



[TRANSLATION]

Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 817

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

## Decision

**Appellant:** M. L.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (519735) dated  
September 23, 2022 (issued by Service Canada)

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**Tribunal member:** Normand Morin  
**Type of hearing:** In person  
**Hearing date:** April 6, 2023  
**Hearing participant:** Appellant  
**Decision date:** May 18, 2023  
**File number:** GE-22-3551

## Decision

[1] The appeal is allowed. I find that the Appellant didn't lose his job because of misconduct.<sup>1</sup> This means that his disqualification from receiving Employment Insurance (EI) regular benefits from February 20, 2022, isn't justified.

## Overview

[2] From March 12, 2018, to January 17, 2022, inclusive, the Appellant worked as a driver for the employer X (employer). He stopped working for it because he was let go.<sup>2</sup> The employer says that it let him go because the story he had told it about the damage to his truck contained several contradictions and inconsistencies.

[3] On June 1, 2022, the Canada Employment Insurance Commission (Commission) told the Appellant that he wasn't entitled to EI benefits from February 20, 2022, because he had lost his employment with the employer on January 24, 2022, as a result of his misconduct.<sup>3</sup>

[4] On September 23, 2022, after a request for reconsideration, the Commission told him that it was upholding the May 31, 2022, decision.<sup>4</sup>

[5] The Appellant says that he didn't lose his job because of misconduct. He says that he isn't responsible for the damage caused to the truck he drove on January 7, 2022, on a run from Montmagny to Boucherville. He says that, soon after leaving the employer's lot in Montmagny, he first stopped in a parking lot after noticing that the truck's communication system wasn't working properly. He explains that, after noticing the problem and going to a convenience store near the parking lot, he went back to the employer's premises to have the problem fixed. He says that, in his opinion, his truck

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<sup>1</sup> See sections 29 and 30 of the *Employment Insurance Act* (Act).

<sup>2</sup> See GD3-18 and GD3-19.

<sup>3</sup> See GD3-41 and GD3-42.

<sup>4</sup> Although the Commission's decision is dated June 1, 2022, a summary of a conversation between a Commission representative and the Appellant on May 31, 2022, shows that the Appellant was notified of the decision verbally before he was notified in writing on June 1, 2022, because he said he was dissatisfied with the decision—GD3-40. See also GD2-1 and GD3-49.

was damaged during that stop, but he didn't notice it then. He says it wasn't when he went back to the employer's premises that he noticed it, but when he stopped at a rest stop during his run. He says that, when he met with the employer to give his version of events, the employer said that it had seen on its surveillance cameras that his truck was already damaged when he came back soon after leaving, that is, before he stopped at the rest stop. He says that he explained to the employer that this meant the truck was damaged when he first stopped, but that he wasn't the one who damaged it. He says that the employer didn't believe his story and let him go. He says that he told the employer the truth, but it tried to get him to say that he had caused the damage in question, when he hadn't. He says that, before he was let go, the employer made it clear that he could stay on if he said he was responsible for the damage to the truck. He points out that his story isn't inconsistent as the employer says. He says he stood by his story that he wasn't responsible for the damage to his truck until he was let go on January 24, 2022. He says that he didn't expect to be let go and that he was in shock when the employer announced his dismissal. He explains that, since he was unemployed and without income, he sent an email to the employer on February 10, 2022, saying that he was responsible for the damage to his truck. According to him, he gave this story because, in his view, it matched the one the employer wanted to hear, even though it wasn't true. He explains that he gave this version of events because he had nothing left to lose, since he had already been let go and wanted to go back to work for the employer. On October 31, 2022, he challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

## **Issues**

[6] I have to decide whether the Appellant lost his job because of misconduct.<sup>5</sup> To decide this, I have to answer the following questions:

- Why did the Appellant lose his job?

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<sup>5</sup> See sections 29 and 30 of the Act.

- Is the reason for the Appellant's dismissal misconduct under the Act?

## Analysis

[7] The Act doesn't 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 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."<sup>6</sup>

[9] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless as to "approach wilfulness," meaning that it is almost wilful.<sup>8</sup> For their 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.<sup>9</sup>

[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.<sup>10</sup>

[11] 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.<sup>11</sup>

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<sup>6</sup> The Court established this principle in *Tucker*, A-381-85.

