or July 2021, several months after his mortgage application was approved and after the purchase had been made. He says that he is not the one who authorized the reimbursement of these fees, that he did not sign any documents to this end, and that this request for reimbursement was done in his partner's name.

[35] However, in his December 23, 2021, declaration to the Commission, the Appellant gave a clearer explanation by saying he thought he was doing the right thing by authorizing his own reimbursement for his notary fees when, usually, the RVP would

⁶¹ See page 6 of the document entitled [translation] "BMO's Code of Conduct" (GD3-38) and pages 16 and 17 from the document entitled [translation] "Managing Conflicts of Interest Operating Directive" (GD3-73 and GD3-74).

be the one to authorize it. Then he said he did that because the RVP always authorizes those kinds of fees and that she was very busy.⁶²

[36] I give more weight to this statement. It is very explicit. Also, this statement is consistent with the information the employer provided in the termination of employment letter, showing that the Appellant authorized the reimbursement of his own notary fees of \$750 without getting authorization from his RVP.⁶³

[37] The Appellant's argument that the issue concerning the reimbursement of notary fees does not fall under any directive from the employee code of conduct and that it is the RVP's prerogative does not change the fact that he breached a legitimate request of the employer's.

[38] On this point, the employer says he also had an employee who reported to him process the transaction and that he used his partner's name to [translation] "hide" the fact that he was reimbursing his own fees.⁶⁴

[39] I note that the document entitled "Managing Conflicts of Interest Operating Directive"⁶⁵ says to avoid all potential conflicts of interest, actual or apparent, an employee [translation] "cannot process or authorize transactions or expenses, grant loans [...] to benefit themselves, immediate family members [...]."⁶⁶

[40] Even though the Appellant says as branch director, he had also authorized the reimbursement of these fees for customers at the branch where he worked, the employer says in the termination of employment letter that it wrote him that this was also not permitted.⁶⁷

⁶² See GD3-27 and GD3-28.

⁶³ See GD3-30.

⁶⁴ See GD3-30.

⁶⁵ See GD3-58 to GD3-79.

⁶⁶ See page 4 of the document entitled [translation] "Managing Conflicts of Interest Operating Directive" – GD3-61.

⁶⁷ See GD3-30.

[41] The representative argues that the criteria set out by the Commission to analyze misconduct⁶⁸ do not show that the Appellant's alleged actions amount to misconduct. He says these actions did not affect the employer negatively, since it will be able to continue to get interest from the mortgage granted to the Appellant.

[42] I find that the representative's arguments about this point do not show that the Appellant followed the employer's requirements on the procedures and policies in place or related to the employee code of conduct.

[43] The same is true for the Appellant's argument that he used his own mortgage application to check whether a technical problem he says the advisor had encountered while processing this application had been resolved.⁶⁹

[44] The evidence on file shows that every year, the Appellant made time to familiarize himself with the contents of the code of conduct and signed this document showing his commitment to follow it.⁷⁰

[45] In this context, the Appellant's argument that this document has many pages and that taking the time to read each one would take hours cannot be accepted in his favour.

[46] I find that by violating the employer's procedures, policies, and employee code of conduct, the Appellant wilfully chose to ignore the standards of behaviour that his employer had a right to expect of him. The Appellant ignored a fundamental requirement of his job.

[47] In summary, I find that by having an employee who reported to him process his mortgage application, the Applicant acted in a way that was conscious, deliberate, or intentional that can fall under misconduct under the Act.

⁶⁸ See GD3-27 and GD3-28.

⁶⁹ See GD3-27 and GD3-28.

⁷⁰ See GD3-22, GD3-27, and GD3-28.

[48] I find that the Appellant was let go because of the actions he committed wilfully and deliberately.

[49] I am of the view that, in this case, the Commission has met its burden of proving that the Appellant's actions amount to misconduct.

[50] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.⁷¹

[51] The Commission has shown that the Appellant intentionally lost his job.

[52] I find that the Commission's evidence shows that the Appellant did not follow the employer's procedures and policies and that he breached the employee code of conduct. The Appellant could have kept his job by following these procedures, policies, and provisions from the code of conduct.

[53] The Court also tells us it must be established that a claimant was let go because of misconduct.⁷²

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

[55] The evidence shows that the fact that the Appellant did not follow the employer's procedures and policies, and the employee code of conduct, is the real cause of his dismissal. The employer explained that it let the Appellant go for that reason. The Appellant says he was let go for that reason.

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

⁷¹ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁷² The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485; *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; and *Joseph*, A-636-85.

Conclusion

[57] I find that the Appellant lost his job because of misconduct.

[58] This means that the Commission's decision to disqualify the Appellant from receiving EI regular benefits as of August 22, 2021, is justified.

[59] This means that the appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section