Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *X v Canada Employment Insurance Commission and BB*, 2019 SST 1731

Tribunal File Number: GE-18-1891

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

B. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARING CONCLUDED: July 11, 2019

DATE OF DECISION: August 29, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant has not proven that the Added Party, B. B. (B. B.), lost her employment due to her own misconduct.

OVERVIEW

[2] B. B. applied for employment insurance benefits (EI benefits) and established a benefit period effective May 1, 2016. On June 8, 2016, the Respondent, the Canada Employment Insurance Commission (Commission) disqualified her from receipt of EI benefits because it concluded that she lost her job as cleaner with the Appellant's X due to her own misconduct. B. B. asked the Commission to reconsider its decision, arguing she was wrongfully dismissed after a heated phone call with her employer about her absence from work due to a last minute medical appointment. The Appellant maintained B. B. was dismissed because of numerous breaches of workplace policies, including smoking in the company vehicle, failing to wear the company uniform, and cleaning for private clients on the side. The Commission found in favour of B. B. and overturned the disqualification imposed on her claim.

[3] The Appellant appealed to the General Division of the Social Security Tribunal (Tribunal) and B. B. was added as a party to the appeal. The Appellant's appeal was dismissed by the Tribunal on May 28, 2017.

[4] The Appellant then appealed the May 28, 2017 decision to the Appeal Division of the Tribunal (AD). In its decision issued on May 23, 2018, the AD allowed the Appellant's appeal and referred the matter back to the General Division for a new hearing before a different Member of the Tribunal.

PRELIMINARY MATTERS

[5] A number of case management conferences were convened by the Member – both before and during the new hearing – in an effort to manage the acrimonious proceedings, the voluminous evidence presented (both documentary and from witnesses), and the scheduling challenges posed by lengthy oral testimony, multiple witnesses, and changes in legal representation along the way.

[6] The new hearing took place by teleconference. It was held in a series of appointments over a 12-month period, and involved approximately 12 hours of recorded testimony and submissions. The Appellant had legal representation on all attendances, but the individual lawyers acting for her changed three times during the proceeding. B. B. was self-represented throughout.

ISSUE

[7] Should B. B. be disqualified from receiving EI benefits on the claim she established effective May 1, 2016 because she lost her employment at X due to her own misconduct?

ANALYSIS

[8] Section 30 of the *Employment Insurance Act* (EI Act) disqualifies a claimant from receiving benefits if the claimant lost their employment as a result of their own misconduct.

[9] In the present case, the onus is on the Appellant as the employer to establish, on a balance of probabilities, that the loss of B. B.'s employment was due to her own misconduct (*Larivee A-473-06, Falardeau A-396-85*). To discharge that onus, the Tribunal must be satisfied that the misconduct was the reason for the dismissal and not the excuse for it, which necessitates a factual determination after weighing all of the evidence: *Bartone A-369-88; Davlut A-241-82*.

[10] In order to prove B. B. lost her employment due to misconduct, it must be shown that she was terminated because she behaved in a way other than she should have *and* that she did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must also be demonstrated that B. B. knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*.

[11] As set out by the Federal Court of Appeal in *Macdonald A-152-96*, the Tribunal must determine the real cause of B. B.'Ss separation from employment and whether it amounts to misconduct for purposes of section 30 of the EI Act.

Issue 1: What is the conduct that led to B. B.'S separation from employment?

[12] The first step in the analysis is for the Tribunal to determine ***when*** and ***why*** B. B. was separated from her employment with the Appellant.

When was B. B. terminated?

[13] On May 2, 2016, E. W. (E. W.) signed and issued a Record of Employment (ROE) for the dismissal of B. B. (GD3-17).

[14] The ROE listed May 2, 2016 as B. B.'s last day of paid employment (box 11) and included the following comments:

> "This employee was terminated with cause but due to length of service, I hope she will receive EI. She has earned EI."

[15] On June 8, 2016, E. W. provided a chronology of events to the Commission (see GD3-100 to GD3-101). According to this chronology, on (Tuesday) April 26, 2016, B. B. texted E. W. that she was unable to work because she had an appointment. E. W. texted back two times that this was fine and wished her well. Later that day, B. B. threatened E. W. several times, stating she had fired her and her work partner. E. W. wrote:

> "I did not fire either one until Thursday evening."

The Tribunal presumes the reference to "Thursday evening" to mean Thursday, April 28, 2016.

E. W. later advised the Commission that it was "Thursday evening" when she decided it was time for them to "move forward" (GD3-107).

[16] E. W. also provided the Commission with a memo summarizing a staff meeting that took place on May 2, 2016 (GD3-95). According to this memo, the "third point" of this meeting was to discuss the obligation on employees not to solicit customers for private cleaning, and included a discussion of allegations that B. B. was "soliciting X our customer due to the downturn of the economy".

[17] In her first interview with the Commission on June 1, 2016, B. B. described the staff meeting "on Monday" – the Tribunal notes that May 2, 2016 was a Monday – and stated that it turned into E. W. "letting me go" (GD3-104). This is consistent with the ROE for dismissal prepared by E. W. on May 2, 2016.

[18] B. B. applied for EI benefits on May 4, 2016 and gave May 2, 2016 as the date of her dismissal.

[19] The Tribunal gives no weight to the May 7, 2016 date on the termination letter at GD3-98 to GD3-99. This document sets out a detailed statement as to the Appellant's reasons for terminating B. B. (more on this below), but was obviously prepared after the termination had already taken place. B. B. had already applied for EI benefits on May 4, 2016 based on her dismissal on May 2, 2016, and the May 7, 2016 termination letter itself includes a rebuttal to the employment standards complaint initiated by B. B. upon her dismissal.

[20] The Tribunal finds that B. B. was terminated on May 2, 2016. This date is consistent with the Appellant's preparation and issuance of the ROE for dismissal, B. B.'s application for EI benefits, and the statements to the Commission by E. W. and B. B.. It is also consistent with the termination date referred to by the parties in the employment standards proceeding (see Determination at RGD3-6).

Why was B. B. terminated on May 2, 2016?