<sup>7</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>8</sup> The Court established this principle in *McKay-Eden*, A-402-96.

<sup>9</sup> The Court established this principle in *Secours*, A-352-94.

<sup>10</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>11</sup> The Court established this principle in *Lemire*, 2010 FCA 314.

[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.<sup>12</sup> This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.<sup>13</sup>

### **Issue 1: Why did the Appellant lose his job?**

[13] In a letter dated January 24, 2022, the employer told the Appellant that it was dismissing him retroactively to January 18, 2022. It gave him the following explanations:

- a) On January 14, 2022, the employer met with the Appellant to discuss and understand his version of events in response to the damage to the truck he had driven on January 7, 2022.
- b) When the story he had given on January 7, 2022, was analyzed, several contradictions and inconsistencies were noted, as were a lack of credibility and cooperation on his part in relation to the investigation into him.
- c) The Appellant wasn't able to give the employer any of the plausible explanations it was looking for. Instead, he provided a second version of events.
- d) The Appellant was administratively suspended on January 18, 2022.
- e) The employer had to continue its investigation into the January 7, 2022, incident.
- f) Despite [translation] "the severity of the situation," the Appellant was given another chance to tell the employer what had actually happened during the incident in question, but he stood by his story.

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<sup>12</sup> The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

<sup>13</sup> The Court established this principle in *Bartone*, A-369-88.

- g) In light of the Appellant's answers, his actions were totally unacceptable and so serious that the relationship of trust was permanently broken.
- h) The employer told him that it had no choice but to terminate his employment.<sup>14</sup>

[14] The employer's statements to the Commission also provide the following information:

- a) The Appellant was a truck driver (road train driver). On January 24, 2023, he was dismissed by his immediate supervisor (head of the local division) and the head of road safety (head of occupational health and safety prevention, training, safety, and compliance).<sup>15</sup>
- b) In its May 12, 2022, statement to the Commission, the employer (head of human resources) said that the Appellant went into the company lot with the truck and that, in backing up, he turned into a tight, narrow spot and damaged the truck. According to the employer, that same day [January 7, 2022], the Appellant went to a rest stop and told the employer [translation] "afterward" that he had had an accident. The employer said that the Appellant's story was that he stopped at the rest stop to go to the washroom for about 15 minutes and that, when he went back to his truck, he discovered that it was damaged.<sup>16</sup>
- c) In this statement, the employer mentioned doing [translation] "extensive research" to find out what had actually happened. It said that it talked to a witness who was in the lot when the Appellant backed up the truck. The employer said that it was able to see that the Appellant was the one who damaged the truck. It said that it also reviewed the footage from the surveillance cameras in the company lot. When it showed the footage to the

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<sup>14</sup> See GD3-32.

<sup>15</sup> See GD3-24.

<sup>16</sup> See GD3-24.

Appellant, he denied [translation] “all the evidence.” He maintained that he wasn’t the one who damaged the truck. The employer said that it met with him two or three times between the day of the incident [January 7, 2022] and the time he was let go so that he could give [translation] “the real story.” The employer told him that he would get [translation] “another chance” and would not be let go if he told the truth about the damage to the truck. Since he was unable to admit his wrongdoing or tell the truth about the final incident [January 7, 2022, incident], the relationship of trust between them could not be maintained. The employer terminated the Appellant’s employment because the relationship of trust was broken as a result of [translation] “professional misconduct.”<sup>17</sup>

- d) In its May 12, 2022, statement, the employer also said that the Appellant [translation] “admitted the truth” in an email he sent it two weeks after his dismissal.<sup>18</sup> But for the employer, it was too late to change its mind, since the relationship of trust with him was broken.<sup>19</sup>
  
- e) In its May 19, 2022, statement, the employer (head of human resources) said that, on the evening of January 7, 2022, after its disciplinary meeting with the Appellant about a dolly<sup>20</sup> getting damaged in the company lot on January 5, 2022,<sup>21</sup> the Appellant tried to turn the truck that the trailer and dolly were hooked up to, but he went about it the wrong way (too tight a turn). Because the space was too narrow to do so, the truck and trailer touched each other ([translation] “rubbed against each other”), causing damage to the truck. The Appellant should have known not to do that, since he was experienced. The employer saw what he did on the camera footage. Another employee gave a

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<sup>17</sup> See GD3-24.

