Citation: *CE v Canada Employment Insurance Commission*, 2023 SST 1919

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (539747) dated October 6, 2022 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	March 8, 2023
Hearing participant:	Appellant
Decision date:	March 28, 2023
File number:	GE-22-3421

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

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

[4] The Appellant disputes that there were any irregularities with anything he did. He says that he was wrongfully let go.

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

Issue

[6] Did the Appellant lose his job because of misconduct?

Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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

Why did the Appellant lose his job?

[8] The Appellant worked for a bank. The Commission says that the Appellant lost his job because of several banking irregularities or failure to follow policies. The Commission says that there is "no single incident, or immediate cause for dismissal".[2] In other words, there was not one thing that caused the employer to let the Appellant go. The Commission also says that because the Appellant was a manager there would have been an expectation that he "maintain higher standards and follow all policy and procedures".[3]

[9] The Appellant says that he was adhering to all policy and procedures. He says that he received "above average" on his annual performance review. The Appellant says that if he was doing something wrong that his supervisors should have mentioned it before he was let go. He feels that he did nothing wrong and that his employer was on a "witch-hunt".

Is the reason for the Appellant's dismissal misconduct under the law?

[10] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[6]

[11] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties towards his employer and that there was a real possibility of being let go because of that.[7]

[12] The Commission has to prove that the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This

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[2] See GD4-7.
[3] See GD4-7.
[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.[8]

No single incident

[13] The Appellant pointed to the Commission's arguments that says, "there is no single incident, or immediate cause for dismissal, the claimant was in the position of manager. He was therefore expected to maintain higher standards and follow all policy and procedures. Furthermore, the position would entail complete trust as an essential condition of his employment, which the claimant should have known".

[14] The Appellant argued at the hearing that he believes it is flawed for the Commission to say there can be "irregularities" and, at the same time also say that there was not a single incident.

[15] It doesn't matter if there was a single incident or more than one incident. In the employer's termination letter, they say that they investigated "into irregular payroll entries, failure to adhere to Bank policies and procedures, an irregular document, nepotism in hiring and numerous conflict of interest situations, involving you".[9] The employer goes on to say, "this letter is to confirm the Bank's decision to terminate your employment immediately for cause, without further notice or payment in lieu thereof".[10]

[16] The Appellant says that he is pursuing his employer for wrongful dismissal as there were no grounds for his termination.

[17] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully let him go.[11] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

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[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See GD3-25 termination letter.
[10] See GD3-25 termination letter.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[18] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[12] He lost his job because of his employer's drug-testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[19] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[13]

[20] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[14]

[21] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[15] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[16]

[22] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[17] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the

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[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

employee did or failed to do; it is not relevant that the employer didn't accommodate them.[18]

[23] My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

Reasons why the Appellant lost his job

– Excessive On-call or in-call pay

[24] The Commission says that there was misconduct because there was no evidence to support that the Appellant worked the hours claimed.

[25] The Appellant says that he works in IT and, after being hired full-time, and no longer being a contract employee, he was required to be available 24 hours a day and 7 days a week. He says that he had to be available if anything happened after regular business hours which he defined as between 8:00 a.m. and 5:00 p.m. For a couple of years, he said he did not charge/claim for the extra $2.00 an hour while he was on-call. However, he started doing this for the last year to year and a half that he was employed. He testified that he was not hiding anything. He testified that he had to put the hours he was claiming on a sheet that his manager and ultimately an executive had to approve. He believes that he was entitled to this pay as he was on-call. The Appellant says that, prior to the investigation, no one said anything to him about this.

[26] The Appellant also testified that when he is called in that he has in-call pay. He says that as a level 10 manager he was not allowed to have overtime.

[27] The Commission does not have any evidence specific to this incident. The employer says that "they looked at all the on call hours and a combination [sic] and excessive on call billing".[19]

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[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See GD3-40.

[28] The Commission says that "there is no evidence suggesting that the claimant attempted to obtain clarifications or guidance to any of the irregularities specified by his employer".[20] Yet, it is the Commission's responsibility to prove that this was one of the reasons the Appellant lost his job. I find that they have not done so. There is no evidence in the Commission's reconsideration file that elaborates what the Appellant did not wrong. On this point, I find that there is no misconduct proven.

