Citation: *RB v Canada Employment Insurance Commission*, 2024 SST 526

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (629828) dated December 6, 2023 (issued by Service Canada)

Tribunal member:	Jean Yves Bastien
Type of hearing:	Videoconference
Hearing date:	March 21, 2024
Hearing participants:	Appellant
Decision date:	{Insert date decision made}
File number:	GE-24-131

Decision

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

[2] The Canada Employment Insurance Commission (the 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 lost his job. The Claimant's employer said that he was let go for misconduct because he breached the company's code of ethics,[2] as well as their software provider's policy on Antitrust and Competition Laws and Fair Dealing,[3] when the Appellant "stole client data, set up a rival company, and went to the direct competitor".[4]

[4] Even though the Appellant doesn't dispute that he was let go, he argues that he didn't commit any misconduct. The Appellant testified that actually, the employer let him go out of spite.

[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.

[6] I have to decide whether or not the Appellant's actions when he was working for the employer amount to misconduct as defined in the *Employment Insurance Act* (the *Act*).

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[1] Section 30 of the *Employment Insurance Act* (*Act*) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See pages GD3-231 to GD3-235 of the appeal record.
[3] See page GD3-236 of the appeal record.
[4] See page GD3-18 of the appeal record.

Issue

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

Analysis

[8] To answer the question of whether or not 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.

Why did the Appellant lose his job?

[9] I find that the Appellant lost his job because he solicited a past client of the employer on behalf of his own business; his "side-gig" as he calls it. The Appellant's actions were contrary to the employer's interests and compromised the employer's relationship with their main business partner and supplier.

[10] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant was running his own business in competition with theirs. The employer said that the Appellant took confidential customer information and business partner confidential information (pricing information) [and shared it], against their interests and for the Appellant's own personal benefit.[5] The employer argues that the Appellant's actions were in breach of the employer's Code of Conduct and Ethics, as well as their software supplier's policy on "Following Antitrust and Competition Laws and Fair Dealing".

[5] See page GD3-30 of the appeal record.

[11] The Appellant disagrees. He argues that there was no exclusivity clause in his employment contract.[6] The Appellant testified that the real reason he lost his job is that the employer was "offended by the fact that I even had a side-gig and that my life didn't revolve around them. He also mentioned that the software supplier was very sensitive about any competition, no matter how small.

[12] But the Appellant doesn't deny that he had his own business to provide procurement services. He said that the aim of his procurement company was to help clients same money on their business expenses, including software services. He testified that his company only became active in early 2023. He decided then that he needed a side-gig to earn more money. But the Appellant says that his company never made any revenue. He says that he sent "only ten emails in total".

[13] The Appellant admitted to the Commission that he had sent a past client of the employer an email about his side-gig and that the past client sent this email to the employer thinking that it had originated from the employer. The Appellant said that his employer saw the email to the past client and that he was quickly dismissed as a result.

[14] When the Commission asked the Appellant **if** his employer had a conflict of interest policy, he replied that he was "not in a conflict of interest". The Commission also asked the Appellant if he had to "seek authorization before taking on a second job or participating in self-employment" to which the Appellant said "no, [he] never signed any policy like that.[7]

[15] The Appellant testified he didn't think his side-gig was "a huge conflict". He also argues that he didn't sign the software provider's policy on Antitrust and Competition Laws and Fair Dealing.

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[6] See page GD3-19 of the appeal record.
[7] See page GD3-21 of the appeal record.

[16] The employer provided the Commission with both their own Code of Conduct and Ethics,[8] as well as the software provider's policy on "Following Antitrust and Competition Laws and Fair Dealing.[9] The employer highlighted that their software provider's policy indicated "[business partners] who violate these laws may face immediate termination of their relationship with [the software provider].[10] So when the Appellant "improperly shared competitively sensitive information", he was in breach of the software supplier's policy, and this could have had a grave impact on the employer because their software supplier could have cut them off.

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

[17] I find that the reason for the Claimant's dismissal **is misconduct** under the law.