<sup>18</sup> See the Appellant’s February 10, 2022, email to the employer—GD3-35.

<sup>19</sup> See GD3-24.

<sup>20</sup> A dolly is a trailer that you hook up behind a trailer hauled by a truck and that makes it possible to hook up another trailer to create a “road train.”

<sup>21</sup> See the employer’s January 7, 2022, note, where it says that it met with the Appellant that day about a dolly getting damaged. The damage amounted to about \$2,500 to \$3,000—GD3-31.

verbal account to the employer. The witness said that he saw the Appellant leave the employer's lot and that the truck was damaged. The employer believed that the video evidence was still available, but it wasn't sure. The January 5, 2022, incident (damage to the dolly) and the final incident (January 7, 2022, incident) were more or less the same thing.<sup>22</sup>

- f) In its May 26, 2022, statement, the employer (head of human resources) explained that, on January 7, 2022, after its disciplinary meeting with the Appellant, he left the company lot and that the truck was in good condition at that time, based on the footage from the cameras in the company lot and at the exit of that lot. About 15 minutes after he left, the Appellant returned to the employer's lot [translation] "a second time." The employer said that it didn't know why the Appellant came back. It believed that he panicked because he had just damaged the truck, but that he didn't dare say so. The employer was able to see on the footage from the cameras at the exit of the company lot that, at that time, the back of the truck had sustained damage, between the truck and the trailer. After the Appellant stopped at the Beaumont-Saint-Michel rest stop, he called the employer and explained that he got hit. According to the employer, it didn't have access to the security cameras when the Appellant parked near a convenience store soon after he had left, or when he stopped at the rest stop. But, it mentioned having access to the tracking system installed in the truck (Isaac system). It said that, using this system, it was able to see that the Appellant had parked at the convenience store close to the company lot and that he had [translation] "probably made too tight a turn when trying to back up." In addition, the tracking system data shows that he was in the parking lot for barely 2 or 3 minutes, not 15 minutes as he claims.<sup>23</sup>

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<sup>22</sup> See GD3-37.

<sup>23</sup> See GD3-39.



g) In its May 26, 2022, statement, the employer explained that the Appellant never wanted to admit to anything despite all the [translation] “conclusive evidence” it had gathered. For previous incidents that had led to disciplinary meetings with him, he admitted the facts.<sup>24</sup>

[15] The Appellant, on the other hand, says that he didn’t commit acts that amount to misconduct under the Act.

[16] The Appellant says that, until his dismissal was announced on January 24, 2022, he always told the employer the same story—that he wasn’t responsible for the damage to the truck he drove during his workday on January 7, 2022. He says that the employer didn’t believe his story and let him go.

[17] I find that the Appellant lost his job because of the acts the employer says he committed, namely, giving it a story containing contradictions and inconsistencies about the damage caused to the truck he drove on January 7, 2022, according to its findings.<sup>25</sup>

[18] Based on the employer’s findings, the Appellant’s dismissal was also the result of his acts that were considered unacceptable, in connection with his lack of credibility and cooperation when it came to the investigation into him, and his inability to provide plausible explanations.<sup>26</sup>

[19] Now, I have to decide whether, on a balance of probabilities, the Appellant committed the acts attributed to him and, if so, whether those acts amount to misconduct under the Act.

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<sup>24</sup> See GD3-39.

<sup>25</sup> See GD3-32.

<sup>26</sup> See GD3-32.

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

[20] I find that the Appellant didn't act to deliberately lose his job. The evidence on file doesn't show that he committed acts that amount to misconduct under the Act.

[21] I find the Appellant's testimony credible and place the most weight on it. The Appellant painted a detailed picture of the circumstances that led to his employment being terminated on January 18, 2022. He didn't contradict himself. He gave specific explanations about the acts that were attributed to him before he was let go. He elaborated on his reasons for sending an email to the employer on February 10, 2022, more than two weeks after his dismissal, in which he said he had caused the damage to his truck. According to him, he sent the email because he wanted, above all, to go back to his job as a driver, and he would be able to do so if he told the employer that he was responsible for the damage to the truck.

