



[TRANSLATION]

Citation: *EG v Canada Employment Insurance Commission*, 2022 SST 948

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

Decision

Appellant: É. G.
Representative: Kim Bouchard

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (443903) dated December 30, 2021 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Videoconference
Hearing date: June 21, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: August 12, 2022
File number: GE-22-443

Decision

[1] The appeal is dismissed. I find that the Appellant lost his job because of misconduct.¹ This means that his disqualification from receiving Employment Insurance (EI) regular benefits from September 19, 2021, is justified.

Overview

[2] From August 13, 2018, to September 13, 2021, the Appellant worked as a warehouse clerk for the employer X (X or employer). He stopped working for that employer because it let him go. The employer says that it let him go for repeatedly being late and missing work and for abusing sick leave.

[3] On November 9, 2021, the Canada Employment Insurance Commission (Commission) told the Appellant that he wasn't entitled to EI regular benefits from September 19, 2021, because he had stopped working for the employer on September 13, 2021, as a result of misconduct.² On December 30, 2021, after a request for reconsideration, the Commission told him that it was upholding the November 9, 2021, decision.³

[4] The Appellant says that he didn't lose his job because of misconduct. He says that his tardiness is what mainly caused him problems at work. He argues that his tardiness was due to his sleep problems. He points out that he usually wasn't late by much. He says that the employer was aware that he had sleep problems and that they could cause him to be late for work. He argues that the employer didn't take his explanations for his tardiness seriously. He indicates that, because of his tardiness, the employer gave him disciplinary warnings and imposed suspension days. He says that, on September 13, 2021, the day he was let go, he hadn't slept in more than two days. He says that he was aware of his tardiness and that he made efforts to address it (for example, he used wake-up alarms and talked to health professionals). He says that his

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

² See GD3-25 and GD3-26.

³ See GD2-9, GD2-10, GD3-56, and GD3-57.

tardiness situation started because of the COVID-19⁴ pandemic, given how he felt at the time. He says that, to make up for being late for work, he would work during his breaks or lunch periods. He says that he wasn't late on purpose. On February 7, 2022, he challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

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

[6] The Act doesn't define the term "misconduct." Federal Court of Appeal (Court) decisions set out the characteristics that describe the notion of misconduct.

[7] In one of its decisions, the Court said that, to be 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."⁵

[8] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless as to "approach wilfulness," meaning that it is almost wilful.⁷ For their

⁴ Coronavirus disease 2019.

⁵ The Federal Court of Appeal (Court) established this principle in *Tucker*, A-381-85.

⁶ The Court established this principle in *Mishibinijima*, 2007 FCA 36.

⁷ The Court established this principle in *McKay-Eden*, A-402-96.

behaviour to be misconduct under the Act, the claimant doesn't have to have wrongful intent; in other words, they don't have to mean to be doing something wrong.⁸

[9] 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.⁹

[10] To determine whether the misconduct can result in dismissal, there has to be a link between the claimant's misconduct and the loss of their job. So, the misconduct has to be a breach of an express or implied duty resulting from the contract of employment.¹⁰

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

Issue 1: Why did the Appellant lose his job?

[12] In this case, the employer says that it let the Appellant go for repeatedly being late and missing work and for abusing sick leave.¹³

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

- a) The Appellant was let go on September 13, 2021, for tardiness.¹⁴ He went through [translation] "progressive discipline" before he was let go.¹⁵

⁸ The Court established this principle in *Secours*, A-352-94.

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

¹⁰ The Court established this principle in *Lemire*, 2010 FCA 314.

¹¹ The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

¹² The Court established this principle in *Bartone*, A-369-88.

¹³ See GD3-23, GD3-38, GD3-39, and GD3-43.

¹⁴ See GD3-38 and GD3-39.

¹⁵ See GD3-23, GD3-38, and GD3-39.