[21] The Appellant submits that B. B. was terminated "for cause" for violations of 3 workplace policies, namely:

a) B. B. smoked in the company vehicle, contrary to her employment contract and workplace policy;
b) B. B. failed to wear the X uniform, as required by her employment contract and workplace policy; and
c) B. B. cleaned for private clients, contrary to her employment contract.

[22] The Tribunal will address each of these reasons in turn.

Smoking in the Company Car

[23] The Appellant provided employees, including B. B., with a X-branded company vehicle to use on their cleaning routes. Smoking was prohibited in all company vehicles. This workplace policy was clearly stated in the Appellant's original employment contract signed March 24, 2013 (RGD3-50 to RGD3-51) and in memos to employees (RGD3-24, RGD3-30, and RGD3-32); and it was confirmed by an employee who wrote a reference letter for E. W. in this appeal (RGD3-39).

[24] B. B. told the Commission that she never smoked in the car but "had it out the door" (see GD3-105). This is consistent with the witness statement the Appellant provided from a co-worker who stated that she personally witnessed B. B. smoke a cigarette a X car "while sitting in the car with the door open" (RGD3-60). B. B. also told the Commission she once had to pay for "a detail" of her car, but it was "a long time ago" (see GD3-105).

[25] In the reconsideration interview on June 22, 2016, E. W. told the Commission that smoking in the company vehicle had no bearing on her decision to dismiss B. B.; and that the only reason for the dismissal was because B. B. was providing cleaning services privately and soliciting clients of X (see GD3-115).

[26] But in her testimony to the Tribunal on December 18, 2018, E. W. stated that she considered the rule against smoking in a company vehicle to be "a primary rule" because it was a health and safety issue and she could "get sued" if she didn't provide a smoke-free environment for her employees.

[27] E. W. further testified that:

- Other employees would tell her that B. B. was smoking in the company vehicle. When she got these "complaints", she would personally go out and "smell the car", have it detailed and move the non-smoking employee to another vehicle.

- On May 30, 2013, she had all of the employees acknowledge they could be liable for up to $350 of car detailing costs if caught smoking in a company vehicle (RGD3-32). E. W. stated that she "had everyone sign it", but it was not enforced.

- B. B.'s signature is on this page.

- On October 29, 2014, she issued a memo (at RGD3-24) about vehicle inspections and cleanliness in response to smoking by employees. The memo reads:

  > "Effective immediately, company vehicles will be inspected daily. Failure to keep the vehicle clean and safe for working will result in disciplinary action and or termination."

- A co-worker has provided a written statement that she saw B. B. smoking in X vehicles (see RGD3-56). Another co-worker has provided a written statement that B. B. was "caught smoking in the work vehicle several times" (see RGD3-61).

- She was "always talking" to B. B. and warning her about smoking in the company car.

- On March 3, 2016, she issued a written warning to B. B. for smoking in the company car. This was intended to be a form of "progressive discipline", so the next time it happened, the Appellant would "have the ground work to terminate her".

[28] The Appellant provided 3 invoices for detailing of company vehicles with handwritten notations identifying them as being for "B. B.'s car" or "B. B.'s Honda". These 3 invoices are dated May 5, 2014 (RGD3-88), July 26, 2014 (RGD3-90) and March 15, 2016 (RGD3-86). The Appellant also provided invoices for detailing of vehicles operated by other employees.

[29] The Disciplinary Letter issued to B. B. on March 3, 2016 (RGD3-168) indicated the vehicle would have to be detailed because she had been smoking in the vehicle. The Tribunal notes that the March 15, 2016 detailing invoice likely corresponds to this letter.

[30] However, the Tribunal also notes that the Disciplinary Letter does not state that the costs of the detailing would be deducted from B. B.'s pay or that any further consequences would flow from the fact it had come to the employer's attention that B. B. had been smoking in the company vehicle. Nor does the letter refer to any of the prior verbal warnings E. W. testified about. It also does not include a statement that violation of the policy could lead to further discipline and/or termination. It is difficult to see how this amounts to progressive discipline in the absence of such statements.

[31] In her cross-examination of E. W., B. B. queried how she could be so certain it was B. B. who was smoking in the vehicle – especially since B. B.'s work partners smoked and they were the ones who took the vehicle home at night. E. W. responded by referring to complaints she received from other co-workers.

[32] In her own testimony, B. B. stated:

- she never drove the company vehicle, so she never took it home. Her work partners smoked and they smoked in the company vehicle. They were also the ones who drove the vehicle and took it home at night.

- She herself did smoke – but she was not "technically" in the company vehicle when she did so because "my whole body was outside of the car and just my bum was in the seat".

[33] B. B. provided a written statement from a co-worker who stated that when E. W. "decided to let B. B. go she would complain that B. B. would smoke in company vehicles, even though she had stated to her and myself we could smoke in the vehicle" (RGD21-3). Another written statement from a different co-worker advised that E. W. would let certain people smoke in vehicles, but not others (RGD21-11).

[34] B. B. also provided a written statement from another co-worker denying that she and B. B. smoked in the company car, and describing E. W. as accusing them of smoking in the vehicle and telling them to detail the car "on a weekly basis" (RGD21-7).

[35] On cross-examination, B. B. did not dispute signing the Disciplinary Letter or knowing about the October 29, 2014 memo about vehicle cleanliness and inspections. She stated she was aware of the Appellant's policy against smoking in company vehicles and that, according to the October 29, 2014 memo, termination was a possibility for violating this policy.

[36] The Tribunal finds that B. B. was aware of the Appellant's prohibition on smoking in company vehicles.

[37] The Tribunal further finds that she breached this policy by smoking in the company vehicle. While she may have tried to minimize the effect of her smoking by holding her cigarette

outside the vehicle door, this technicality does not change the fact that she was sitting in the vehicle when she was smoking.

[38] However, the Tribunal finds that this breach of workplace policy was not the operative cause of B. B.'s dismissal on May 2, 2019. Rather, this conduct was an on-going contravention that only ever attracted low-level verbal warnings until the March 3, 2016 Disciplinary Letter. By signing the Disciplinary Letter, B. B. acknowledged that smoking was a breach of her employment contract and stated she "will not smoke in the vehicle moving forward".

[39] The wording about termination in the October 29, 2014 memo must be considered in the context of the employer's on-going tolerance of the conduct. There is no compelling evidence B. B. had any reason to believe there was a real possibility she could lose her job for violating the Appellant's smoking policy.