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

- a) The employer's assertion that he gave it two stories about the damage to the truck he drove on January 7, 2022, isn't true. Before he was let go, he gave the employer only one story—that he wasn't responsible for the damage to his truck. There are no inconsistencies in the story he gave the employer, even though the employer found it inconsistent. He always told the truth, but the employer refused to believe him.<sup>27</sup>
- b) Around 5 p.m. on January 7, 2022, at the start of his workday, he first met with the employer about an incident that happened on January 5, 2022, and that is unrelated to his dismissal. On January 5, 2022, he had problems entering the employer's lot with his truck, which had a trailer and a dolly hooked up to it, and he ended up damaging the dolly.<sup>28</sup>

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<sup>27</sup> See GD2-9, GD2-10, GD3-36, GD3-40, GD3-45, GD3-47, and GD3-48.

<sup>28</sup> See GD3-23 and GD3-38.

- c) On January 7, 2022, he started his shift around 6 or 7 p.m. After inspecting his truck, he left the employer's lot for Boucherville with a trailer and a dolly hooked up to his truck. The weather was such that he could not hook up another trailer to the back of the dolly to drive a "road train," but he could have done so on the way back. He didn't notice any damage to his truck at that time.<sup>29</sup>
- d) Soon after he left, when he noticed that his truck's communication system (on-board computer) wasn't working, he stopped in the parking lot of a business roughly one or two kilometres from the employer's lot. It was easier for him to park there, since a trailer and a dolly were hooked up to his truck. He didn't want to have to go through a roundabout to park at the convenience store. During that stop, he walked to a convenience store about half a kilometre from where he had parked his truck. His stop there lasted about 20 minutes. He didn't notice any damage to his truck during that time. It was in the evening, it was dark, and there was snow.<sup>30</sup>
- e) He then went back to the employer's premises to fix the problem with the communication system. An employee fixed the problem while he stayed in the truck. After that, he left the employer's lot to hit the road again. Before that, he didn't inspect his truck again, having already done so before he left. So, he didn't notice that his truck was damaged. No one from the employer told him about the damage before he left the company lot again.<sup>31</sup>
- f) About 20 minutes after he left, he stopped at the Beaumont-Saint-Michel rest stop, about 25 kilometres from the employer's lot. When he went back to his truck about 15 minutes later, he noticed that it was damaged. He thinks that another truck clipped or damaged it. He contacted the employer, specifically his immediate supervisor (a dispatcher), who referred him to the employer's

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<sup>29</sup> See GD3-36 and GD3-38.

<sup>30</sup> See GD2-9, GD2-10, GD3-36, GD3-47, and GD3-48.

<sup>31</sup> See GD2-9, GD2-10, GD3-47, and GD3-48.

- head of road safety (head of occupational health and safety prevention, training, safety, and compliance). After telling her that he could carry on driving despite the damage to his truck, she asked him to stop in Lévis, where she lived. She wanted to see the damage and take photos.<sup>32</sup>
- g) After stopping in Lévis, the Appellant continued toward Boucherville, and he came back to the employer's premises, in Montmagny, around 1 a.m. on January 8, 2022.
  - h) He prepared a written report about the damage to his truck and gave it to the employer on or about January 10, 2022. In the report, he said that, when he went back to his truck after stopping at the Beaumont-Saint-Michel rest stop, he noticed that the truck had been damaged, probably by another truck that had clipped it while he was inside the rest stop.<sup>33</sup>
  - i) On January 10 or 11, 2022, the Appellant met with the employer to give it his version of events, that is, the one described in the written report he had given it.<sup>34</sup> The employer told him that it was [translation] "good" and that everything was "fine." He continued his work week.<sup>35</sup>
  - j) On January 14, 2022, the Appellant met with the employer again because it wanted more explanations about his workday on January 7, 2022, and the damage his truck sustained that day. The head of the local division and the head of road safety attended the meeting. The Appellant gave the employer the same story he had told it a few days earlier—that his truck was damaged when he stopped at the Beaumont-Saint-Michel rest stop, but that he wasn't the one who damaged it.<sup>36</sup> The employer told him that there was a problem with his story, since it had seen on the footage from the surveillance cameras

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<sup>32</sup> See GD3-36, GD3-47, and GD3-48.

