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

Citation: *X and Canada Employment Insurance Commission and M. D.*, 2020 SST 97

Tribunal File Number: AD-19-866

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

M. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: February 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, X (Employer), is seeking leave to appeal the General Division's decision. Leave to appeal means that an applicant has to get permission from the Appeal Division. An applicant has to get this permission before they can move on to the next stage of the appeal process. An applicant has to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division determined that the Employer had not proven that the Added Party, M. D. (Claimant), lost her job because of misconduct. Following the Claimant's dismissal from her employment, the Employer discovered discrepancies in the Claimant's payroll.[2] The employer alleges theft by the Claimant. The Employer argues that the alleged theft—discovered after the Claimant's dismissal—constitutes misconduct and that it should be a basis upon which to disqualify the Claimant from receiving any Employment Insurance benefits. The Employer argues that the General Division made several legal errors in its decision.

[4] I have to decide whether the appeal has a reasonable chance of success. For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

ISSUE

[5] The only issue before me is whether there is an arguable case that the General Division made any legal errors.

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[1] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[2] The specific allegations against the Added Party are set out in the Employer's submissions dated October 20, 2019, at GD12-46.

ANALYSIS

[6] Before the Applicant can move on to the next stage of the appeal, I have to be satisfied that the Applicant's reasons for appeal fall into at least one of the three types of errors listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The types of errors are:

(a) The General Division process was unfair.

(b) The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.

(c) The General Division made an error of law when making a decision.

(d) The General Division based its decision on an important error of fact.

[7] The appeal also has to have a reasonable chance of success. This is a relatively low bar because claimants do not have to prove their case at this stage of the appeals process.

[8] The Employer submits that the General Division made several legal errors, as follows:

a. finding that "misconduct" requires a direct causal relationship to the Claimant's loss of employment; despite jurisprudence suggesting otherwise;

b. concluding that the Claimant did not lose her employment because of misconduct without assessing whether any of the alleged misconduct is in fact misconduct; and,

c. concluding that misconduct committed by the Claimant during her employment but discovered after the Claimant's termination cannot be used to disqualify a Claimant pursuant to subsection 30(1) of the *Employment Insurance Act* ("EI Act") despite jurisprudence suggesting otherwise.

[9] The Employer is revisiting arguments that it made at the General Division. Establishing misconduct lies at the heart of the Employer's application. The Employer maintains that conduct discovered after an employee's dismissal may disqualify a claimant from receiving any

Employment Insurance benefits under subsection 30(1) of the *Employment Insurance Act*. In other words, the Employer argues that there need not be a direct causal relationship between a claimant's misconduct and their dismissal.

[10] Subsection 30(1) reads as follows:

> 30.(1) **Disqualification—misconduct or leaving without just cause—**A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause …

[11] The Employer refers to three decisions cited by the General Division. They include *Canada (Attorney General) v. Brissette*,[3] *Smith v. Canada (Attorney General)*,[4] and *Canada (Attorney General) v. McNamara*.[5] The Employer asserts that the three decisions support its position that subsection 30(1) may disqualify claimants whose misconduct resulted in dismissal from their employment. However, those cases do not involve conduct that the employer discovered after the employee's dismissal.

[12] Despite the fact that the Employer relies on *Brissette*, in part, I note that Mr. Justice Létourneau wrote the following, at paragraph 12 :

> This being said, the fact that what is done might constitute misconduct under subsection 28(1) does not mean, however, that it necessarily results in disqualification from receiving unemployment insurance benefits. **There must, first, be a causal relationship between the misconduct and the dismissal**. It is not sufficient, in order for the disqualification to come into play, for the misconduct to be a mere excuse or pretext for the dismissal (see CUB-4503, February 4, 1977, Mahoney J.). It must cause the loss of employment and must be an operative cause. It is not necessary for the purposes of this case to determine whether it must be the only operative cause of the dismissal. (My emphasis)

[13] This would seem to respond to the Employer's argument that there need not be a direct causal relationship between a claimant's misconduct and their dismissal.

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[3] *Canada (Attorney General) v. Brissette*, A-1342-92. See AD1-33 to AD1-37.
[4] *Smith v. Canada (Attorney General)*, A-875-96. See AD1-38 to AD1-48.
[5] *(Attorney General) v. McNamara*, 2007 FCA 107. See AD1-49 to AD1-59.

[14] The Employer also relies on *Lake Ontario Portland Cement Co. Ltd. v. Groner*.[6] There, the Supreme Court of Canada wrote:

> The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., v. 22, p. 155, where it is said:
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> > It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

[15] The decision however does not address the issue of whether a causal relationship between misconduct and dismissal is required for the purposes of the *Employment Insurance Act*. In other words, the Supreme Court of Canada did not address the issue of whether an employee would be disqualified from receiving benefits if their dismissal was the result of misconduct. The decision therefore is of limited applicability.

[16] Interestingly, the Employer relies on *Reist* CUB 6666,[7] to show the close relationship between misconduct and the concept of just cause. Yet, the Umpire in that case determined that the reason for the loss of employment must be the employee's misconduct and that the conduct falls within the meaning of the word "misconduct."

[17] The Employer argues that there are at least two decisions where Umpires have decided that, for the purposes of "misconduct" under subsection 30(1) of the *Employment Insurance Act*, it does not matter whether the misconduct occurs before or after the dismissal.

