Citation: *XL v Canada Employment Insurance Commission*, 2023 SST 480

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	X. L.
Representative:	Avery Yandt
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (532175) dated September 23, 2022 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	March 7, 2023
Hearing participants:	Appellant Avery Yandt (Appellant's lawyer)
Decision date:	April 21, 2023
File number:	GE-22-3454

Decision

[1] I am dismissing X. L.'s appeal.

[2] The Canada Employment Insurance Commission (Commission) has proven that she lost her job because of misconduct (in other words, because she did something that caused her to lose her job).

[3] This means she is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[4] X. L. (the Appellant) lost her job as a financial planner at a bank (employer).

[5] Her employer said it let her go because she reviewed customer accounts without a valid business reason and emailed confidential information to a former bank employee. This breached the employer's policies. [2]

[6] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct under the *Employment Insurance Act* (EI Act). So the Commission didn't pay her EI regular benefits.

[7] The Appellant says there is no misconduct. She didn't breach the employer's policies. And she couldn't have known her employer would dismiss her for what it alleges she did. She thought her employer would probably suspend her.

[8] I have to decide if the Appellant lost her job because of misconduct under the EI Act.

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[1] Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See the termination letter the employer sent to the Appellant (dated April 6, 2022), at GD2-17.

Issue

[9] Did the Appellant lose her job because of misconduct?

Analysis

[10] To answer the question whether the Appellant lost her job because of misconduct, I have to decide two things.

[11] First, I have to determine why the Appellant lost her job.

[12] Then, I have to determine whether the law considers that reason to be misconduct.

The reason the Appellant lost her job

[13] I find that the Appellant lost her job because she breached her employer's policies.

[14] The employer's termination letter to the Appellant says, in part:

> This is to confirm our discussion of today, when you were advised that your employment with [bank] has been terminated for cause effective immediately. Our investigation has revealed that you breached several [bank] policies when you reviewed customer accounts without a valid business reason and then gave by email confidential information to a former [bank] employee. Your conduct constitutes a serious breach of [bank] policies, including but not limited to [bank's] Code of Conduct. As a result, [bank] has lost all confidence in your ability to work with honesty and integrity.[3]

[15] The Appellant argued that her actions didn't beach the Code of Conduct (Code), so her termination isn't causally linked to her conduct.[4] In other words, her employer

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[3] See the termination letter (dated April 6, 2022) the employer sent to the Appellant, at GD2-17.
[4] The Appellant relies on a Tribunal decision to support this argument: *X v CEIC and JP*, 2020 SST 659. The Tribunal decided **the real reason** the employer dismissed the appellant was because they had complained to the labour board. It wasn't because of the disciplinary reasons the employer told the Commission. So the facts in that appeal are very different from this appeal. There is no evidence in this

was wrong to dismiss her because she didn't breach its Code. So her dismissal can't be causally related to her conduct.

[16] I don't accept this argument, for two reasons. First, it confuses the reason the employer dismissed the Appellant with the question of whether that reason is misconduct under the EI Act.[5] Second, it confuses the causation analysis under the EI Act with a wrongful dismissal type analysis in employment law. My job its to decide whether the Appellant's conduct counts as misconduct under the EI Act. It isn't to figure out whether her employer's actions (its investigation, findings from that investigation, and discipline) are reasonable or justified.[6]

[17] I accept the Commission's evidence. I have no reason to doubt the reasons for termination the employer wrote in the termination letter. It is consistent with the reason the Appellant gave in her testimony at the hearing when her lawyer asked her why she had been dismissed.

[18] The Appellant hasn't shown her employer dismissed her for a reason other than the reason set out in the termination letter. In her EI application she said her employer's investigation and discipline were motivated by racism. When I asked her about this at the hearing, she said she felt that her employer singled her out for investigation. It wasn't fair that her employer fired her because a lot of people were doing the same thing. She said that was how she felt at the time she applied for EI.

[19] I find there is no evidence the real reason her employer dismissed her was because of her race, rather than the reasons her employer wrote in the termination

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appeal the employer attempted to mislead the appellant or the Commission about its reasons for dismissing her.

[5] The Tribunal's decision in *X v CEIC and JP* is misleading about the causation requirement of the legal test for misconduct under the EI Act. It wrongly states at paragraph 23, "The Employer has to prove that it is more likely than not the Claimant lost his job because of misconduct." This isn't correct. The Commission (not the employer) bears the burden of proving the appellant lost their job for a reason the EI Act counts as misconduct. The causation element is about **the real reason** the appellant was dismissed. It's up to the Tribunal to look at all the relevant evidence and determine the real reason (in other words, the cause) for the appellant's dismissal. So the Tribunal can then determine whether that reason is misconduct under the EI Act.