<sup>33</sup> See GD6-1.

<sup>34</sup> See GD6-1.

<sup>35</sup> See GD3-36.

<sup>36</sup> See GD3-20 and GD3-21.

in the company lot that the truck was damaged before he stopped at the rest stop. He explained to the employer that, in that case, his truck was damaged after he parked to go to the convenience store at the very beginning of his run. He said that he stopped soon after he left after noticing a problem with his truck's communication system, that he went to a convenience store, and that he then went back to the employer's premises to fix the problem with the communication system. Despite the explanations he gave the employer, it told him that he had two stories. It concluded that he was responsible for the damage to the truck.<sup>37</sup>

- k) The Appellant says that, at that second meeting, the employer made assumptions and developed theories about what might have happened concerning the damage to the truck. The employer tried to get him to say that he had caused it. The employer didn't believe that he went to a convenience store when he stopped at the beginning of his run. The employer made it clear that he could stay on if he took responsibility for the damage to the truck.<sup>38</sup>
- l) The Appellant was initially suspended on January 18, 2022, and then dismissed on January 24, 2022. The Appellant [*sic*] initially told him verbally that it was dismissing him and then gave him a letter of dismissal.<sup>39</sup>
- m) According to the Appellant, there are no inconsistencies in the story he gave the employer, despite what the employer says in the letter of dismissal.<sup>40</sup> He points out that he first noticed that his truck was damaged when he was at the Beaumont-Saint-Michel rest stop. He wrote his report based on when he noticed the damage to his truck.<sup>41</sup>

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<sup>37</sup> See GD3-23 and GD3-45.

<sup>38</sup> See GD2-9 and GD2-10.

<sup>39</sup> See GD3-32.

<sup>40</sup> See GD3-32.

<sup>41</sup> See GD3-47, GD3-48, and GD6-1.

- n) In his May 25, 2022, statement to the Commission, the Appellant said he felt that the version of events from the employer that was summarized to him was related to the January 5, 2022, incident, not the January 7, 2022, incident that led to his dismissal. In that statement, he also said that he didn't know someone had witnessed the incident in the employer's lot on the evening of January 7, 2022.<sup>42</sup>
- o) The summary of one of his statements to the Commission about completing a [translation] "joint report" concerning a fender-bender with his truck on January 7, 2022, is incorrect. According to him, a [translation] "joint report" related to that incident wasn't discussed.<sup>43</sup>
- p) The Appellant didn't expect to be let go and was surprised by the decision. When he realized that the employer was dismissing him, he was [translation] "in a state of panic, in shock." He had been with the employer for four years. He says that he always told the employer the same story—that he wasn't the one who damaged the truck. He told the employer the truth and stood by his story until his dismissal was announced. He could have said what the employer wanted to hear, and then he would have been able to continue working for it.<sup>44</sup>
- q) On February 10, 2022, about two weeks after his dismissal, he sent the employer an email saying that he was the one who damaged his truck, on January 7, 2022, by skidding in a parking lot when trying to do a U-turn to come back to the employer's premises, after noticing a problem with his communication system. In that email, the Appellant said that he had made a mistake and told the employer that he was still available to work for it.<sup>45</sup>

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<sup>42</sup> See GD3-38.

<sup>43</sup> See GD3-23, GD3-38, and GD3-40.

<sup>44</sup> See GD3-23, GD3-36, GD3-47, and GD3-48.

<sup>45</sup> See GD3-35.

- r) The Appellant explains that he sent that email to the employer because he had nothing left to lose. He hadn't worked for two weeks and had no income. He thought he would be able to go back to work for the employer if he sent that email and told the employer what it wanted to hear—that he was responsible for the damage to the truck. He stresses that he thought it was the only way he could go back to work for the employer and that he was prepared to make that [translation] “sacrifice” to do so, but it didn't work.<sup>46</sup>
- s) On February 20, 2022, the Appellant also sent the employer a text message offering \$2,000 as compensation for the damage to the truck if it agreed to reinstate him.<sup>47</sup>
- t) The Appellant says that he did everything humanly possible to go back to work for the employer.