[18] The first of these decisions is *Mallach* CUB 25896A.[8] The employer advised Mallach that it would no longer require his services because of a work shortage and a change in company

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[6] *Lake Ontario Portland Cement Co. Ltd. v. Groner*, 1961 CanLII 1 (SCC), [1961] SCR 553 at para. 28. See AD1-68 to AD1-76.
[7] *Reist* CUB 6666, at AD1-60 to AD1-67.
[8] *Mallach* CUB 25896A, at AD1-77 to AD1-79.

ownership. After Mallach left the company, the employer discovered that Mallach had misappropriated company funds. The employer issued a record of employment stating that it had dismissed Mallach with cause and that "cause discovered post-termination." The Umpire decided that the immediate and subsequent discovery of Mallach's misconduct could not justify payment of benefits. Had Mallach remained with the company, the employer would have fired or dismissed him because of that misconduct. The Umpire was of the view that the fact that Mallach had left a few days before the discovery of his misconduct was not enough to shelter him from the consequences of his misconduct. The Umpire allowed the employer's appeal, thus denying benefits to Mallach.

[19] The second decision is *Ciolfitto* CUB 58110.[9] The Umpire ordered a new hearing because the Board's assessment of the facts was unsatisfactory. The Umpire determined that the respondent's character, rather than the misconduct itself, justified the respondent's dismissal. The Umpire referred to *Walerius v. McDiarmid Lumber Ltd.*,[10] for the proposition that an employee's conduct, subsequent to his dismissal, could be used to justify the dismissal.

[20] *Ciolfitto* was heard a second time before an Umpire.[11] The Claimant's father was a co-employer. Mr. Paterra was also a co-employer and president of the company. The Claimant's father slapped his son and told him he was fired. In turn, Ciolfitto slapped Mr. Paterra. Mr. Paterra later stated that he had dismissed Ciolfitto for assaulting him. The Commission determined that because the assault took place after the dismissal, this could not amount to misconduct.

[21] The employer appealed the Commission's decision to the Board of Referees. The Board found that the incident fit a pattern of behaviour for Ciolfitto. There had been previous incidents of unacceptable conduct. The Board determined that post-termination behaviour was a factor to justify earlier termination, so it made no difference whether the employer dismissed Ciolfitto before or after the assault. The Board concluded that Ciolfitto was dismissed because of misconduct. Ciolfitto appealed this decision.

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[9] *Ciolfitto* CUB 58110, at AD1-14 to AD1-15.
[10] *Walerius v. McDiarmid Lumber Ltd.*, [2000] M.J. No. 234, at AD1-14 to AD1-15.
[11] *Ciolfitto* CUB 60751, at AD1-80 to AD1-83.

[22] The Umpire examined Paterra's evidence before the Board. Paterra testified that as he was walking away, Ciolfitto punched him and threw a battery towards him. At that point, Ciolfitto's father slapped him and fired him later that day. The Board noted that there was a history of prior incidents.

[23] The Umpire found that Ciolfitto never denied Paterra's evidence that Ciolfitto had hit him on the back of the head prior to being dismissed by his father. The Umpire determined that the Board did not err. The evidence was uncontested that Ciolfitto's aggressive behaviour led to his dismissal, initially by his own father and then by Paterra.

[24] Factually, the second *Ciolfitto* decision does not fully support the Employer's arguments that there need not be a casual relationship between misconduct and dismissal.

[25] The General Division addressed the Employer's arguments on this issue. The General Division found that the Federal Court of Appeal has clearly and consistently held that a finding of misconduct requires a causal relationship between a claimant's conduct and the dismissal. The General Division found that an employer was not permitted to dismiss an employee and then look for a reason for the dismissal afterwards.

[26] The Claimant argues that the two Umpire decisions are "isolated cases" that do not represent the law. The Claimant argues that the Appeal Division should refrain from incorporating the doctrine of "after acquired knowledge" into the *Employment Insurance Act*. Otherwise, this will require sweeping changes to the legislation. The Claimant also argues that the doctrine should be available only in very exceptional cases, such as existed in *Mallach.* The Claimant argues that those circumstances do not exist here. If the Employer had acted diligently, it would have discovered the Claimant's alleged misconduct before her dismissal.[12]

[27] The General Division acknowledged that the Employer relied on an Umpire decision. However, the General Division noted that it was not bound by Umpire decisions. In this case, the General Division did not find the reasoning of the Umpire to be persuasive. The General Division found that the Umpire did not directly address the requirement for a causal relationship between the action and the dismissal. Although I find that the Umpire did indeed address this

[12] See Claimant's submissions dated December 5, 2019, at AD1-88 to AD1-95.

issue, ultimately, the General Division member found that she could not ignore Federal Court of Appeal jurisprudence.

[28] I do not have to consider the Claimant's arguments. Despite the fact that neither the *Mallach* or *Ciolfitto* decisions were appealed and arguably may be of some precedential value, decisions of the Federal Court of Appeal are binding on the Social Security Tribunal. As the General Division member noted, there are several decisions of the Federal Court of Appeal that require a causal relationship between the misconduct and the dismissal. The misconduct must cause the loss of employment and must be an operative cause.[13] These decisions are binding on the Social Security Tribunal. It seems to me to be settled law that there must be a causal relationship between the misconduct of which an employee is accused and their dismissal, under subsection 30(1) of the *Employment Insurance Act*.

[29] Finally, the Employer argues that the General Division should have assessed whether the Claimant's conduct was in fact misconduct. That issue was unnecessary to determine, in light of the fact that there must be a causal relationship between the conduct and the dismissal.

CONCLUSION

[30] I am not satisfied that there is an arguable case that the General Division erred in law. I am therefore refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

REPRESENTATIVES:	Jim Wu (counsel), for the Applicant
	Lee A. Cowley (counsel), for the Added Party

[13] See, for example, *Brissette*, *supra*. See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Nelson v. Canada (Attorney General)*, 2019 FCA 222; *Canada (Attorney General) v. Bergeron*, 2011 FCA 284.