



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: 9089-7679 *Québec Inc. v. Canada Employment Insurance Commission*, 2018 SST 900

Tribunal File Number: AD-17-587

BETWEEN:

9089-7679 Québec Inc.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

A. A.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: September 14, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the Appeal.

OVERVIEW

[2] The Added Party, A. A. (Claimant), filed an initial claim for Employment Insurance benefits. On reviewing the claim, the [Respondent, the] Canada Employment Insurance Commission (Commission)[,] approved the claim for benefits. The Commission imposed a stop payment because of allegations of misconduct that the Appellant raised, 9089-7679 Québec Inc. (employer). The Commission received the Claimant's request for reconsideration of the decision, revised its position in the Claimant's favour, and found that there was insufficient information to conclude that the Claimant lost her employment because of her own misconduct. The employer appealed the reconsideration decision to the Social Security Tribunal.

[3] The General Division found that the employer had not succeeded in establishing that the Claimant had committed the alleged misconduct that led to her dismissal. The General Division found that the employer's evidence did not allow it to convincingly establish the Claimant's actual conduct, which is fundamental to a case of misconduct. The General Division found that the Claimant had not lost her employment because of her own misconduct within the meaning of the *Employment Insurance Act* (EI Act).

[4] The Tribunal granted leave to appeal. The employer argued that the General Division erred in its application of the burden of proof in relation to misconduct within the meaning of the EI Act. It alleges that the General Division imposed an excessive burden. It maintains that the General Division made an error by ignoring the decision of the Court of Québec's Civil Division, which sentenced the Claimant to repay the employer the stolen amounts, as well as the video camera evidence that shows the Claimant's wrongful acts.

[5] The Tribunal must determine whether the General Division made an error in its application of the burden of proof in relation to misconduct and by ignoring the employer's evidence.

[6] The Tribunal dismisses the employer's appeal.

ISSUES

[7] Did the General Division make an error in its application of the burden of proof in relation to misconduct?

[8] Did the General Division make an error by ignoring the employer's video camera evidence and the Court of Québec's decision in the employer's favour?

ANALYSIS

The Appeal Division's Mandate

[9] The Federal Court of Appeal has determined that the Appeal Division's mandate is limited to the one conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act*.¹

[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.

[11] As a result, 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 or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

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

Issue 1: Did the General Division make an error in its application of the burden of proof in relation to misconduct?

Issue 2: Did the General Division make an error by ignoring the employer's video evidence and the decision of the Court of Québec's Civil Division in the employer's favour?

[12] The Tribunal is of the view that the employer's appeal should be dismissed.

[13] The General Division's role is to determine whether the employee's conduct constitutes misconduct within the meaning of the EI Act, not to determine whether an employee's acts constitute reasonable grounds for dismissal.²

[14] In addition, the concept of misconduct does not necessarily imply that the wrongful behaviour is the result of wrongful intent; it must simply be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects their actions would have on their performance.³

[15] It is well-established law that the burden of proof is with the employer and the Commission to show, on a balance of probabilities and not beyond a reasonable doubt, that the Claimant lost her employment due to her own misconduct.⁴

[16] A finding of misconduct, with the grave consequences it carries, can be made only on the basis of clear evidence and not merely of speculation and suppositions.⁵

[17] The Tribunal finds that the General Division was in no way bound by the Court of Québec's decision. It was open to the General Division to verify and interpret the facts and to assess the issue under appeal that was before it.

[18] Furthermore, contrary to the Honourable Judge Cameron's finding in the Court of Québec decision, the General Division found that the video evidence and the

² *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

³ *Canada (Attorney General) v. Hastings*, 2007 FCA 372; *Tucker* A-381-85; *Mishibinijima*, A-85-06.

⁴ *Canada (Attorney General) v. Larivée*, 2007 FCA 312, *Canada (Attorney General) v. Falardeau*, A-396-85.

⁵ *Crichlow*, A-562-97

documentary evidence of screen captures from the videotape was not conclusive and did not allow it to determine, on a balance of probabilities, that the Claimant engaged in the fraudulent scheme that the employer described.

[19] The Tribunal considers the video evidence on file to be the cornerstone of the employer's position. It therefore viewed the video evidence multiple times, at normal and reduced speed, and carefully analyzed the documentary evidence of the video screen captures, while simultaneously reading the description of events given by the manager, M. S..⁶ The Tribunal has arrived at the same conclusion as the General Division. The video evidence and the documentary screen-capture evidence are simply not clear and conclusive.

[20] Furthermore, the General Division had an opportunity to hear the Claimant, and it gave significant weight to her testimony. It finds that the Claimant maintained the same version of facts in her numerous statements to the Commission and during her testimony at the hearing. The General Division found that the Claimant testified in a logical, coherent, and compelling manner without any appearance of embellishment or exaggeration.

[21] Beyond asking her to give her version of the facts and an explanation for the table transfer transactions on the Maitre'D system (which she did and which the General Division accepted), the General Division rightfully found that it would be contrary to the EI Act to require the Claimant to provide proof of actions she claims she did not take.

[22] The Tribunal is aware that the burden of proof is not the same in criminal cases but would still like to clarify that the Claimant was not subject to criminal proceedings.

[23] The Tribunal is therefore of the view that the General Division did not make an error when it found, after reviewing the material before it, that the employer had not met its burden of proof on a balance of probabilities.

⁶ General Division decision at para. 40.

[24] The General Division's decision is based on the evidence before it, and it is consistent with the legislative provisions and case law.

[25] For the reasons stated above, it is appropriate to dismiss the appeal.

CONCLUSION

[26] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 28, 2018
METHOD OF PROCEEDING:	Teleconference
PERSONS IN ATTENDANCE:	Sébastien Sénéchal, [Counsel] for the Appellant A. A., [Added Party]