



Citation: *EC v Canada Employment Insurance Commission*, 2024 SST 106

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** E. C.  
**Representative:** Andrew Lister

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

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**Decision under appeal:** General Division decision dated March 28, 2023  
(GE-22-3421)

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**Tribunal member:** Pierre Lafontaine

**Type of hearing:** Teleconference  
**Hearing date:** January 18, 2024  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** February 2, 2024  
**File number:** AD-23-394

## **Decision**

[1] The appeal is dismissed. The Appellant (Claimant) lost his job because of misconduct.

## **Overview**

[2] The Appellant (Claimant) works in the banking industry and lost his job. His employer said that he was let go because there were failures to adhere to bank (employer) policies.

[3] The Respondent (Commission) determined that the Claimant lost his job because of misconduct, so it was not able to pay him benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost his job because he did not report outside business activity and borrowed money from a work colleague, contrary to the employer's policies. It found that the Claimant knew or ought to have known that the employer was likely to dismiss him in these circumstances. It found that he was dismissed for these reasons. The General Division concluded that the Claimant was dismissed because of misconduct.

[5] The Claimant was granted leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division made legal and factual errors in concluding that he had committed misconduct within the meaning of EI law in failing to disclose his outside business activity and by borrowing funds from a co-worker.

[6] I must decide whether the General Division made legal and factual errors in concluding that he had committed misconduct within the meaning of EI law in failing to disclose his outside business activity and by borrowing funds from a co-worker.

[7] I am dismissing the Claimant's appeal.

## Issue

[8] Did the General Division make legal and factual errors in concluding that he had committed misconduct within the meaning of EI law in failing to disclose his outside business activity and by borrowing funds from a co-worker?

## Analysis

### – Appeal Division’s mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.<sup>1</sup>

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.<sup>2</sup>

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

### – Did the General Division make legal and factual errors in concluding that he had committed misconduct within the meaning of EI law in failing to disclose his outside business activity and by borrowing funds from a co-worker?

[12] The General Division had to decide whether the Claimant was dismissed because of misconduct. It is well established that the General Division is not bound by how an employer, or the Commission, characterizes the reasons for the loss of employment. It was up to the General Division to verify and interpret the facts of the present case and make its own assessment on the issue of misconduct.

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

<sup>2</sup> *Idem*.

[13] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct under EI law and whether this misconduct led to his dismissal.

**– Borrowing/lending money**

[14] Before the General Division, the Claimant agreed that he did borrow money from another employee that works for the employer. He says that they knew each other, and were friends, prior to working together. He said that he could not remember exactly the amount he borrowed, but he thought it was a couple of thousand dollars.

[15] The employer's *Code of Conduct and Ethics* (Code) has a specific clause about personal borrowing and lending. It says: "We must not borrow funds from or lend personal funds (including cosigning or providing a guarantee for loans) to an employee of [employer] in an amount that is more than nominal value."<sup>3</sup>

[16] The employer's termination letter says that the Claimant borrowed money from his supervisor contrary to his obligations under the Code.<sup>4</sup>

[17] I note that no evidence was presented to the General Division to establish what amount would be considered by the employer to be an amount that is more than nominal value. The General Division nonetheless found that the amount the Claimant borrowed was an amount that was more than nominal value.

[18] I have two issues with this finding of fact. First, the policy did not define nominal value. Second, it was not up to the General Division to interpret the employer's policy to conclude that the amount borrowed was more than nominal value.

[19] The burden of proving misconduct rests on the Commission. It did not inquire with the employer what the policy meant by nominal value. It was not up to the General

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<sup>3</sup> See GD2-34.

<sup>4</sup> See GD3-25.

Division to fill the gaps in the evidence presented before it to justify a conclusion of misconduct.

[20] I find that the General Division made legal and factual errors in concluding that the Claimant had committed misconduct within the meaning of EI law in borrowing funds from a co-worker. The Commission did not meet its burden on this point.

**– Failing to report business activity**

[21] Before the General Division, the Claimant did not dispute that he had an outside business activity. He said that when he first started working for his employer, he was only hired on a contractual basis. He said that his business was listed on his résumé and therefore he was not hiding it. He said that his managers were aware of his business and that he was not aware that he had to disclose that he was still involved with running his side business.