[23] In this case, and based on the evidence, I find that the circumstances of the Appellant's dismissal don't show that he deliberately chose to lose his job. His dismissal isn't the result of wilful acts on his part.

[24] I find that the evidence from the employer doesn't show that the Appellant lost his job because of misconduct.

[25] I find that, in its letter dismissing the Appellant, the employer doesn't describe in measurable and observable terms the acts it says he committed, namely, giving a story containing contradictions and inconsistencies about the damage caused to the truck he drove on January 7, 2022.<sup>48</sup>

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<sup>46</sup> See GD3-36, GD3-45, GD3-47, and GD3-48.

<sup>47</sup> The Appellant showed the Tribunal the content of his February 20, 2022, text message to the employer.

<sup>48</sup> See GD3-32.

[26] In that letter, the employer doesn't say which version of events the Appellant gave it before it let him go. It also doesn't describe the inconsistencies and contradictions it noted in his story.<sup>49</sup>

[27] Despite also criticizing the Appellant for providing a second version of events, the employer doesn't specify in the letter what that second version of events was or explain why it didn't accept it.<sup>50</sup>

[28] The letter also refers to unacceptable acts allegedly committed by the Appellant, associated with a lack of credibility and cooperation on his part, in relation to the employer's investigation into him, which aren't described in measurable and observable terms either (for example, concrete examples of the unacceptable acts, when they occurred, and how they were discovered).<sup>51</sup>

[29] In addition, the letter doesn't elaborate on the Appellant's inability—according to the employer—to give it plausible explanations for the acts attributed to him.<sup>52</sup>

[30] In my view, making a series of criticisms and allegations without providing compelling evidence to back them up—as the employer did against the Appellant in its letter dismissing him—isn't enough to show that we are dealing with reprehensible acts that amount to misconduct under the Act.

[31] I also note contradictions in the employer's statements to the Commission in terms of its findings as to what caused the damage to the truck the Appellant drove on January 7, 2022. These contradictions concern both the evidence that the employer says it has, as well as where and when the damage was caused.

[32] In its May 12, 2022, statement to the Commission, the employer said that it was able to see that the Appellant was the one who damaged the truck after watching the footage from the surveillance cameras in its company's lot and speaking with a witness

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<sup>49</sup> See GD3-32.

<sup>50</sup> See GD3-32.

<sup>51</sup> See GD3-32.

<sup>52</sup> See GD3-32.



about the incident.<sup>53</sup> In that same statement, the employer said that, after it showed the Appellant the footage from the surveillance cameras in the company lot, he [translation] “denied all the evidence” and “maintained” that he wasn’t the one who damaged the truck.<sup>54</sup>

[33] In that statement, the employer then said that, two weeks after it let him go, the Appellant [translation] “admitted the truth” in an email he sent it,<sup>55</sup> saying that he damaged the truck when he went to a convenience store.<sup>56</sup>

[34] In that statement, the employer provided two versions of events. But, it didn’t explain why it considered that the “truth” about what caused the damage to the truck was that it was damaged when the Appellant went to a convenience store soon after he left, if the footage from the surveillance cameras in the company lot shows that the damage happened there.

[35] The employer also didn’t explain why, before it let the Appellant go, it didn’t accept his story that it wasn’t until he stopped at a rest stop that he noticed his truck was damaged.<sup>57</sup> In my view, it is a plausible story.

[36] In its statement to the Commission on May 19, 2022, several months after it read the Appellant’s February 10, 2022, email, the employer reiterated the same version of events that it [translation] “saw” on the footage from its surveillance cameras that the Appellant damaged his truck trying to perform a manoeuvre in the company lot before leaving on the evening of January 7, 2022.<sup>58</sup> The employer then noted that an employee reported seeing that the truck was damaged when the Appellant left the company lot.<sup>59</sup>

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<sup>53</sup> See GD3-24.

<sup>54</sup> See GD3-24.