- b) The Appellant worked as a warehouse clerk for the company, a security product and door hardware retailer. He stored goods, did inventory, and helped with customer service and shipping. He worked Monday to Friday from 8 a.m. to 4:30 p.m. That was the schedule agreed upon when he was hired. He never asked to change it.¹⁶
- c) The Appellant got many verbal warnings for tardiness. Tardiness of 5 to 10 minutes wasn't recorded at first. Only lengthier tardiness (for example, 45 minutes, 1 hour, or more) was recorded. For example, on December 30, 2020, at 8:48 a.m., the Appellant told the employer that someone had stolen his phone and that he hadn't set his alarm properly.¹⁷
- d) On January 12, 2021, the Appellant got a written warning for repeated unexcused tardiness. He met with his immediate supervisor and the branch director. The employer reminded him that any further unexcused tardiness or absence would not be tolerated and would result in his dismissal.¹⁸ He signed the disciplinary warning given to him.¹⁹
- e) Before that, on June 3, 2019, the Appellant got a first written warning for making inappropriate comments to another employee. The employer then told him that this type of behaviour wasn't allowed.²⁰
- f) After getting the January 12, 2021, written warning for tardiness, the Appellant was late on the following dates: January 15, 2021 (late without notifying the employer); April 29, 2021 (he arrived at work at 9:20 a.m.); May 13, 2021 (he arrived at 8:45 a.m.); and June 2, 2021 (he texted the employer at 11:27 a.m. saying he had just woken up suddenly).²¹

¹⁶ See GD3-38 and GD3-39.

¹⁷ See GD3-38 and GD3-39.

¹⁸ See GD3-23.

¹⁹ See GD3-23, GD3-38, GD3-39, and GD3-41.

²⁰ See GD3-23, GD3-38, GD3-39, and GD3-42.

²¹ See GD3-38, GD3-39, GD3-46, and GD3-47.

- g) On June 3, 2021, the Appellant got another warning, for unauthorized tardiness and absences. A two-day suspension was also imposed on him on June 3 and 4, 2021.²² He was spoken to by his immediate supervisor and the branch director. The warning says that no further tardiness or absence would be tolerated and that, the next time he was late or absent, the Appellant would be automatically let go. He signed the written warning given to him.²³
- h) The Appellant was again late without being excused on July 17, 22, 28, and 30, 2021, and on August 9, 2021.²⁴
- i) On September 13, 2021, the day he was let go, the Appellant was several hours late because he had been unable to wake up on time.²⁵
- j) The reasons the Appellant would give it for being late were that he had lost his cell phone, that he hadn't woken up on time, or that he had trouble sleeping. He didn't cite medical reasons to explain his tardiness. The employer says that the Appellant had changed his habits during COVID-19. He could not go work out at the gym anymore but told it that he was [translation] "managing on his own."²⁶
- k) The Appellant asked it whether, because of his tardiness, he could make up the time at lunchtime or during his breaks, but his request was denied. If he did this, he wasn't allowed to.²⁷
- l) The employer says that it was very forgiving about the Appellant's tardiness, given that it was understaffed. But his tardiness could not be tolerated anymore, since it was excessive. The employer didn't trust him anymore. It

²² See GD3-38 and GD3-39. Although the employer's November 5, 2021, statement to the Commission indicates that it was on April 3, 2021, that another warning was given to the Appellant (see GD3-23), I find that he did, in fact, get the warning on June 3, 2021, given that the suspension days imposed on him following that notice were June 3 and 4, 2021.

²³ See GD3-38 to GD3-40, GD3-48, and GD3-49.

²⁴ See GD3-23, GD3-38, and GD3-39.

²⁵ See GD3-23, GD3-38, and GD3-39.

²⁶ See GD3-38 and GD3-39.

²⁷ See GD3-38 and GD3-39.

also wanted to keep the respect of all its employees, even though it was understaffed and it took some time to replace the Appellant.²⁸

m) Employees are entitled to five days of sick or personal leave a year. The Appellant used the five days of sick or personal leave he was entitled to each year and even more.²⁹

[14] The employer also sent the Commission copies of the following documents:

- a) Disciplinary warning letter to the Appellant dated June 3, 2019 (first written warning), indicating that he had made comments deemed inappropriate to another employee and that such language wasn't allowed in the workplace (paragraph 16 of the employee handbook). The Appellant signed this document.³⁰
- b) Disciplinary warning letter to the Appellant dated January 12, 2021 (second written warning), indicating that he had been repeatedly late despite several warnings. The document says that no tardiness or absences not authorized by his supervisor would be allowed (paragraph 2.4 of the employee handbook). The warning also says that this type of behaviour would no longer be tolerated and would result in dismissal. The Appellant signed this document.³¹
- c) Disciplinary warning letter to the Appellant dated June 3, 2021 (suspension without pay), indicating that he was being suspended without pay for two days—June 3 and 4, 2021—for not complying with the employer concerning his unauthorized or unexcused tardiness and absences. The document says that any further unauthorized tardiness or absence would result in automatic

²⁸ See GD3-38 and GD3-39.