[40] There is also no evidence that she smoked in a company vehicle ***after*** the March 3, 2016 Disciplinary Letter was issued to her.

[41] The Tribunal makes no findings as to whether the Appellant had cause to terminate B. B. for her breach of the smoking policy.

[42] The Tribunal does, however, find that B. B.'s breach of this policy was not the reason she was dismissed from her employment on May 2, 2016. It was an excuse for it.

Failure to wear the X Uniform

[43] The Appellant provided employees, including B. B., with X-branded uniform items to wear when cleaning. Employees were required to wear their X uniform on the job. This workplace policy was clearly stated in the Appellant's original employment contract (RGD3-50 to RGD3-51); and was confirmed in a number of the written statements from other employees that were provided by the Appellant (see examples at RGD3-40 and RGD3-42). There was also a memo to employees on November 3, 2014 (RGD3-25), in which the Appellant specifically advised that X uniform shirts had to be worn everyday, and that failure to comply "will result in disciplinary action and termination with cause" (RGD3-25).

[44] B. B. told the Commission that she had a X apron and always wore it (see GD3-105).

[45] In the reconsideration interview on June 22, 2016, E. W. told the Commission that failing to wear the company uniform had no bearing on her decision to dismiss B. B.; and that the only reason for the dismissal was because B. B. was providing cleaning services privately and soliciting clients of X (see GD3-115).

[46] But in her testimony to the Tribunal on December 18, 2018, E. W. stated that wearing the X uniform was an important requirement that had to be enforced because the Appellant operated a X and the franchisor "graded her" on compliance with their rules about uniforms and cleaning supplies. The Appellant bought uniform shirts and expected all employees to wear them so that the X logo was visible while they were on the job.

[47] E. W. further testified that:

- The uniform consists of a pink t-shirt with a navy X logo on it. The uniform is incomplete if the employee is not wearing the X shirt.

- She personally conducted "spot checks" and found B. B. to not be wearing the uniform shirt. E. W. stated:

> "I tried to get her to wear the uniform and followed her around from house to house for 2 days in a row. She'd put it on, then when I got to the next house, it was off again."

- She even purchased a V-neck X uniform shift that B. B. personally approved. But B. B. "still didn't wear it".

- She ordered various different uniform shirts in response to complaints from B. B.. Examples of the invoices for these purchases are at RGD3-92 to RGD3-99. Over 3 years, she spent $375.00 on new shirts for B. B., and when she bought new shirts for B. B., she had to do the same for all 30 employees.

- There is a cancelled work order for X tank tops at RGD3-99, which she cancelled because it was placed by B. B. without her authorization.

- The other employees were coming to her and reporting that B. B. wasn't wearing the uniform. Some of them have provided written statements about B. B. not wearing her uniform at work (see examples at RGD3-56, RGD3-57 and RGD3-58).

[48] In her cross-examination of E. W., B. B. asked if E. W. ever saw her wearing the X apron on the job. E. W. answered that she could not recall.

[49] When the Tribunal asked why B. B. was not fired for her repeated failure to wear the uniform provided by the employer, E. W. answered that she was trying ***not*** to fire B. B. because B. B. was "supporting her daughter as a single mom" and she "actually showed up for work". She also said B. B. kept promising to change.

[50] Emily Nolan, a witness for the Appellant, testified on December 18, 2018 that B. B. was "often" not wearing any X clothing when they went to E. W.'s home office to pick up their job duty for the day.

[51] B. B. testified that she wore the branded X apron "every single day" she was working, but did not always wear the branded X shirt. B. B. further testified that:

- She wasn't the only one of the Appellant's employees who didn't wear the X uniform shirts.
- She wore "tank tops and the apron" because "you get sweating doing physical labour".
- The uniform shirts provided by the Appellant were "collared" or had sleeves and were made of "thick material", which was too hot, especially in the summer.
- E. W. agreed to order tank tops with the X logo, as per the purchase order at RGD3-99. E. W. later cancelled the order, and other people were also unhappy.
- She never ordered anything without authorization and disputes E. W.'s version of events regarding the tank top order.
- Wearing the X apron was "good enough" for clients to identify her as from X.
- The rules got "more slack" as time went on, as evidenced by the fact that some people were hired and never even given a uniform shirt or an apron.

[52] B. B. provided a number of written statements from people who worked with her. One stated that B. B. always wore her X apron (RGD21-7). Another stated that she was told there were no uniforms when she was hired by the Appellant because she asked B. B. why she had a X apron and "Emily no longer hand any" (RGD21-9). And another stated that E. W. knew this other employee wasn't wearing her uniform shirt, never enforced the wearing of uniform shirts and never made "a problem out of it" (RGD21-12).

[53] On cross-examination, B. B. did not dispute that the X logo shirt was part of the uniform. She stated she always wore the X logo apron, but admitted she did not always wear the pink shirt. She also admitted that E. W. did order alternate uniform shirts in an attempt to alleviate "sweaty" concerns, but said they still weren't satisfactory, so E. W. agreed to order the tank tops.

[54] The Tribunal finds B. B. was aware that the Appellant's uniform policy required her to wear a X branded shirt when she was on the job.

[55] The Tribunal further finds that she breached this policy by failing to wear the uniform shirt on a consistent basis. While she may have believed the X apron was sufficient to identify her to the Appellant's clients, this technicality does not change the fact that she was not in compliance with the employer's uniform policy if she did not also wear the branded uniform shirt.

[56] However, the Tribunal finds that this breach of workplace policy was not the operative cause of B. B.'s dismissal on May 2, 2019. Rather, this conduct was an on-going contravention that the employer was aware of and willing to overlooK. S. There is no evidence B. B. was ever disciplined for failing to wear the uniform shirt. In fact, the Appellant's continued efforts and expenditures to find a uniform shirt that would be suitable to B. B. for the physical labour of cleaning point more to the employer's attempt to address a valid issue raised by a valued employee than to an infraction that could lead to termination of the employee.

[57] The wording about termination in the November 3, 2014 memo must be considered in the context of the employer's on-going tolerance of the conduct and efforts to source new uniform shirts. There is no compelling evidence B. B. had any reason to believe there was a real possibility she could lose her job for violating the Appellant's uniform policy.