– **Approving contractors excessive overtime pay**

[29] The Appellant says that he had different roles. He says that he was covering three distinct teams. As well, he had another team that he said he was a "soft-link" for. He says that there were maximums on the number of people that could be on certain teams. He testified that a different team was at their maximum number of people, but still needed more employees. So, he says that he became a "soft-link". Those that he was a soft-link for, reported to him but would work for another team, like the incident team. For people that he was a soft-link for, they would have to submit their e-time (a report of their hours claimed) and it would need to be reviewed by their actual manager who should have known whether the time was accurate or not. The Appellant says that the due diligence would have been the other manager's job, not his.

[30] For contractors, he said that there are several time sheets that have to be submitted. There is an internal time sheet and there is also an "e-time" sheet. There is also a document that is sent to the "vendor" that supplied the contractors as that is who would pay the contractors.

[31] For his own team that had contractors, the Appellant says that he was only doing spot-checks. He says that it would have been a full-time job to constantly check all of the timesheets and that he did not have the time to do so. He testified that he did not know what his employer's policies were on this. He says that if his employer had specific policies regarding this that they should have reinforced those policies. The

[20] See GD4-7.

Appellant says that his team came under budget by a million dollars so he feels that he was a responsible financial team manager.

[32] The Appellant says that he is uncertain of the exact allegations against him. There is no documentation in the Commission's file about any specifics.

[33] I find that based on the Appellant's information that he has provided specifics about what he did, or did not do. Yet, there are no specifics regarding the allegation against the Appellant. It is not possible to figure out if he breached one of the employer's policies as there are not details about what he did or did not. So, I find that the Commission has not proven, on a balance of probabilities, that the Appellant engaged in misconduct on this issue.

– **Creating a fraudulent T4**

[34] The employer's termination letter, dated March 10, 2022, says that the Appellant "confirmed your awareness that a X employee created a fraudulent T4 document for a third party which listed yourself as the employer".[21]

[35] The Commission spoke to the employer and they said, "the T4 was issued by [the employer] for someone who didn't work [for] them at the time".[22]

[36] The Appellant says that he personally created a T4 for his own employee (not one that worked for the employer). The Appellant says that he did this because the person had done work for him for his side business. The Appellant says that there was no misconduct because the person legitimately did work for him. The Appellant says that he submitted the T4 to the Canada Revenue Agency (CRA).

[37] I find that the Commission hasn't proven that there was misconduct on this point because there is no evidence that the Appellant breached a duty that was express or

[21] See GD3-25.
[22] See GD3-40.

implied in his contract of employment.[23] Without evidence there is nothing to show that the Appellant did something wrong.

– **Engaging in nepotism and failure to report personal relationships**

[38] The employer says that the Appellant engaged in nepotism. The employer also says that the Appellant hired contractors that had close personal relationships with other employees in the Appellant's department. The employer says this is a conflict of interest. They allege that the Appellant did not give a reasonable explanation of why the Appellant did not follow the standard hiring process. The employer says that there were 7 contractors that were found to have close personal relationships with other employees in the same department, and none met the qualification requirements or had IT experience.

[39] The Appellant says that there was no misconduct because he had no one on his team that was related to him and did not think this applied to him.

[40] The Appellant says that when he hired people, he did not ask about whether they had blood relationships already at his employer.

[41] The Appellant testified that he did not know what "close personal relationship" means. I referred the Appellant to the Code of Ethics that he provided where there is a definition of that term.[24] The Appellant agreed that the Code of Ethics was given to him on an annual basis.

[42] The Appellant said that he did not receive training on this. He said that one has to be careful in the current social climate about asking personal questions.

[43] He says that he did hire people based on referrals from current employees. He also said that he hired people that were finishing school so that it would cost the employer less.

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[23] See *Smith v Canada (Attorney General)*, A-875-96.
[24] See GD2-32.

[44] Unfortunately, there are not a lot of specifics from the employer. This makes it difficult for the Appellant to respond to the allegations. It is also difficult to weigh whether or not the Appellant committed misconduct within the meaning of the EI Act.

[45] I find that the Commission hasn't proven that there was misconduct on this issue. The employer says there is nepotism and irregular hiring practices for which the Appellant was responsible. The Appellant says there is not. With no further information, I can't find that the Commission met their burden on this point.

– **Failing to report business activity**

[46] The employer's termination letter says that the Appellant failed "to disclose your outside business activity in accordance with your obligations under the Bank's Code of Conduct and Ethics".[25]

[47] The Appellant provided a copy of the Bank's Code of Conduct and Ethics.[26] The Appellant says that when he first started working for his employer that he was only on a contract. He says that his business was listed on his résumé and therefore he was not hiding it. He testified that he was not aware that he had to disclose that he was still involved with running his side business. The Appellant also testified that CRA told him it was not a business and that it was a hobby.