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it is almost wilful.[12] 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.[13]

[19] There is misconduct if the Appellant knew, or ought to have known, that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[14]

[20] 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 means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.[15]

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[8] See pages GD3-231 to GD3-235 of the appeal record.
[9] See page GD3-236 of the appeal record.
[10] See page GD3-236 of the appeal record.
[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[13] See *Attorney General of Canada v Secours*, A-352-94.
[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Commission says that there was misconduct because the Appellant breached the employer's code of conduct and ethics when he established a personal business while leveraging information acquired from his main employer, and this act inherently posed a conflict of interest. The Commission argues that the Appellant's actions constitute misconduct because his use of confidential information compromised his employer's integrity and jeopardized his employer's competitive advantage and business partnership with their software provider. The Employer told the Commission that "the client's actions were so nefarious that they could lose their entire contract with their [software provider]"[16]

[22] The Commission also argues: "the claimant conducted his personal business during the hours he was working for his main employer, The Commission does not accept the claimant's statement that he did not know what he was doing was wrong. If the claimant was so certain his business did not pose a threat to his employer, then he should have been transparent with his employer about his endeavors."[17]

[23] The Appellant told the Commission "that there was maybe a 2 – 5 % overlap between his business and his employer's"[18] But the Appellant argues that there was no misconduct because he was not in conflict of interest with his employer while he was running his own, separate business. The Appellant says that he only worked on his side-gig once all of his work for the employer was done. The Appellant argues that there was no wrongdoing on his part and that his termination was unjust.[19] The Appellant testified that he never signed any code of conduct and ethics. The Appellant also says that he was never given any verbal or written warnings so he could correct the situation that led to his dismissal.[20]

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[16] See page GD3-33 of the appeal record.
[17] See page GD4-5 of the appeal record.
[18] See page GD3-34 of the appeal record.
[19] See page GD3-25 of the appeal record.
[20] See page GD3-19

[24] I find it **more likely** than not that the Appellant was aware of the employer's Code of Conduct and Ethics. This is because the employer had an online training program for all employees about their own Code of Conduct and Ethics. The employer's training program records an employee's progress and completion of all modules. The Appellant doesn't dispute that he was aware of the employer's code of conduct, he just says that he "didn't sign anything. With an on-line program you wouldn't physically sign a paper acknowledgement. So I don't see the fact that the Appellant didn't "sign anything" as proof that he was unaware of the employer's code.

[25] I find it more **unlikely** than likely that the Appellant was aware of the software provider's policy on "Following Antitrust and Competition Law and Fair Dealing.[21] The employer provided the Commission with a copy of the software provider's policy, but the Commission does not provide any proof that the Appellant was aware, or ought to have been aware, of this policy. The Appellant testified that he was unaware of the policy, and I believe him.

[26] I find that the Commission has proven that there was misconduct, because:

- The employer had a Code of Conduct and Ethics. This code was on the company website. Employees were required to complete online training on the code. Electronic records of progress and completion were kept. There was no requirement to sign a physical piece of paper.

- The employer's code clearly said in a section entitled "Protection of Company Property" that "All employees should treat our company's property, whether material or intangible, with respect and care."[22] And also that "[employees] should respect all kinds of **incorporeal property**. This includes trademarks, copyright, and other property (information, reports etc.) Employees should use them only to complete their job duties.[23]

[21] See page GD3-236 of the appeal record.
[22] See page GD3-233 of the appeal record
[23] See page GD3-234 of the appeal record. Emphasis in the original.

- The employer's documents also contain a section entitled "Conflict of Interest" which says "We expect employees to avoid any personal, financial or other interests that might hinder their capability or willingness to perform their job duties. **Any** conflict of interest can result in discipline or termination."[24]

- The employee was aware, or ought to have been aware of the employer's Code of Conduct and Ethics.

- The employer's Code of Conduct and Ethics says, "**Any** conflict of interest can result in discipline or termination." So the Appellant knew or ought to have known that his employment could be terminated if he breached the employer's Code of Conduct and Ethics.

- The Appellant told the Commission that he didn't receive any verbal or written warnings before he was dismissed. But the Appellant shared the employer's supplier's pricing sheet with his own client. This is an egregious and reckless act.

- As a salesperson, the Appellant knew, or ought to have known, warnings or not, that sharing supplier costing information outside of the employer was completely forbidden. Yet the Appellant wilfully shared confidential and sensitive information with his own customer, contrary to the Employer's Code of Conduct and Ethics.

[24] See page GD3-235 of the appeal record. Emphasis added.

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

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

[28] This is because:

- The employer had a Code of Conduct and Ethics.
- The Appellant knew, or ought to have known, about this code.
- The Appellant knew, or ought to have known, that he could be terminated for breaching this code because this sanction is included in the employer's code.
- Despite all of the above, the Appellant wilfully and recklessly shared confidential and highly sensitive pricing data with one of his own customers against the interests of his employer.

Conclusion

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

[30] This means that the appeal is dismissed.

Jean Yves Bastien

Member, General Division – Employment Insurance Section