[58] The Tribunal makes no findings as to whether the Appellant had cause to terminate B. B. for her breach of the uniform policy.

[59] The Tribunal does, however, find that B. B.'s breach of this policy was not the reason she was dismissed from her employment on May 2, 2016. It was an excuse for it.

Cleaning for Private Clients

[60] The original employment contract signed on March 24, 2013 (RGD3-50) provided that B. B. shall use her full time in performing her employment duties (paragraph 1), shall not "solicit the Employer's customers for any purpose at any time" (paragraph 7), and shall not "compete in the same industry for a period of 5 years after employment ceases" (paragraph 8).

[61] The Appellant provided numerous written statements from current and former employees, some of whom were former cleaning partners of B. B., to the effect that the Appellant had a well-known workplace policy prohibiting employees from competing with the Appellant or stealing clients (see examples at RGD3-61, RGD3-40 and RGD3-43) and from cleaning privately on the side (see examples at RGD3-39, RGD3-41 and RGD3-45).

[62] In her application for EI benefits, B. B. denied she was cleaning on the side (GD3-11), but subsequently told the Commission that she cleaned for X (X) for 2 years on the side, and that E. W. was made aware of it 1.5 years ago (GD3-105).

[63] On May 26, 2016, E. W. told the Commission that the main reason for the termination was because B. B. was soliciting clients and using company supplies for her own work (GD3-21). She provided the Commission with a copy of the May 7, 2016 Termination Letter, which provided in part:

> "Section 1, 7, 8 deal with your responsibilities as a X employee. You are to exert your full efforts to the X Company and not solicit customers etc. You have violated this portion of *(sic)* contract on several occasions. You clean privately outside of your contract. Approximately 1.5 years ago, this was brought to my attention by a third party employee who felt it should be dealt with immediately. At that time, you were verbally warned to stop privately cleaning outside of X with X. Not, *(sic)* only did this not happen but *(sic)* recently solicited our customer X on April 27 (Section 7) on X Time. Due to the economy we can no longer ignore your behavior as it is a threat to the company and all others who work within. As previously stated You were verbally warned to stop cleaning

> outside of your contract and told this was a fireable offense. You were told if you continued and it was brought to my attention again, you would be terminated with cause." (GD3-98 and GD3-118)

[64] The Appellant also provided a memo outlining what was discussed at the staff meeting on May 2, 2016. It reads in part as follows:

> "The third point of the meeting the reason it was called was to discusses *(sic)* the portion of your contract dealing with soliciting customers for private cleaning purposes. During the meeting we discussed B. B. soliciting X our customer due to the downturn of the economy. We clearly stated this was a fireable offense and that it would lead to termination with cause." (GD3-95)

[65] In her reconsideration interview on June 22, 2016 (GD3-115), E. W. told the Commission that the only reason B. B. was dismissed was because she had been soliciting clients of X and doing private cleaning on the side over the past year. She also said that no other issue or event was involved in the decision to dismiss.

[66] The Commission's agent made the following note about the interview:

> "E. W. said she knew over the past year the claimant has been working as a cleaner on the side and has spoken to her several times asking her to stop. As recently as Monday, May 2nd, staff were advised during a general meeting that they are not permitted to solicit X customer's *(sic)* pursuant to the employment contract. E. W. said when she received confirmation on Thursday, May 5th from a X client, X, that the claimant was continuing to work privately as a cleaner, she immediately called the claimant and dismissed her." (GD3-115).

[67] E. W. told the Commission that X was never a client of X, but that they provided her with a letter proving B. B. was performing cleaning work outside of her X employment (see GD3-269 and GD3-209).

[68] In her reconsideration interview (GD3-270), B. B. told the Commission that she never solicited a X client for work, but had been providing casual cleaning services privately. B. B. indicated it was not a violation of her employment contract to provide cleaning services outside of X's clientele.

[69] E. W. testified as follows:

- When she interviewed B. B. for the job, she asked if she had any private cleaning clients. B. B. said No.

- She would not have hired B. B. if she had private cleaning clients, as this is a conflict of interest. If an employee is cleaning privately, they are competing with the Appellant. She went over this very carefully with B. B. and with all employees she hired; and everyone was told they would be fired if they cleaned privately.

- She also reviewed the non-solicitation of X's clients provision in the employment contract (at RGD3-50) and had B. B. initial that on paragraph #7.

- Employees are provided with a company car and they are allowed to use it for personal use – but not to privately clean.

- She had B. B. sign a new employment contract on February 11, 2014 (RGD3-52 to RGD3-53) because she suspected B. B. was privately cleaning on the side and wanted to reiterate all the rules. The new contract contained "an extra non-compete clause".

- She had confronted B. B. several times about her suspicions and B. B. always promised to stop. E. W. kept giving her another chance because B. B. is "a single mom and kept promising to fly straight".

- When B. B. first started working for the Appellant, she showed up on time, was dependable and very methodical. But a few months later, she started to get complaints about B. B. (see example at RGD3-154), so she verbally warned her that her performance needed to improve and offered B. B. "incentives".

- In late 2014 or early 2015, she "got the receipt book" B. B. was using for private cleaning from another employee. She talked to X and confirmed it, and then had a long talk with B. B. and told her this was a fireable offence and she was costing the company business. She told B. B. this was "very serious" and had to stop or she would be fired. B. B. was "verbally warned" and promised to stop.

- But after the B. B. called and "yelled" at her about K. S.not working on the day of B. B.'S medical appointment, she "hung up the phone and called X" and confirmed B. B. was still cleaning for them. E. W. stated:

> "That prompted an investigation. Her yelling at me and attacking me – with the smoking in the car and everything else that had been going on and on and on and not improving, and all of her promises that it was – prompted an investigation."

- She took a week and "did an investigation" to see if she could prove B. B. was doing "anything else". She found documentation that showed B. B. was using "far more gas and supplies" than all of the other routes and other employees who were driving farther distances on their routes (see RGD3-101 to RGD3-122, RGD3-162 and RGD3-165). She also contacted "other people" and "they have all written testimonies", including B. B.'s "roommate" (at RGD3-59) who confirmed it.

