



Citation: *RP v Canada Employment Insurance Commission*, 2022 SST 1034

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

## Decision

**Appellant:** R. P.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (466870) dated May 10, 2022 (issued by Service Canada)

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**Tribunal member:** Glenn Betteridge  
**Type of hearing:** Teleconference  
**Hearing date:** September 16, 2022  
**Hearing participant:** Appellant  
**Decision date:** September 29, 2022  
**File number:** GE-22-1864

## Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost her job in January 2022. She started work in January 2021, during the COVID pandemic. The job was remote, and training was completely on-line.

[4] The Claimant's employer says they let her go because she broke the rules about client privacy, confidentiality, and file access. (I will call these the "privacy rules.") The privacy rules are in the employer's code of conduct. (I will call this the "Code"). She signed the Code during training. The Code is publicly available on the employer's website.

[5] The Claimant agrees this is the reason she was let go.

[6] But she says she didn't intentionally break the privacy rules. She didn't know she wasn't allowed to access client files to help her learn the job. She doesn't remember signing the Code or being trained on the privacy rules. She only accessed her file, her son's file, and her spouse's file. And she already knew the information in these files.

[7] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that she is disqualified from receiving EI benefits.

[8] I have to decide if the Claimant lost her job due to misconduct.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

## Issue

[9] Did the Claimant lose her job because of misconduct under the EI Act?

## Analysis

[10] To answer this question, I have to decide two things.

- First, I have to decide why the Claimant lost her job.
- Second, I have to decide whether the law considers that reason to be misconduct.

## Why the Claimant lost her job

[11] I find that the Claimant lost her job because she accessed her file and her family members' files. She broke the employer's privacy rules and under the Code the employer fired her for this.

[12] When the employer found out about the privacy breach, the employer started an investigation and extended the Claimant's probationary period.

[13] During the investigation the employer showed her a copy of a document with her signature, which she signed in training. The employer also told her the Code was publicly available on its website.

[14] After the investigation the employer dismissed the Claimant for breaching the privacy rules.<sup>2</sup>

[15] The Claimant and the Commission agree about this. And there is no evidence that goes against this.

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<sup>2</sup> See the Commission's notes of a call with the Claimant at GD3-25.

[16] So, the only issue in dispute in this case is the Claimant's state of mind.<sup>3</sup> Did she know or should she have known she was likely to be dismissed if she broke the privacy rules? This is what I have to decide next.

### **The reason the Claimant's lost her job isn't misconduct under the law**

[17] I find that the reason the Claimant was dismissed isn't misconduct under the law. She didn't willfully or recklessly break her employer's privacy rules.

#### ***What misconduct means***

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have wrongful intent (in other words, she meant to do something wrong) for her behaviour to be misconduct under the law.<sup>6</sup>

[19] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer, and that there was a real possibility of being let go because of that.<sup>7</sup>

[20] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.<sup>8</sup>

[21] The Commission says there was misconduct because the Claimant signed the employer's Code. So she knew or should have known the privacy rules say she should

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<sup>3</sup> See *Locke v Canada (Attorney General)*, 2003 FCA 262, at paragraph 6. I use the words "should have known" where the court uses the words "willfully blind to the fact". They mean the same thing.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

never access her file or family members' files. And she knew or should have known that she could lose her job if she did.

[22] The Commission also says it doesn't matter that the Claimant only accessed the files to learn her job. It doesn't have to show the Claimant had wrongful intent to prove misconduct under the EI Act.

### ***The Code and the Privacy Rules***

[23] The employer refused to give the Commission a copy of the Code or the document the Claimant signed. The Commission downloaded the Code from the internet.<sup>9</sup> The Code is 25 pages. The privacy rules take up about one page in the Code.

[24] The Code says the employer can terminate an employee for breaching the privacy rules. And it says employees must **never** access:<sup>10</sup>

- any information that is not part of your officially assigned workload
- your own ... information or that of your relatives or acquaintances

### ***Claimant didn't know the Privacy Rules or that her conduct could lead to dismissal***

[25] I find the Commission hasn't proven that it is more likely than not the Claimant knew the privacy rules forbid her from accessing her file and her family members' files. And she didn't know she could be fired if she did.