[6] See *Canada (Attorney General) v Caul*, 2006 FCA 251; *Canada (Attorney General) v Marion*, 2002 FCA 185.

letter. The Appellant's evidence about being fired because of her race was extremely vague. She gave no details. And her argument that she was investigated and fired because of her race doesn't make sense in light of all the other evidence that shows her employer dismissed her for breaching its policies.

[20] So I find the Commission has proven the reason the Appellant's employer dismissed her was because she breached its Code, among other policies.

That reason is misconduct under the EI Act

[21] The reason for the Appellant's dismissal is misconduct under the law.

The law about misconduct

[22] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[7] Misconduct also includes conduct that is so reckless that it is almost wilful.[8] The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[9]

[23] There is misconduct if the Appellant **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.[10]

[24] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.[11]

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[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[9] See *Attorney General of Canada v Secours*, A-352-94.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[25] The role of the Tribunal isn't to determine whether the employer's decision to dismiss an appellant was reasonable, justified, or the appropriate sanction.[12]

What the Commission and the Appellant say

[26] The Commission says that there was misconduct.[13] The Appellant admitted she reviewed client accounts based on information a former employee gave her. And she also admitted that she didn't tell her employer what the former employee had asked her to do.

[27] The Commission says the employer's Code tells employees they should only access customer information for legitimate business purposes and that employees must report actual or suspected breaches of the Code to management or the responsible department. The Code also says an employee who violates the Code will face corrective measure up to and including termination of employment.

[28] So, the Commission says the Appellant ought to have known her actions—accessing client information without a business purpose and not reporting her former colleague to her employer—were a breach of the Code. And she ought to have known her employer could terminate her for that breach.

[29] The parts of the bank's Code that are relevant to this appeal say:[14]

- it sets out an enduring ethical guide and its principles are non-negotiable
- not following the Code has serious consequences—anyone who violates the Code will face corrective measure up to and including termination of employment and legal action
- all employees must report actual and suspected breaches of the Code

[12] See *Canada (Attorney General) v Caul*, 2006 FCA 251; *Canada (Attorney General) v Marion*, 2002 FCA 185.
[13] See the Commission's representations at GD4 and GD8.
[14] The employer's Code of Conduct is at GD3-32 to GD3-51.

- it is possible to anonymously report a possible violation
- employees must follow the letter and spirit of the law, including understanding and complying will all bank policies, standards, and operating procedures, and meet all of the bank's legal and regulatory obligations
- consider only the interests of customers and provide them with the information needed to make financial decisions that are right for them
- don't use confidential information improperly
- protect the confidential information of customers, suppliers, and fellow employees—confidential information means all information that isn't public
- access customer and employee information in bank systems only for legitimate business purposes
- keep customer and employee information strictly confidential and use or disclose it only under terms of bank's policies and procedures
- use bank property (such as telephones, voicemail, faxes, computer networks, email, and instant and text messaging) only for legitimate business purposes
- misuse of position—don't use your position to harm customers' interests

[30] At the hearing the Appellant testified:

- she was aware of her employer's Code
- a former colleague contacted the Appellant by phone and text shortly after leaving the bank
- the former colleague sent her a list of bank client names and account information—for accounts the former colleague used to manage

- although it is very common for financial planners to take this type of information when they leave the bank, the bank does not permit financial planners to do this

- her former colleague asked her to do three things: (a) access client profiles and change a standing transaction in each; (b) start the process to transfer client accounts to another financial institution, where the former colleague was currently employed, and (c) email her a client business investment account statement

- there weren't any restrictions on accessing client accounts, and she accessed client accounts from the list her former colleague sent her, but she didn't do (a) or (b) because she knew what her former colleague was asking her to do was completely wrong and didn't want to lose her job

- she told her former colleague it was totally wrong, and she could lose her job

- she said she accessed the clients accounts on the list to see if she could expand her portfolio of clients, but she also admitted when I asked her that it was not for legitimate business purposes

- regarding (c), the Appellant emailed her former colleague a business investment account statement of one bank client because she knew her for many years, guesses she had a very soft heart, and after refusing so many times to do the other things, with the pressure, she decided to send the account statement—but when I asked her, she said she knew she shouldn't do it and it was not for legitimate business purposes

- during her employer's investigation she cooperated with investigators because she feared losing her job, but her manager never said anything about termination

- she thought she would only be suspended for a week or so and would get some training, but never thought she would be terminated

[31] The Appellant gave a number of reasons why she didn't report her former colleague to her employer. She told the Commission she didn't want to get her former colleague in trouble. She also told the Commission she never thought about reporting. At the hearing she testified she didn't report because she didn't have a direct manager at the time—the position was vacant.

[32] The Appellant argues that the Commission hasn't proven misconduct, for four reasons.[15]

[33] First, she didn't breach the Code because she didn't breach client privacy by accessing client files that weren't already assigned to her. She had access to those files in the normal course of her work.