- She eventually got a letter from X (at RGD3-170 – the date on the letter contains a "typo" and should be May 26, 2015) confirming B. B. had cleaned for them between July 2014 and May 2016. She stated:

> "This showed the promises were never going to be kept."

- The investigation occurred in the week before B. B. was fired and took about a weeK. S. E. W. stated:

> "You have to have proof. You can't just fire somebody."
>
> And
>
> "She yelled at me and it prompted an investigation. Do I have grounds, legal grounds to fire someone? Because you can't just fire anybody."

- X is not a client of the Appellant. But she considers "everybody in X" to be a potential X client. That included X.

- After B. B. was fired, she and K. S.called E. W. from one of the Appellant's customer's houses and "bragged they'd stolen the customer".

[70] When the Tribunal asked E. W. why she fired B. B. on May 2, 2016, she answered that she had told her a year earlier that if she was caught privately cleaning again, she would be fired. The smoking and uniform breaches were also issues that she kept making promises for. When B. B. was caught privately cleaning again, that was "the last straw". The economy was "going down" and E. W. had to "protect the business". There would be "no more second chances" for B. B..

[71] T. C. (T. C.), a witness for the Appellant, testified on January 24, 2019. T. C.stated that she worked for the Appellant from December 2014 to January 2016. T. C. further stated that:

- Before she signed her employment contract, E. W. explained everything – that you can't smoke in the car, you have to wear the uniform, and you can't work for anyone else.
- The phrase "Can't work for anyone else" meant employees couldn't do "private cleaning for anyone where we get the money and not X."
- Before T. C. went on maternity leave in 2016, she saw E. W. confront B. B. about working for X. E. W. told B. B. that she can't work for them and gave her 2 or 3 warnings in the conversation.

[72] E. N. (E. N.), another witness for the Appellant, testified on January 24, 2019. E. N. stated that she worked for the Appellant for 3 years between 2012 and 2015. E. N. further stated that:

- She worked with B. B..
- She overheard B. B. admit to other employees that she was cleaning on the side and had "taken clients" and "sabotaged" E. W.'s relationship "with that customer".

[73] B. M. (B. M.), a further witness for the Appellant, testified on January 24, 2019. B. M. stated that she worked for the Appellant in X from 2014 to 2015. B. M. further stated that:

- When she was hired, she was told about the rules – no smoking the car, you had to wear the uniform, no cleaning privately.
- Employees were not allowed to privately clean for other clients "out of respect" and because it was in the employment contract.

- The phrase "Can't clean privately" meant "no after-hours cleaning and no cleaning when I'm not under her company."

[74] B. B. testified as follows:

- She was "an excellent cleaner" and went "above and beyond" in her work for the Appellant.
- She got 3 pay raises during her time with the Appellant.
- She never signed the second employment contract (at RGD3-52 to RGD3-53). Those are not her initials at RGD3-52 or RGD3-53 and, unlike the original employment contract, there isn't even a signature on the document.
- The second employment contract purports to have been signed on February 11, 2014. But the X letter E. W. provided states she didn't even start to clean for them until July 2014. So how can E. W. say she had me sign this new contract in because I was cleaning for X?
- She couldn't even drive the company car. She stated:

  > "I have anxiety and a 2 year-old daughter and had no licence. I never got behind the wheel."

- Her work partners did the driving and took the company car home at the end of the day.
- She only got her "L" licence towards the end of her employment with the Appellant. She didn't drive the company car. And she didn't have the gas card – the driver did. It wasn't her who drove the car or "racked up" the gas bills.
- X used X from February 2009 to March 2014 (see RGD5-165).
- She started cleaning for X on weekends in 2014. She got the job through a friend.
- She never used any of the Appellant's supplies or gas for her cleaning at X.
- X supplied their own cleaning products.
- She never used the company car to get to X.
- She could walk to X from her house.
- X provided the email at RGD21-2 which reads as follows:

  > "In September of 2014 B. B. was hired on a recommendation from a work colleague and X was never considered for this job. During the time that B. B.

> worked for us cleaning our crew house, X supplied all cleaning materials and equipment required to do the task."

- She did not tell E. W. she was cleaning for X on the side because X was never a client of the Appellant's and they were not potential business for X. She "asked X", but they never wanted to be a client of the Appellant's.
- X provided the email at RGD5-191 indicating that "X has never been solicited by X to clean the crew house".
- She never thought she could get fired for cleaning at X on her weekends.
- Her employment contract required her to devote her full time to her duties for the Appellant. Full time means Monday to Friday, from 9am to 5pm. Cleaning for X on her own time was not a breach of this.
- She never solicited X, who was a client of the Appellants.
- X provided her with a written statement confirming she did not solicit them. It reads as follows:

> "B. B.worked 4 days under X cleaning X well site shacks. She could complete cleaning tasks and duties fast, efficient, and properly with out *(sic)* a problem. She never solicited X nor did she slander any of the other X workers. When asked if she could vouch for the other workers she simply stated that she did not know them personally or how they work so she could not answer that question." (RGD21-19)

- In response to the written statement by T. M. relied upon by the Appellant (at RGD3-59), B. B. stated:

> "I lived with T. M. for about 8 months and then kicked her out of the house for partying and not paying rent, so she had a vendetta and these statements are untrue."

- In response to the written statement by J. S. relied upon by the Appellant (at RGD3-61), B. B. stated that J. S. told her that she never made this statement or signed it.
- She has never even met most of the other people who provided statements to E. W. and queries how they can know her.
- With respect to the testimony of E. N., B. B. stated that she worked with her "maybe twice" and "everything she said" is "a lie".

[75] On cross-examination, B. B. denied she was ever told she could not privately clean while employed by the Appellant.

[76] B. B. also denied that her relationship with E. W. was "strained" in 2016. She signed the March 3, 2016 Disciplinary Letter about smoking in the vehicle as a "respect thing". She signed things she didn't agree with because she did not want to lose her job.

[77] The Tribunal finds that B. B. was aware of the Appellant's policy against private cleaning on the side by employees. Her employment contract did not contain a clause explicitly prohibiting such conduct, although it is implied in paragraph 1. But the Appellant's prohibition against cleaning privately on the side was confirmed by the numerous written statements and testimony from other employees and, as such, was a well-known workplace policy. It is not plausible that the workplace policy and overall intent of non-competition provisions in B. B.'s employment contract were not explained or emphasized when she was hired.