[48] The Appellant's evidence on this point conflicts with his evidence about creating a T4 for someone he employed through his business. The Appellant appears to have believed it was a business as he created a T4 for someone he employed. If CRA does not consider it to be a business for tax purposes, that does not relieve the Appellant of any requirement to disclose his outside activity to his employer.

[49] The Appellant said to the Commission, "do I have to disclose"?[27] The Commission noted that the Appellant told them that he had done home inspections on

[25] See GD3-25.
[26] See GD2-18 to GD2-42.
[27] See GD3-38.

the side for about 10 years before working for his employer. The Appellant said that his managers knew.[28]

[50] The Code of Conduct and Ethics 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”.[29]

[51] The policy 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”.[30]

[52] The policy has an annual attestation that is required.[31] The Appellant provided a copy of the policy.

[53] 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.[32] The employer told the Commission that the Appellant never did this.

[54] The Appellant also produced a document which shows the many different managers that he reported to over the span of approximately 5 and ½ years.[33] It is likely, for this very reason, that his employer required a formal written document that

[28] See GD3-39.
[29] See GD2-34.
[30] See GD2-39.
[31] See GD2-39.
[32] See GD3-40.
[33] See GD2-13.

had the disclosure on it. Then if supervisors/managers changed, there would still be a record that the outside activity was approved.

[55] On this issue, I find that there is misconduct for the following reasons.

[56] The Appellant does not dispute that he had an outside business activity. I find that this means that the Appellant's outside business activity is a wilful act.

[57] The employer had a clear policy about outside business activities. The Appellant agreed that he was given a copy of the policy every year.

[58] The Appellant says that the employer should have known from his résumé that he was engaged in his outside business activity. Yet, the employer could not have known whether the Appellant had chosen to continue with his outside business once he was hired on a non-contractual basis.

[59] The employer's Code of Conduct and Ethics makes it clear that outside business activities must be disclosed. The employer told the Commission that there is a specific form for disclosure. The Appellant testified that he did not know about any form. Yet, the Code of Conduct makes it clear that there are additional guidelines for outside business activities. As a manager, and as someone that attested to the code of conduct annually, the Appellant should have known about the requirements. I find that it is more likely than not that the Appellant was not in compliance with the disclosure requirements.

[60] This means that the Appellant breached his employer's Code of Conduct and Ethics. This interfered with the Appellant's ability to carry out his duties to his employer because he went against their policy. This means that the trust in the employer-employee relationship would have been broken.

[61] The Appellant knew, or should have known, that failing to disclose his business activities and not following his employer's policy could get in the way of carrying out his duties toward his employer and result in being let go. The employer's policy says any

failure of an employee to comply can result in discipline, up to and including, termination of employment.[34]

[62] I find that this was one of the reasons specified in the employer's letter of termination to the Appellant.

[63] I find that, on a balance of probabilities, the Commission has proven that there was misconduct on this point.

– **Borrowing/lending money**

[64] The employer alleges that the Appellant borrowed money from his supervisor and loaned money to a subordinate employee.

[65] The Appellant says that he never loaned money to any subordinate. He says that he was giving money to someone, who was not an employee, because they needed help paying for medication.

[66] The Appellant also says that he was not given any other details from his employer about the specifics of his alleged lending money. If his employer is not referring to these payments, which he says were not loans but gifts, then he is not sure what money his employer means.

[67] There are no further details about the Appellant loaning money. As I have no other evidence to the contrary, I accept the Appellant's testimony that he did not loan any money to another employee.

[68] Yet, the Appellant agrees 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. The Appellant says that at the time he borrowed the money his friend was not his supervisor/manager at the time of the loan.

[69] I asked the Appellant how much money he borrowed and he testified that he could not remember exactly. He testified he thought it was a couple of thousand dollars.

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[34] See employer's policy and failure to comply GD2-39.

He stressed that he was not in a reporting relationship with the person when he borrowed the money.

[70] The employer's Code of Conduct and Ethics 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. Also, employees must not borrow from or lend any personal funds to a [employer] customer (other than relatives and people with whom we share a financial or close personal relationship), though we may borrow from a customer that is a financial institution or one that offers credit to customers, provided the terms of the loan are in the ordinary course of the customer's business".[35]

[71] The Appellant says that there was no misconduct because he borrowed money from someone that was not his manager. Yet, the employer's policy does not say anything about a subordinate or non-subordinate borrowing. It says that there is not supposed to be borrowing or lending.