²⁹ See GD3-38 and GD3-39.

³⁰ See GD3-42.

³¹ See GD3-41

dismissal and that he would be given a written warning on June 7, 2021. The Appellant signed the June 3, 2021, warning letter.³²

- d) Letter to the Appellant (subject: [translation] “Dismissal”) dated September 13, 2021, indicating that the employer was letting him go for the following reasons: abuse of sick leave and unexcused tardiness and absences.³³

[15] The Appellant says that he didn’t lose his job because of misconduct. He admits that he was late for work a few times. He says that the employer let him go because of his tardiness.³⁴ He says that he wasn’t late on purpose.³⁵

[16] The Appellant’s representative argues that his conduct wasn’t intentional. She points out that he is categorical that he never had any unexcused absences.

[17] I find that the Appellant lost his job as a result of repeated tardiness. Although the employer also cites unexcused absences or abuse of sick leave to explain his dismissal, I consider that he was let go mainly because of his tardiness.

[18] Now, I have to decide whether the acts attributed to the Appellant amount to misconduct under the Act.

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

[19] I find that the Appellant acted to deliberately lose his job. The evidence on file shows that he committed acts that amount to misconduct under the Act.

³² See GD3-40.

³³ See GD3-43.

³⁴ See GD3-9 and GD3-24.

³⁵ See GD3-29 to GD3-37.

[20] The Appellant's testimony and statements indicate the following:

- a) The misconduct attributed to him hasn't been proven [translation] "beyond doubt." The acts attributed to him weren't intentional and didn't show negligence on his part.³⁶
- b) Based on the disciplinary warnings he got, his tardiness was the main problem that led to his dismissal. He didn't have unexcused absences. He was late occasionally and involuntarily. He says that he was mostly [translation] "late by a little bit" (two to eight minutes), sometimes more.³⁷ He explains that, very occasionally, he was three hours late because his body needed sleep so much that he wasn't able to wake up, even with a wake-up alarm.³⁸ He says that he doesn't know the dates he was late or what the employer meant by [translation] "lots of tardiness." He knew that the employer kept a record of his tardiness.
- c) His tardiness was due to sleep disorders that started because of the COVID-19 pandemic and the health restrictions introduced. These health restrictions (for example, gym closures) and the pandemic lockdown turned his lifestyle upside down. He wasn't able to continue working out. He hadn't had any tardiness issues with the employer before that.³⁹
- d) The Appellant talked about his tardiness issues with the manager (department manager), but the latter would pick and choose what to pass on to the director (branch director) on this point. Despite his explanations concerning the reasons for his tardiness and his sleep problems, the employer didn't believe him. The employer took him for a liar.⁴⁰

³⁶ See GD3-27 to GD3-33.

³⁷ See GD3-27 to GD3-33.

³⁸ See GD3-10.

³⁹ See GD3-10, GD3-24, GD3-27 to GD3-33, GD3-51, and GD3-52.

⁴⁰ See GD3-10 and GD3-12.

- e) When the Appellant met with the employer (the manager and the director) to read and sign the disciplinary warnings given to him, he was aware that his tardiness was affecting his work and could lead to his dismissal.⁴¹ He says that he wasn't happy to sign those documents. He points out that he wasn't indifferent to the situation. He didn't know the dates he was late. The employer told him that it had kept a record of his tardiness. Although the Commission says that he made a conscious decision not to make the necessary efforts to rectify the situation, he did try.
- f) The Appellant says that he tried different methods to find a solution to his tardiness issues (for example, doing relaxation and time management exercises, using wake-up alarms, and taking [translation] "natural products" like melatonin). But these methods didn't improve the situation.⁴²
- g) The Appellant says that he offered to continue performing his tasks during his breaks and lunch periods and that he took the initiative of doing so to make up for being late. This initiative could amount to roughly an additional five hours a week, from December 2020 to September 2021.⁴³ The employer didn't recognize these additional hours as [translation] "valid."⁴⁴ Despite his tardiness, the Appellant says that he always kept up with his work. His work was done on time. His tardiness never affected the quality of his work. He says that he has always cared about performing well at work.⁴⁵
- h) In January or February 2021, following the January 12, 2021, warning (warning letter), he took the initiative of talking to health professionals (for example, physician, psychologist).⁴⁶

⁴¹ See GD3-24.

⁴² See GD3-10, GD3-51, and GD3-52.