[78] The Tribunal further finds that B. B. breached this policy by cleaning for X outside of her employment with the Appellant. While she may have believed it was okay to do so because X was not – and had no intention of becoming – a client of the Appellant's, this distinction does not justify her decision to ignore the spirit and intent of the non-competition provisions in her employment contract. And if this distinction was going to be relied upon as an exemption from the policy, then B. B. could have secured the Appellant's consent after it was clear X was not going to sign up with X. It is telling that she did not do so.

[79] However, the Tribunal finds that this breach of workplace policy was not the operative cause of B. B.'s dismissal on May 2, 2019. Rather, the conduct was on-going and the employer was aware of it and chose to turn a blind eye. During the reconsideration process, E. W. told the Commission's agent that she had known about the private cleaning over the past year and warned B. B. about it several times (see paragraph 66 above). The Tribunal finds it highly significant that the very first thing E. W. did after being yelled at by B. B. on the day of her medical appointment was to phone X (see paragraph 69 above). This strongly leads the Tribunal to conclude that E. W. knew about the private cleaning and was prepared to do nothing about it until she was yelled at by B. B. "at the top of her lungs with profanities" (RGD5-32) and decided to set about building a case for termination.

[80] The wording about termination in the employment contract must be considered in the context of the employer's on-going tolerance of the conduct. There is no compelling evidence B. B. had any reason to believe there was a real possibility she could lose her job for violating the Appellant's policy against private cleaning.

[81] The Tribunal makes no findings as to whether the Appellant had cause to terminate B. B. for her breach of the private cleaning policy.

[82] The Tribunal does, however, find that B. B.'s breach of this policy was not the reason she was dismissed from her employment on May 2, 2016. It was an excuse for it.

Personal Decision made by E. W.

[83] As stated above, the Tribunal finds that none of the 3 policy breaches cited by the Appellant were the operative cause of B. B.'s separation from her employment.

[84] The Tribunal finds that the real reason B. B. was dismissed was because E. W. came to a personal decision to part ways with B. B. and no longer wished to employ her.

[85] This decision was triggered by B. B.'s act of confronting E. W. in a hostile manner about K. S.not being given work when B. B. was absent for a medical appointment on April 26, 2016.

[86] In an email to the Tribunal on June 9, 2017, E. W. wrote that B. B. was "fired a week after the **initial incident** where she demanded I put someone on the schedule at the top of her lungs with profanities" (RGD5-32) (emphasis added).

[87] On May 4, 2016, B. B. described the confrontation with E. W. in her application for EI benefits (at GD3-9 to GD3-11). She stated it was E. W. who started the yelling by accusing her of lying about her medical appointment. B. B. then got emotional with E. W. and "threatened the Labor Board if she didn't let my co worker come and work". Further details about the confrontation were provided by B. B. in her interview with the Commission on June 22, 2016 (see GD3-114). She described the stress she felt about having to provide details about her medical appointment, being called a liar and thinking her job was over. As the conversation escalated, she told E. W. she had a right to severance pay and would be going to Labour Standards.

[88] E. W. described the confrontation in a memo to the Commission on June 8, 2016 (GD3-100). On the morning of April 26, 2016, B. B. texted to say she was not able to work because she had an appointment. E. W. texted back that this was fine. She gave the work that would have gone to B. B. and her partner, K., to another group because K. S.had recently "wrecked" a microwave and she didn't want K. S.to clean without B. B. "to watch her". K. S.asked to be dropped off at B. B.'s home, which she did. B. B. then telephoned E. W. and "yelled at the top of her lungs" and threatened to take E. W. "to Employment Standards, WCB, Human Rights, X, Police etc."

[89] E. W. implemented her personal decision to part ways with B. B. when she terminated her following the staff meeting on May 2, 2016 and prepared her ROE the same day. This was after having taken a week for an "investigation" to build the case to dismiss B. B. for cause.

[90] When B. B. asked E. W. why she was being let go, E. W. said she had "taken advantage" of her and would not be getting severance pay or 2 weeks notice because she had been terminated with cause (GD3-11).

[91] From the outset, B. B. believed E. W. was "using other tools to her advantage" to justify the termination so she could avoid paying severance (GD3-11).

[92] This belief is supported by E. W.'s E-mail on May 17, 2016 to X's head office which reads as follows:

> "Can you please send me the amount of money, I have spent on Uniform Shirts and Aprons from the beginning of time? **I am in a battle with B. B., I could not afford to pay her off so I had to terminate her.** Thus I am in a battle. One of the points of her contract she consistently broke was not wearing her uniform shift. I went through a great deal of trouble and money to purchase many different shirts. If it would be at all possible to get this to me today, it is a priority." (GD3-47) (emphasis added)

[93] The Tribunal gives significant weight to this E-mail. It was written a mere 2 weeks after the termination and is important because it was sent spontaneously and before E. W. was ever contacted by the Commission about B. B.'s application for EI benefits. It demonstrates the personal nature of E. W.'s decision to terminate B. B.'S employment. It also shows E. W. was

aware that she would have had to pay B. B. if she let her go for personal reasons, and that instead of doing that, she was actively looking to justify the decision by claiming the termination was for cause – namely breaches of workplace policies.

[94] It's troubling that, in her efforts to gather evidence to defend her course of action when B. B. inevitably sought pay in lieu of notice and severance, E. W. asked head office for the amount of money she had spent on uniforms "from the beginning of time". Presumably the more appropriate period to look at would have been the period of B. B.'S employment; or, more accurately, from the point the uniform shirts became an issue, such as when she issued the memo about wearing the shirts on November 3, 2014.

[95] The Tribunal also gives weight to E. W.'s comments on the ROE prepared May 2, 2016, as they were made contemporaneously with the termination and prior to any contact from the Commission. While E. W. may not have been prepared to give B. B. pay in lieu or notice or severance, she nonetheless clearly hoped B. B. would receive EI benefits:

> "This employee was terminated with cause but due to length of service, I hope she will receive EI. She has earned EI."