[72] The policy says that borrowing or lending must be avoided if it is more than a nominal value. The Appellant said he did not know what was meant by "nominal" as the policy does not define it.

[73] It is unknown if there is a document from the employer that does define nominal. Yet, it is commonly considered to mean an insignificant, or very small, amount when referring to money.[36]

[74] The Appellant's own testimony was that he thought it was a couple thousand dollars that he borrowed from another employee. The fact that the co-worker was a

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[35] See GD2-34.

[36] See, for example, the Merriam-Webster online dictionary that refers to "nominal" as "trifling, insignificant e.g., his involvement was nominal; charged only nominal rent" https://www.merriam-webster.com/dictionary/nominal or Oxford Languages dictionary that says nominal means "(of a price or amount of money) very small; far below the real value or cost. 'some firms charge only a nominal fee for the service'" https://languages.oup.com/google-dictionary-en/

friend before they worked together doesn't matter. The fact that the co-worker was not a superior at the time also doesn't matter. The Appellant admits that both of them, at the time he borrowed the money, worked for the employer.

[75] I find that the amount that the Appellant borrowed was more than nominal. The employer policy is clear that no borrowing, other than a nominal amount, is acceptable from another employee. I find that this means that the Appellant borrowing money was a wilful act.

[76] The Appellant says that he received a copy of the Code of Conduct and Ethics each year and attested to its contents. This means that he knew, or should have known, what the policies were.

[77] The Appellant went against the employer's policy. This means that the employer-employee trust relationship was disrupted. The employer no longer wanted to have the Appellant at the workplace. This means that the Appellant could no longer reasonably carry out his duties towards his employer.

[78] I find that this means that the Appellant was not in compliance with his employer's policy. I find that this is misconduct.

[79] The Appellant knew, or should have known, that borrowing money from another employee, and not following his employer's policy, could get in the way of carrying out his duties toward his employer and result in being let go. The employer's policy says any failure of an employee to comply can result in discipline, up to and including, termination of employment.[37]

[80] I find that this was one of the reasons specified in the employer's letter of termination to the Appellant.

[81] I find that the Commission has proven, on a balance of probabilities, that there was misconduct on this issue.

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[37] See employer's policy and failure to comply GD2-39.

Elements of Misconduct/Conclusion

[82] There is no dispute that the employer had many policies. The Appellant provided the Code of Conduct and Ethics for Employees. The Appellant knew about the policy. The Appellant confirmed that the policy was attested to every year. There are at least two things, from the evidence before me, that the Appellant did that was against the employer's Code of Conduct and Ethics. I find that the Appellant knew, or should have known, what he was required to do, or not do, under his employer's policy. For the reasons above, I find the actions of Appellant were conscious, deliberate and intentional.

[83] If the Appellant's actions were not conscious, deliberate and intentional then I find that they were so reckless that it can be considered wilful. The Appellant was a manager. The Appellant was responsible for people reporting to him. Because of his position the Appellant should have been aware and knowledgeable about his employer's policies.

[84] The Appellant said that he did not receive specific training on the policies. Even if this is true, the Appellant was still expected to know the policies as he had to attest to them annually. This means that the Appellant should have been aware of the policies and made sure that he followed all policies. The Appellant was not in compliance with his employer's policy. He broke the trust relationship between him and his employer. For the reasons above, that means that he could not go to work to carry out his duties owed to his employer. This is misconduct.

[85] The employer's Code of Conduct and Ethics policy is also clear on what happens if there is a failure to comply with the policy. The policy says, "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".[38]

[86] I find that the policy clearly says that there can be a termination of employment for not following the policy. This means that the Appellant knew, or should have known, that if he didn't follow the policy that he could lose his job.

[87] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a policy, and did not follow the policy. The Appellant knew, or ought to have known, that by not following the policy that he might face disciplinary action including termination of employment. This means that he did not carry out his duties to his employer.

[88] I do not find that the Commission needed to prove every allegation the employer set out in their letter of termination. There are many allegations against the Appellant. The purpose of these proceedings is not to determine if the Appellant was wrongfully dismissed. The purpose is to determine if the Appellant is entitled to benefits. I find Commission proved some of the allegations against the Appellant. This means that the Appellant is not entitled to benefits because misconduct has been proven.

So, did the Appellant lose his job because of misconduct?

[89] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

[90] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[91] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section

[38] See GD2-39.