⁴³ See GD3-27 to GD3-33, GD3-51, and GD3-52.

⁴⁴ See GD3-10.

⁴⁵ See GD3-10 and GD3-27 to GD3-33.

⁴⁶ See GD3-27 to GD3-33, GD3-51, and GD3-52. See also the two medical certificates issued by Dr. Réjean Boisvert from the Centre Médi-Soleil on November 12, 2021. One certificate indicates that the Appellant was seeing a family doctor, a gastroenterologist, and a social worker—GD3-36. The other

- i) During his initial medical consultations for his sleep problems, it wasn't easy for the Appellant to explain what he had. Back then, the physician didn't have clear words about him and could not say that he had sleep disorders. The Appellant says that an [translation] "overworked nervous system" causes sleep disorders.⁴⁷ In his opinion, his sleep problems aren't an illness. He points out that he isn't sick and is functional. He thinks that his tardiness issues are caused by [translation] "post-pandemic stress." He says that he is learning to live with his sleep problems and that he is aware that this problem is unresolved. He believes that there is no medication that can fix this problem or help him sleep better or better manage his time.⁴⁸
- j) The employer was aware of the state he was in because of his sleep problems. The Appellant says that he discussed it regularly with the manager, given the warnings he got. For example, he had this type of discussion around March and April 2021, following the January 2021 written warning. He points out that he was always transparent and available for his employer, in addition to being open to discussing his tardiness with it. He says that, after his conversations with the employer, he understood that he would have to rectify the situation.⁴⁹
- k) Around June 2021, the employer suggested that he use the company's telephone consultation service. He says that he was already having consultations at the time. He told the employer that he would deal with his tardiness or sleep problems using his [translation] "own methods." The employer didn't tell him that he would have to provide a medical certificate during that discussion.

certificate says that the Appellant had been seeing a family doctor monthly since February 2021 for sleep disorders and that he was receiving regular psychological (social work) treatment—GD3-55.

⁴⁷ See GD3-10.

⁴⁸ See GD3-10.

⁴⁹ See GD3-51 and GD3-52.

- l) After the two suspension days imposed on him in June 2021, he wasn't late for several weeks, including during the construction holiday. He says that he started being late again after that (for example, August 2021).⁵⁰ The suspension days imposed on him in June 2021 didn't resolve or reduce the stress he was feeling. He didn't feel [translation] "relaxed." He felt pressured by the employer, and that pressure did nothing to help him. He points out that it wasn't those suspension days that caused him to be on time for a while afterwards; it was the fact that there were employees on holidays and that he had to [translation] "double down." He felt that he had to perform well at work. He says that he knew full well that it was [translation] "do or die" then.
- m) Around late July 2021 or early August 2021, after the construction holiday, the manager talked to him about his tardiness issues, given that his tardiness was [translation] "coming back" like before.
- n) On Monday, September 13, 2021, when the Appellant contacted the employer, saying that he was running late (two and a half hours after the start of his work day), the employer told him to check his emails.⁵¹ He points out that he hadn't slept in two or three days. He told the employer that he could provide it with medical proof. The employer let him go that same day. He didn't get a chance to come in to work.⁵²
- o) On October 25, 2021, the Appellant filed a complaint with the Commission des normes, de l'équité, de la santé et de la sécurité du travail [Quebec's labour standards commission] (CNESST). This complaint was filed concerning an amount of money the employer apparently owes him and for a

⁵⁰ See GD3-12 and GD3-24.

⁵¹ See GD3-10 and GD3-12.

⁵² See GD3-24, GD3-51, and GD3-52.

dismissal not made for good and sufficient cause.⁵³ The Appellant and the employer reached an out-of-court settlement in January 2022.⁵⁴

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

- a) The central issue is the Appellant's tardiness, not his problems with unauthorized or unexcused absences. He is categorical that he never had any unexcused absences. He had never had problems being on time for work before the COVID-19 lockdown measures or health restrictions.
- b) The Appellant didn't wilfully commit misconduct. There is no evidence on file that his conduct was intentional. The evidence doesn't show that his alleged tardiness was wilful or deliberate or the result of carelessness or negligence that approaches wilfulness.
- c) Since applying for benefits, the Appellant has alleged that he was late involuntarily and due to the sleep disorders and the consequences of the pandemic for his health. The COVID-19 pandemic caused him significant disorganization. He had problems managing his routine (for example, he could not work out anymore). He was consistent in his statements, both during the administrative review of his file and at the hearing. His story has been consistent throughout everything that has happened.
- d) The employer knew about the Appellant's sleep disorders. The Appellant says that he talked to the employer about it several times. The employer says that the Appellant never cited illness to explain his tardiness. The employer remembers hearing about the Appellant's having trouble sleeping and not working out anymore.⁵⁵ The employer never asked him for a medical certificate to justify his tardiness or explain his sleep problems.