<sup>55</sup> See the Appellant’s February 10, 2022, email—GD3-35.

<sup>56</sup> See GD3-24.

<sup>57</sup> See GD3-24.

<sup>58</sup> See GD3-37.

<sup>59</sup> See GD3-37.

In that same statement, the employer said it believed that the video evidence of the incident was still available.<sup>60</sup> The employer hasn't provided this video evidence.

[37] In its May 26, 2022, statement to the Commission, the employer said that the truck wasn't damaged when the Appellant left the company lot on January 7, 2022, but that the damage was discovered when he came back soon after he left.<sup>61</sup> In that same statement, the employer said that, using its [translation] "tracking system," it was able to see that the Appellant had parked at the convenience store and that he had [translation] "probably made too tight a turn when trying to back up," causing damage to the truck.<sup>62</sup> The employer added that the Appellant never wanted to admit to anything despite [translation] "all the conclusive evidence."<sup>63</sup>

[38] I find that such contradictions and inaccuracies affect the credibility of the employer's statements, not only when it described the acts it attributes to the Appellant when it comes to the damage to his truck, but also when it criticized him for changing his story and lacking credibility.

[39] I find that the employer's statements don't show that, when it decided to let the Appellant go on January 24, 2022, he gave it a story containing contradictions and inconsistencies about the damage caused to the truck he drove on January 7, 2022.

[40] In my view, it is rather the employer who changed its version of events based on the content of the email the Appellant sent it on February 10, 2022, about two weeks after his dismissal, in which he said he was the one who damaged his truck on January 7, 2022, while doing a U-turn.

[41] I would point out that the employer didn't let the Appellant go based on that email, since it let him go on January 24, 2022.<sup>64</sup>

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<sup>60</sup> See GD3-37.

<sup>61</sup> See GD3-39.

<sup>62</sup> See GD3-39.

<sup>63</sup> See GD3-39.

<sup>64</sup> See GD3-35.

[42] I find that the employer relied on the content of that email to conclude, after the fact, that the Appellant had [translation] “probably” caused the damage when he went to a convenience store<sup>65</sup> and that he had “admitted the truth” in that email.<sup>66</sup>

[43] I also find the employer’s statements on this point to be contradictory, given that, in its statements to the Commission on May 12 and 19, 2022, several months after it read that email, it still said that it had video evidence that the Appellant was the one who damaged his truck while in the company lot.<sup>67</sup>

[44] I note that the employer didn’t provide the Commission with the compelling evidence that it says it looked at and that, in its opinion, shows that the Appellant was the one who caused the damage in question. The employer also says that it did [translation] “extensive research,” that it met with the Appellant two or three times after the January 7, 2022, incident, and that he denied “all the evidence.”<sup>68</sup>

[45] I find that the employer’s statements also suggest that it is confusing the January 7, 2022, incident with another incident involving the Appellant that happened two days earlier and that led to a meeting with him before he started his shift on January 7, 2022.

[46] I find that the Appellant’s February 10, 2022, email doesn’t amount to changing the story he had given before he was let go, given the circumstances under which he sent that email and the timing of the email. I find that he wasn’t admitting to being the one who damaged his truck.

[47] I accept the Appellant’s explanations that he had nothing to lose by sending the email and that he sent it because he thought he would be able to continue working for the employer if he told it what it wanted to hear—in other words, if he admitted that he was responsible for the damage to the truck.

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<sup>65</sup> See GD3-39.

<sup>66</sup> See GD3-24.

<sup>67</sup> See GD3-24 and GD3-37.

<sup>68</sup> See GD3-24.

[48] I note that, according to its statements, the employer itself told the Appellant that he would get [translation] “another chance” and would not be let go if he “told the truth” about the damage to the truck.<sup>69</sup>

[49] So, I give no weight to the content of the Appellant’s February 10, 2022, email in determining to what extent he changed his story—according to the employer—as to what caused the damage to the truck he drove on January 7, 2022. The same goes for the message he sent on February 20, 2022, when he texted the employer offering to compensate it for the damage to the truck.