[96] But in an E-mail to the Commission on June 23, 2016, E. W. retracted these comments (see GD3-116), and stated:

> "I *(sic)* very much like to retract my initial statement on B. B. ROE Form. She does not deserve EI, please save the tax payers money. Since this has began *(sic)* there are now 4 law suits that are waiting to initiate against B. B."

E. W. then listed the law suits as:

1. An anti-defamation league law suit for hate crimes for three discriminatory comments about E. W.'s race and religion.
2. A sexual harassment enquiry for inappropriate conduct by B. B.
3. "Fraud", with no explanation as to the nature of the fraud except a reference to $10,000 worth of monies owed to the Appellant for "lost gas, insurance, time, travel, supplies used for her private cleaning using our equipment".
4. A report to the police that B. B. and K. S.were suspected to have "stolen our boat".

[97] E. W. testified that she did not fire B. B. on the day she was unavailable to work due to her medical appointment. It came about after she was "attacked" in emotional texts from both B. B. and K. S.for not giving K. S.work that day. E. W. stated they both kept "bombarding me with negative text messages" about being fired and that was when she decided "I'm going to do an investigation" to see if B. B. was still violating the workplace policies. The termination came "a week to a week-and-a-half later", after E. W. had conducted her investigation and confirmed B. B. was not "improving on all the things I had asked her to do".

[98] B. B. told the Commission that she and E. W. had been friends outside of work, but their relationship seemed to be negatively affected over the last few months of her employment, culminating in the heated exchange on the day of her medical appointment (GD3-114). On cross-examination, she denied the relationship was strained" in early 2016 and that she believed they had a "decent" relationship at that point. She signed the smoking disciplinary letter as "a respect thing" and was always respectful to "E. W." out of fear of losing her job.

[99] The Tribunal asked E. W. to explain why she changed her mind about B. B.'s entitlement to EI benefits after the termination, as she had originally stated on the ROE that B. B. should receive them. E. W. answered as follows:

> "Well first off, many things changed. There was a lot of lying that came out and a lot of attacking that came out. So first off, what we went through – what my personal family went through – after this…we had one of our company cars rammed into, there was people at my house stealing, we had our boat stolen…"
>
> "The thing is, I suspected this had a lot to do with B. B. because, what happened was, after J. [NOTE – this is not a reference to B. B., but to another employee] actually was caught with the theft, I wanted to press charges because I had the evidence. I had the evidence and it's still there. And the police came to me and said don't. Let's just try and stop this and get everybody to stop and calm down. And I agreed that that was the right path to follow, so I did not press charges. But at this point, so many lies and attacking and everything to my family – and then I get this document stating that I have done wrong and that she did not deserve to be fired. She actually did. She broke several of the contract terms."
>
> "At the bottom of the letter it said X did not have grounds for misconduct, but in fact I did. I had plenty of grounds for misconduct. I just wanted her to get the EI so that she

> would be happy and that we could both go our separate ways. But it said at the bottom of the letter that I did not have grounds for misconduct. I did. I had plenty of grounds."

[100] The Commission's reconsideration decision letter to E. W. (at GD3-273 to GD3-274) states:

> "We have approved the claim for Employment Insurance benefits of your employee, B. B..
>
> Our decision is based on the *Employment Insurance Act.* We consider that you did not provide enough information to prove that your former employee lost their job because of their own misconduct." (GD3-273)

[101] Nowhere in the letter does it say that the Commission determined E. W. did not have cause for terminating B. B.

[102] On at least 2 occasions during the 12 months it took to hear this appeal, the Tribunal paused the proceeding and explained to E. W. that this appeal was not about the employer's conduct – and that the decision in this appeal would not provide her with a declaration that she had cause for terminating B. B.'s employment. Rather, it would only result in a ruling as to whether B. B. lost her employment due to misconduct **as that term is interpreted for purposes of the EI Act**. E. W. nonetheless persisted in providing numerous witness statements and lengthy testimony to the effect that she is a good person and a good employer, and that she was justified in terminating B. B.

[103] The Tribunal cannot ignore the impact that E. W.'s erroneous interpretation of the Commission's reconsideration decision had on her motivation in opposing B. B.'s entitlement to EI benefits.

[104] The Tribunal also cannot ignore the various personal conflicts that arose between E. W. and B. B. ***after the termination*** and how these have coloured her statements. In her letter to the Commission on June 23, 2016, E. W. stated:

> "B. B. and K. S. are suspected to have stolen our boat, recently. This crime has been reported and they are the prime suspects in the case. As you can see, our boat was no

> prize, no one would want it. Why all of sudden has it gone missing. We all know the answer.
>
> I am due for three months of chemotherapy. This business and these girls have taken my financial stability, my second born child, and my health. Our business is closing due to B. B. and her conduct ***after her termination***." (GD3-116) (emphasis added)

[105] In her testimony in reply, E. W. stated:

- On March 6, 2016, there was a theft by "J.", who is one of B. B.'s "character witnesses". The police recovered the item on March 11, 2016.

- E. W. subsequently wanted to press criminal charges for this theft. However, the police told E. W. that it was "theft under $1,000", and pointed out that E. W. had had her boat stolen, her company car "rammed into", and "a boyfriend up here pounding on the door", and told her not to press charges. The police suggested E. W. instead offer B. B. a settlement in the Employment Standards proceeding she commenced after her termination to "end this".

- E. W. did offer a settlement, but B. B. rejected it and ultimately lost her case before Employment Standards. E. W. stated:

  > "Because she lost, I had cause. That's proven."

- Another one of B. B.'s "character witnesses" is "C.", who was drunk driving in the Appellant's company vehicle and had it impounded.

- E. W. recently went to the RCMP to request an investigation and charges against B. B. for falsely accusing E. W. of "forging her signature" on documents in this appeal.

- If you look at B. B.'s "current website", many of the names on her client list were on her route when she worked for the Appellant.

[106] As stated above, the Tribunal cannot ignore the impact of these post-termination conflicts on E. W.'s motivation in opposing B. B.'s entitlement to EI benefits.

[107] For all of these reasons, the Tribunal gives greatest weight to E. W.'s testimony that she had no intention of firing B. B. on April 26, 2016, and only started down the path towards termination because of the confrontation with B. B. on the phone after her medical appointment and the hostile texts she received from B. B. and K. S.after that.