⁵³ See GD3-37, GD3-53, and GD3-54.

⁵⁴ See GD14-2 to GD14-4.

⁵⁵ See GD3-38 and GD3-39.

- e) The Appellant tried to address his tardiness problem but was unsuccessful. This wasn't just a matter of will. He did everything in his power to improve things. He proposed solutions. He used wake-up alarms, talked to health professionals (for example, physician, social worker), and worked additional hours (for example, breaks and lunch periods). Despite the methods he used, he continued being late, and this led to his dismissal.
- f) The representative questions whether the employer's suggestion to the Appellant, namely that he use the telephone consultation service, would have really made a difference, given that he was already receiving care.
- g) The Commission had no reason to doubt the Appellant when he said that his tardiness issues were due to the sleep disorders and the repercussions of the pandemic.
- h) In its arguments, the Commission says that it is up to the Appellant to prove that there is a specific medical condition concerning his inability to show up for his shift on time.⁵⁶ In the representative's opinion, the Commission is placing an undue burden on the Appellant in the circumstances. He has provided medical certificates showing consultations with several health professionals over his situation. He also indicates that there are no diagnoses or magic pills that can put an end to the problems he describes.
- i) The lack of a medical certificate doesn't mean that a testimony has to be rejected if the witness is credible.⁵⁷ The Commission has provided no evidence to contradict the Appellant's testimony or to undermine his credibility and show that the sleep disorders aren't what caused his tardiness issues.
- j) It is up to the Tribunal to assess the Appellant's credibility based on his statements.

⁵⁶ See GD4-4.

⁵⁷ See the Court's decision in *Brisebois*, A-510-96.

- k) The Tribunal doesn't have to decide whether the Appellant's dismissal was justified. It has to decide whether the acts committed amount to misconduct under the Act.⁵⁸
- l) The notion of misconduct requires that the act complained of be wilful, not that the person have bad intentions.⁵⁹
- m) The Act recognizes that certain acts considered reprehensible don't automatically amount to misconduct.⁶⁰
- n) The measure of whether there is misconduct isn't just whether the claimant knew or should have known that their actions could lead to their dismissal. Evidence of wilfulness in the claimant's actions is needed, meaning that the acts that led to the dismissal were conscious, deliberate, or intentional.⁶¹

[22] In this case, and based on the evidence, I find that the circumstances relating to the Appellant's dismissal show that he deliberately set himself up to lose his job. His dismissal is the result of wilful actions on his part.

[23] In my view, it was up to the Appellant to make sure that he got to work on time following the many warnings he was given for tardiness.

[24] The evidence on file shows that, starting in late December 2020, there were several incidents of tardiness for which the Appellant received verbal and written warnings.

[25] On January 12, 2021, and June 3, 2021, the Appellant signed disciplinary warning letters related to his tardiness.⁶² The employer imposed on him a two-day suspension without pay on June 3 and 4, 2021, because of his tardiness.

⁵⁸ See the Court's decision in *Marion*, 2002 FCA 185.

⁵⁹ See the Court's decision in *Lemire*, 2010 FCA 314.

⁶⁰ See the Court's decision in *Locke*, 2003 FCA 262.

⁶¹ See the Court's decision in *Mishibinijima*, 2007 FCA 36. See also the decision of the Tribunal's Appeal Division in *NL v Canada Employment Insurance Commission*, AD-21-369 at paras 17, 37, and 43.

⁶² See GD3-40 and GD3-41.

[26] In each letter, the Appellant was informed that he could be let go if he was late again and his tardiness wasn't excused or authorized.⁶³ He signed each of those documents.

[27] I find that the Appellant's tardiness on September 13, 2021, shows that he ignored the employer's reasonable ask. I find that he ignored a fundamental requirement of his job.

[28] The Appellant could have foreseen that his tardiness on September 13, 2021, would lead to his dismissal.

[29] I find that he made a conscious choice not to comply with the employer's requirements concerning his tardiness.