[22] The General Division found that the Code says, “we may not enter into any employment, directorship, office, trade, volunteer activity or business outside of [employer] or invest in a company (other than an interest of less than 10% of a publicly traded corporation) without first reviewing the guidelines for outside business activities, our terms of employment and applicable laws and regulations that apply to us by virtue of our role, and obtaining consent from [employer] where required”.<sup>5</sup>

[23] The General Division found that the Code also says that “it is our responsibility to be familiar with and understand the provisions of this Code as well as other applicable [employer] policies, including those specifically identified in this Code. Failure of an employee to comply with the Code or any other applicable policy may result in disciplinary action, including formal written discipline and unpaid suspensions, up to and including termination of employment and may also impact performance ratings and incentive pay”.<sup>6</sup>

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<sup>5</sup> See GD2-34.

<sup>6</sup> See GD2-39.

[24] The General Division found that the Claimant, as a condition of employment, had to complete an annual attestation stating that he had complied with the obligations set out in the policy.<sup>7</sup>

[25] The employer told the Commission that there is a form that is required to be filled out for outside business activities, for the employer to review for a conflict of interest.<sup>8</sup> The employer said that the Claimant never provided this.

[26] The employer's termination letter says that the Claimant failed to disclose outside business activity in accordance with his obligations under the Code.<sup>9</sup>

[27] The General Division concluded that the Claimant lost his job because of misconduct. It found that he knew about the policy. He did not disclose his outside business as required by the policy. It found that he knew or ought to have known that not following the policy could lead to his termination, and that he lost his job because he did not report annually his outside business.

[28] Counsel for the Claimant contended that the employer dismissed the employee because of a mere, technical oversight on his part. He did not know he had to fill out a form and did not willfully refuse to comply with the policy. It also did not affect his job performance. Counsel submits that the employer was on a witch hunt to find a reason to dismiss the Claimant.

[29] It is true that a simple failure by an employee to fulfill any obligation linked to his employment does not necessarily lead to a finding of misconduct.

[30] However, in this case, the act or omission was more than a simple mistake or inability to do the job as required. The Claimant had a contractual obligation to be familiar with the policy. He was given a copy of the policy every year. He was required, under the policy, as an essential, concrete condition of his employment, **to complete an attestation annually of any outside business** to allow his employer to decide whether

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<sup>7</sup> See GD2-39.

<sup>8</sup> See GD3-40.

<sup>9</sup> See GD3-25.

his outside activities would interfere with the performance of his duties. He did not do it. He was warned that failure to comply with the policy may result in disciplinary action, including termination of employment.

[31] In reading the policy, I note that the employer puts great emphasis on managing actual, potential, or perceived conflicts of interest. In this context, the Claimant's conduct of not complying with the requirements of the policy was so careless or negligent as to approach willfulness. By not following the requirements of the policy, the Claimant's conduct broke the trust relationship and misconduct occurred.<sup>10</sup>

[32] Counsel for the Claimant puts forward that the Claimant was treated badly by his employer. He was aggressively and maliciously questioned by his employer's investigator during a meeting. He puts forward that the employer now refuses in bad faith to disclose to the Claimant any information regarding said meeting.

[33] Even if this is true, the employer's actions after the misconduct had occurred are irrelevant to the question of whether the Claimant had in fact engaged in misconduct under EI law.<sup>11</sup>

[34] I must emphasize that the General Division could not focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. It had to focus on the Claimant's conduct.

[35] I must also reiterate that I cannot reassess a case or substitute my discretionary power for that of the General Division. My jurisdiction is limited under the law. I am required to dismiss an appeal, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse manner or without regard for the material before it.

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<sup>10</sup> An act (or omission) can be characterized as misconduct if it will affect the employee's job performance or will be detrimental to the interests of the employer, or will harm, irreparably, the employer-employee relationship.

<sup>11</sup> *Canada (Attorney General) v Caul*, 2006 FCA 251.

[36] I find that the General Division did not make legal and factual errors in concluding that the Claimant had committed misconduct within the meaning of EI law in failing to disclose his outside business activity in accordance with the policy.

[37] I have no choice but to dismiss the Claimant's appeal.

## **Conclusion**

[38] The appeal is dismissed.

Pierre Lafontaine  
Member, Appeal Division