[34] Second, she didn't breach the Code because she didn't send confidential information to her former colleague. Her former colleague already knew the information because she had been that client's financial planner.

[35] Third, her conduct wasn't wilful or reckless because she didn't know (and ought not to have known) there was a real possibility her employment would be terminated.

[36] Fourth, the Commission can't rely on the fact she didn't report actual or suspected breaches of the Code to management or the responsible department to show misconduct. This is because the employer didn't include this conduct (failure to report) in its termination letter.

My findings about the evidence and the law

[37] The Appellant's conduct counts as misconduct under the EI Act.

[38] I accept the testimony the Appellant gave at the hearing. I have no reason to doubt what she said about what she did, what she knew, and what she believed.

[15] See the Appellant's appeal form and documents (GD2) and submissions (GD7). The Appellant's lawyer summarized the arguments from GD2 and GD7 at the hearing.

[39] I prefer the Appellant's testimony to what the Commission's notes say she told the Commission. In her calls with the Commission the Appellant focuses her answers on denying she did anything wrong that would justify her dismissal by her employer.[16] At the hearing the Appellant gave detailed factual answers to the questions her lawyer and I asked her. She let her lawyer make the arguments.

[40] Based on the Appellant's testimony I find:

- she knew about the Code
- as part of her job, she knew or should have known the duties she owed to her employer (and its clients) under the Code
- she knew what her former colleague was asking her to do was wrong
- she knew she could lose her job if she did what her former colleague was asking her to do—in other words, **she knew there was a possibility she could lose her job if she did it**
- despite this, she consciously, deliberately, and intentionally accessed client information based on the list her former colleague gave her, using bank systems and with no legitimate business purpose for doing so—this was a breach of the Code
- despite this, she consciously, deliberately, and intentionally used her bank email account to send her former colleague a client's business investment account statement, which she knew was wrong and she had no legitimate business purpose for doing—this was a breach of the Code
- her employer terminated her employment for breaching its policies, including the Code[17]

[16] See the Commission's notes of its calls with the Appellant at GD3-26, GD3-59, and GD3-60.
[17] This is also what the employer said in its termination letter. See the letter at GD

[41] Based on my findings of fact, I find that the Appellant's conduct meets the legal test for misconduct under the EI Act.

– The Appellant's other arguments

[42] I accept that during the investigation the Appellant believed her employer would suspend but not terminate her—in other words, she believed her employer would **probably suspend her rather than terminate her.** But her belief isn't relevant to the legal test for misconduct. The legal test is based on whether the Appellant **knew or should have known there was a possibility** her employer would dismiss her. And her testimony proved to me she knew there was a possibility that she could lose her job if she did what her former colleague asked.

[43] I don't accept the Appellant's arguments that she didn't breach the Code because the client information she accessed wasn't private and the client account information she emailed wasn't confidential. I have five reasons.

[44] First, the Appellant had an obligation to follow the letter and spirit of the Code, applicable policies, and the law. I find the Appellant's conduct went against the spirit of the Code. She put her interests and her former colleague's interest above the interest of clients. I doubt clients would have wanted her to use their names and account numbers (which were given to her by a former employee who stole this information from the bank) to check on their financial affairs. So she could see if they had accounts and whether they were a good business opportunity for her.

[45] Second, the bank and the Appellant owed a duty of confidentiality to clients. Information is confidential because of that duty. The fact the former employee had access to a client's confidential information before she left the bank doesn't make the information any less confidential after she left. And it doesn't lower the duty of confidentiality the bank and the Appellant owed to the client—to keep the client's information confidential. I can only assume the former employee wanted the account statement because she didn't have it. She had no legal right to have it. And the Appellant had no legal right or other authority to send it to her. Under the Code she had a duty not to send it.

[46] Third, the employer told the Commission a bank customer complained that the Appellant had improperly accessed their information.[18] I accept this evidence because I have no reason to doubt it, and there is no evidence that goes against it.

[47] Fourth, the Code directly contradicts the Appellant's argument. The Code says confidential information means "all information that isn't public". The Appellant should have known this. And I assume the client's business investment account statement wasn't public.

[48] Fifth, even if I accepted the Appellant's argument that she didn't breach the privacy and confidentiality parts of the Code, she still breached the Code. When I asked her directly, she said she had no legitimate business purpose for accessing client information based in the list or for sending the client account statement to her former colleague. This shows her conduct went against the Code.

Conclusion

[49] The Commission has proven the Appellant lost her job for a reason the EI Act considers to be misconduct.

[50] Because of this, the Appellant is disqualified from getting EI benefits.

[51] So I have to dismiss her appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

[18] See the Commission's notes of its call with the employer at GD3-64.