[26] She testified that she never would have accessed the files if she had known the rules. She is a perfectionist and an overachiever. Nothing like this has ever happened to her before.

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<sup>9</sup> See the Code at GD3-41.

<sup>10</sup> See the Code at GD3-43. "Never" is written in bold in the Code.

[27] Her training was all on-line. It was seven and a half hours every weekday, for four weeks. She felt rushed. She experienced “information overload.”<sup>11</sup> The training was so stressful she lost seven pounds.<sup>12</sup>

[28] Her employer asked her to sign many documents during training. The trainer would send a link to a document. She would get five or ten minutes to read it, then had to electronically sign it. She wasn’t given copies of the documents she signed and couldn’t access them on her employer’s computer system.

[29] She doesn’t remember reviewing or signing the Code during training. She says her employer showed her a signed copy during a video conference meeting in October 2021. This meeting was part of the investigation into the privacy breach.

[30] She also testified that she doesn’t remember receiving any training on the privacy rules. And she doesn’t remember her employer telling her the Code was publicly available and she could (or should) look at it on the internet.

[31] I believe the Claimant’s testimony. Here is why: She was upfront when she testified. She answered my questions directly and she didn't overstate her case. When she wasn’t sure about something, she said so. She seemed very upset when she testified about the investigation, the October 2021 meeting, and the meeting where she was dismissed.

[32] I also believe her because her story didn't change over time.<sup>13</sup> What she told the Commission, and wrote in her reconsideration and appeal documents, matched her testimony under oath.

[33] And there is no evidence that contradicts her evidence about what she knew.<sup>14</sup>

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<sup>11</sup> See her Reconsideration Request at GD3-31.

<sup>12</sup> See her Notice of Appeal at GD2-4.

<sup>13</sup> See her EI Application at GD3-9, the Commission’s notes of a call with her at GD3-25, her Reconsideration Request at GD3-31, and her Notice of Appeal at GD2-4.

<sup>14</sup> The employer didn't give any evidence to the Commission. At GD3-33, the Commission notes of its call with the employer read, “The reasons regarding the dismissal would be known by local management, but this would not be something they will discuss. She could not provide me with any information on the policy.” That was the only communication where the employer responded to the Commission.

[34] So, I find that that the Commission hasn't shown it's more likely than not she knew about the privacy rules, and she could be dismissed if she broke those rules.

***Commission hasn't proven Claimant should have known***

[35] Now I have to decide whether the Commission has proven that she **should have known** about the privacy rules, and she could be dismissed if she broke them.

[36] Normally, if someone signed a document I would find they knew or should have known what the document says. That is the reason why an employer asks an employee to sign this type of document.

[37] But this case is different.

[38] In the circumstances, I find that the Commission should not have expected the Claimant to know what was in the document she signed.

[39] I find the employer didn't give her a reasonable chance to know the privacy rules and the consequences under the Code of breaking those rules.

[40] During COVID many jobs and job training went remote and on-line.

[41] The Claimant testified she is in her 60s and really struggled with the on-line training. She was given five to ten minutes to read a document and then had to sign it. And she signed many documents. Her employer didn't give her a copy of the Code, tell her where she could access it, or train her about the privacy rules.

[42] The Code is long (25 pages) and the privacy rules are one page in the Code. And she says that her employer didn't cover the privacy rules in training.

[43] I accept the Claimant's testimony, for the reasons I give above.

[44] So, I find that that the Commission hasn't shown it's more likely than not she should have known the privacy rules, or that she could be dismissed if she broke those rules.

**The Claimant didn't act wilfully or recklessly**

[45] After considering and weighing all of documents in the appeal and the Claimant's testimony, I find that the Commission hasn't proven that she acted wilfully or recklessly when she accessed her file and her family members' files.

[46] So, I find that the Claimant didn't lose her job because of misconduct.

**Conclusion**

[47] The Commission hasn't proven that the Claimant lost her job because of misconduct. Because of this, she isn't disqualified from receiving EI benefits.

[48] This means that her appeal is allowed.

Glenn Betteridge  
Member, General Division – Employment Insurance Section