[50] I find that the Appellant was transparent in telling the employer his version of events and that he stood by it until he was let go, saying that he wasn’t the one who caused the damage in question. I find that his version of events is consistent, detailed, and coherent but that the employer decided not to accept it.

[51] The fact that the Appellant may have learned from the employer that his truck might have been damaged when he went to a convenience store rather than at the rest stop where he stopped afterward doesn’t mean that he changed his story. I find it plausible that he didn’t notice that his truck was damaged when he stopped at a convenience store at the beginning of his run, before he went back to the employer’s premises.

[52] I find that the employer hasn’t provided persuasive evidence or explanations to support that the Appellant was responsible for the damage in question and that he didn’t want to admit it. In my view, the employer is instead trying to blame him without explaining why it didn’t accept his story.

[53] The Commission argues that the Appellant committed the act attributed to him and that led to his dismissal—lying about the circumstances of the damage caused to the truck on January 7, 2022—because he admitted to committing that act.<sup>70</sup>

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<sup>69</sup> See GD3-24.

<sup>70</sup> See GD3-35, GD4-4, and GD4-5.

[54] The Commission says that it is more likely than not that the information in the Appellant's February 10, 2022, email is true and that it is consistent with the facts gathered by the employer—that the truck was damaged [translation] “the second time” the Appellant was on company premises.<sup>71</sup>

[55] I don't accept the Commission's arguments on these points.

[56] I find that the Commission reached such conclusions based on the email the Appellant sent to the employer two weeks after his dismissal and that it did this without considering his reasons for sending that email or the consistent and coherent version of events he gave before he was let go.

[57] I also find that the Commission is overlooking the fact that the employer contradicted itself when it said, on May 12 and 19, 2022, several months after it read the February 10, 2022, email, that it had video evidence that the Appellant was the one who damaged his truck while in the company lot.<sup>72</sup>

[58] I find that the Commission hasn't shown, using the evidence from the employer, that the Appellant lied to the employer about the circumstances of the damage to his truck, or that he changed his story, before he was let go.

[59] So, I don't accept the Commission's argument that the Appellant [translation] “knowingly gave his employer false information and concealed his responsibility” concerning the damage to his truck.<sup>73</sup>

[60] I find that the employer's statements don't show that the Appellant committed unacceptable acts, associated with a lack of credibility and cooperation, in relation to the employer's investigation into him, or that he was unable to give it plausible explanations for the acts attributed to him.

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<sup>71</sup> See GD3-35, GD3-39, and GD4-4.

<sup>72</sup> See GD3-24, GD3-25, and GD3-37.

<sup>73</sup> See GD4-5.

[61] In summary, I find that the Appellant didn't commit acts that were conscious, deliberate, or intentional and that can be considered misconduct.

[62] I find that the Appellant could not 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 for the acts attributed to him.

[63] In my view, the Appellant didn't consciously choose to ignore the standards of behaviour that the employer had a right to expect of him. He didn't breach an express or implied fundamental duty resulting from the contract of employment.

[64] The Commission hasn't proven that the Appellant intentionally lost his job. I am of the view that in this case, the Commission hasn't met its burden of proving whether the Appellant's acts amount to misconduct.

[65] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.<sup>74</sup>

[66] In my view, the Commission's evidence is inadequate and not detailed enough to find, on a balance of probabilities, that the Appellant lost his job because of misconduct.

[67] I find that the Commission didn't consider the Appellant's side of the story, including his credible, specific, and detailed testimony, concerning the acts attributed to him and the circumstances that led to his dismissal.

[68] I am of the view that the Commission was quick to accept the employer's statements in finding that the Appellant had lost his job because of misconduct.

[69] The Court also tells us that it must be established that the claimant was let go because of misconduct.<sup>75</sup>

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<sup>74</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>75</sup> The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

[70] I find that the Appellant wasn't let go because of acts he committed wilfully and deliberately.

[71] The reason for the Appellant's dismissal isn't misconduct under the Act.

## **Conclusion**

[72] The Appellant didn't lose his job because of misconduct.

[73] As a result, the Commission's decision to disqualify him from receiving EI regular benefits from February 20, 2022, isn't justified.

[74] This means that the appeal is allowed.

Normand Morin  
Member, General Division – Employment Insurance Section