[30] Although the Appellant argues that he used several methods to fix his tardiness problem (for example, doing relaxation and time management exercises, using wake-up alarms, taking [translation] "natural products," and talking to health professionals as of January or February 2021), the fact is that he knew he might lose his job if he didn't take appropriate action to rectify the situation. He also admits that he wasn't able to resolve his tardiness problem with the methods he had used.

[31] I note that, according to the Appellant's testimony, the employer suggested around June 2021 that he use the company's telephone consultation service concerning his problems being on time for work. I find that the Appellant's explanation that he declined, given that he was already having consultations with health professionals at the time, doesn't show that he wanted to take the necessary steps to rectify the situation. In my view, in telling the employer that he would deal with his tardiness or sleep problems using his [translation] "own methods," as he explained at the hearing, the Appellant consciously chose to reject the method it had suggested to him.

[32] Although the Appellant also argues that the employer didn't ask him to provide medical proof that confirmed his sleep disorders or that could justify his tardiness, he

⁶³ See GD3-40 and GD3-41.

could have approached his family doctor about this, given their regular consultations since January or February 2021.

[33] In my view, the Appellant could have done this after the suspension without pay imposed on him on June 3 and 4, 2021, when his job was at stake, given that he had been formally warned that any further unauthorized tardiness or absence would result in [translation] “automatic dismissal.”⁶⁴

[34] I note that the Appellant has mentioned sleep problems since the COVID-19 pandemic, but he made his own diagnosis, indicating that, in his opinion, it wasn't an illness.

[35] In my view, by giving the employer a medical document referring to his sleep problems, the Appellant would have been better able to justify his tardiness.

[36] I note that the employer's statements indicate that the Appellant's reasons for being late were that he had lost his cell phone, that he hadn't woken up on time, or that he had trouble sleeping.⁶⁵ The Appellant also says that the employer didn't believe him concerning the reasons for his tardiness.⁶⁶

[37] I note that it wasn't until November 12, 2021, almost two months after being let go, that the Appellant submitted a medical document indicating that he was having consultations for sleep disorders.⁶⁷ But this document doesn't contain a specific medical recommendation.

[38] Although the representative argues that, in one of its decisions, the Court found that the lack of a medical certificate doesn't mean that a testimony has to be rejected if the witness is credible,⁶⁸ the situation is different here.

⁶⁴ See GD3-40.

⁶⁵ See GD3-38 and GD3-39.

⁶⁶ See GD3-10.

⁶⁷ See GD3-55.

⁶⁸ See the Court's decision in *Brisebois*, A-510-96.

[39] I find that, in the Appellant's case, before submitting medical proof, he made his own diagnosis concerning his sleep problems by attributing them to, among other things, an overworked nervous system⁶⁹ or the stress caused by the COVID-19 pandemic ([translation] "post-pandemic stress"). I am of the view that such an assessment would need to be supported by medical documentation, especially since the Appellant was late many times. He also chose to deal with his tardiness issues using his [translation] "own methods," as he told the employer.

[40] I find that the Appellant was responsible for taking appropriate action to be able to resolve his tardiness issues and, in so doing, meet the standards of behaviour that the employer had a right to expect of him.

[41] I find that the Appellant knew or should have known that his conduct was a breach of his duties toward his employer and that there was a real possibility of being let go if he was late again without giving it a reason or justification.

[42] In summary, I find that the Appellant's tardiness, including on September 13, 2021, shows that he committed acts that were conscious, deliberate, or intentional and that can be considered misconduct.

[43] The out-of-court settlement that the Appellant and his former employer reached in January 2022 changes nothing.⁷⁰

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

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

⁶⁹ See GD3-10.

⁷⁰ See GD3-37, GD3-53, GD3-54, and GD14-2 to GD14-4.

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

[47] The Commission has proven that the Appellant intentionally lost his job.

[48] I find that the Commission's evidence shows that the Appellant didn't comply with the employer's reasonable requirement concerning his tardiness, including on September 13, 2021. The Appellant could have stayed on by complying with that requirement.

[49] The Court also tells us that it has to be established that the claimant was let go because of misconduct.⁷²

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

[51] The evidence shows that the Appellant's tardiness, including on September 13, 2021, is the real cause of his dismissal. The employer says that it let him go for that reason. The Appellant says that he was let go for that reason.

[52] The reason for the Appellant's dismissal is misconduct under the Act.

Conclusion

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

[54] As a result, the Commission's decision to disqualify him from receiving EI regular benefits from September 19, 2021, is justified.

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.

[55] This means that the appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section