[108] There must be a causal relationship between the misconduct of which B. B. is accused and the loss of her employment with the Appellant in order for her to be disqualified from receipt of EI benefits. Said differently, the alleged misconduct must be the operative cause for her loss of employment. While the Tribunal has found that B. B. did violate the 3 workplace policies identified by the Appellant, the Tribunal is not satisfied the violations were the real cause of the separation from employment in this case. Rather, the Tribunal has found that they were on-going violations that were tolerated by the employer, and merely the excuse for terminating B. B.'s employment.

[109] The Appellant's representative referred the Tribunal to the decision of a different Member in *Illimicell Inc. v. Canada Employment Insurance Commission, 2015 SSTGDEI 23.* While a decision of one Member of the Tribunal is not binding on another, this particular decision is distinguishable from the present fact scenario for two reasons: the Tribunal has found the employer tolerated the workplace violations; and the Tribunal accepted E. W.'s own testimony that she would not have fired B. B. but for their unpleasant exchange on April 26, 2016, which is what prompted her to do the "investigation" and build the case for termination with cause based on the workplace policy violations.

[110] The Tribunal finds that the real reason B. B. was separated from her employment on May 2, 2016 was because E. W. made a personal decision to part ways with B. B. after their hostile exchange on April 26, 2016.

Issue 2: Does the conduct constitute "misconduct" within the meaning of the EI Act?

[111] The Tribunal acknowledges the many glowing references from former employees of the Appellant stating that E. W. is a fair and considerate employer. However, it is not the role of the Tribunal to determine whether the steps taken by the employer in terminating B. B. were appropriate or justified (*Caul 2006 FCA 251*), but rather whether the conduct that the employer

alleges led to the separation from employment amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[112] The Federal Court of Appeal has held that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not merely on speculation and suppositions, and that it must be proven with such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. It is not the excuse used by the employer for dismissing a claimant but the real reason for the dismissal that is relevant to a finding of misconduct: *Davlut A-241-82*.

[113] As set out in the analysis under Issue 1 above, the Tribunal has significant doubt about whether the Appellant was terminated because she violated the employer's workplace policies with respect to smoking in the company vehicle, wearing the uniform and cleaning for private clients; and finds it far more likely that E. W. came to a personal decision to part ways with B. B. after their confrontation on April 26, 2016. This is especially the case given the evidence that E. W. was actively seeking to avoid having to pay severance to B. B. by building a case for termination with cause.

[114] While there were violations of the workplace policies by B. B., there are also genuine questions about the Appellant's true motivation for dismissing B. B. with cause and for challenging her entitlement to EI benefits. The Appellant relies on the employment standards decision as proof E. W. had cause to fire B. B. The Tribunal acknowledges that the adjudicator in that case did find the Appellant had cause to terminate B. B. and, therefore, did not owe her any severance. However, the employment standards decision is not a determination of misconduct for purposes of EI benefits. The Tribunal must consider the question of whether B. B.'s actions amounted to misconduct in law while ignoring the employer's subjective assessment as to whether that misconduct warranted dismissal in the circumstances. It would be wrong for the Tribunal to address the question by looking at the reasonableness of the employer's decision (*Summers A-225-94*). It is for the Tribunal to assess the evidence and come to a decision; and it is not bound by how a third party might characterize the grounds on which an employment has been terminated (*Morris A-291-98*, leave to S.C.C. refused, *[1999] S.C.C.A. No. 304*; *Boulton A-45-96; Perusse A-309-81*).

[115] It may be the case that B. B. was terminated with cause, as E. W. so tenaciously maintained. But that does not necessarily prevent B. B. from receipt of EI benefits. It is possible that behaviour which constitutes "cause" does not rise to the level of misconduct for purposes of the EI Act. The Appellant must prove that the termination was due to misconduct - not as E. W. defines the term, but as the term is considered for purposes of the EI Act. The Appellant has not done so.

[116] There are also conflicting versions of the events surrounding the hostile confrontation on April 26, 2016. While E. W. repeatedly stated that she felt "attacked" during the phone call and subsequent negative texts (which are no longer available for review), B. B. just as adamantly maintained that things only escalated because she was compelled to disclose the nature of her medical appointment to E. W. and then, believing she had been fired, raised the issue of severance pay – which E. W. didn't want to hear about. The two versions of what happened between E. W. and B. B. on April 26, 2016 are radically different. In the absence of the entire chain of subsequent negative text messages E. W. says she was bombarded with, the Tribunal considers the evidence it has heard about the exchange to be evenly balanced on both sides.

[117] The Tribunal must have sufficiently detailed evidence for it to be able, first, to know how B. B. behaved, and second, to decide whether such behaviour was reprehensible (*Meunier A-130-96; Joseph A-636-85*). With the lack of clear evidence to support the Appellant's position that B. B. was, in fact, terminated for her breaches of workplace policies (as discussed under Issue 1 above), and the conflicting versions of events surrounding the confrontation on April 26, 2016, the Tribunal must be guided by the Federal Court of Appeal's ruling in *Bartone A-369-88* and give the benefit of the doubt to the Appellant.

[118] For all of these reasons, the Tribunal finds there is no evidence that conclusively points to willful or reckless behavior on the part of B. B. which she knew or ought to have known could have resulted in the termination of her employment with the Appellant. As such, the employer's evidence is not sufficient to prove misconduct in the present case.

CONCLUSION

[119] The Tribunal finds that the Appellant has not proven, on a balance of probabilities, that B. B. lost her employment at X due to her own misconduct.

[120] The Tribunal therefore finds that B. B. is not subject to disqualification from receipt of EI benefits pursuant to section 30 of the EI Act on the claim she established effective May 1, 2016.

[121] The appeal is dismissed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON: (* Case Conferences)	July 31, 2018* August 30, 2018* December 18, 2018 (3 hrs) January 24, 2019 (3 hrs) March 27, 2019* March 28, 2019* April 10, 2019* June 6, 2019* July 11, 2019 (3 hrs)
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. W. on behalf of X, Appellant Eric Chow, Alan Yip, and Alfonso Chen, Representatives for the Appellant B. B., Added Party