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

[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and AA*, 2020 SST 790

Tribunal File Number: AD-20-701

BETWEEN:

X

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 18, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal allows the Employer's appeal.

OVERVIEW

[2] The Added Party, A. A. (Claimant), made an initial claim for Employment Insurance benefits. After reviewing the claim, the Canada Employment Insurance Commission (Commission) approved the claim for benefits. The Commission then imposed a stop payment due to allegations of misconduct that the Appellant (Employer) made.

[3] The Commission then received a reconsideration request from the Claimant and determined that the Employer's information was not enough to find that the Claimant had lost her job because of her own misconduct. The Commission therefore lifted the stop payment it had imposed on the Claimant. The Employer appealed the Commission's reconsideration decision to the Tribunal's General Division.

[4] The General Division determined that the Employer had failed to establish that the Claimant had committed the alleged misconduct leading to her dismissal. The General Division found that the Employer's evidence did not convincingly establish the Claimant's behaviour, which is fundamental in a case of misconduct. The General Division found that the Claimant had not lost her job because of her own misconduct under the *Employment Insurance Act* (EI Act).

[5] The Tribunal's Appeal Division granted leave to appeal. The Employer argued before the Appeal Division that the General Division had made an error in its application of the burden of proof with regard to misconduct under the EI Act. It submitted that the General Division had imposed too high a burden of proof. The Employer argued that the General Division had made an error by ignoring the Court of Québec, Civil Division, decision ordering the Claimant to repay it money that she had allegedly stolen from it and by ignoring the video evidence demonstrating the Claimant's wrongful acts.

[6] In a first decision, the Appeal Division decided that the General Division was not bound by the Court of Québec decision and that it was free to verify and interpret the facts in evidence and assess the issue before it. It found that the General Division had not made an error when it decided that the Employer had not met its burden of proving misconduct on a balance of probabilities.

[7] The Employer applied for judicial review of the Appeal Division decision.

[8] On June 29, 2020, the Federal Court of Appeal set aside the Appeal Division decision. It returned the file to the same Appeal Division member [translation] "to dispose of the appeal in light of *res judicata* relating to the Court of Québec decision."

[9] On July 14, 2020, the Appeal Division asked the parties to file their written submissions after the Federal Court of Appeal decision. The Employer and the Commission responded to the Appeal Division's request.

[10] After reviewing how *res judicata* applies to this case, the Appeal Division now finds that the Claimant committed the alleged acts. The Appeal Division therefore determines that the Claimant committed misconduct, which disqualifies her from receiving benefits.

[11] The Tribunal allows the Employer's appeal.

ISSUES

[12] Did the General Division make an error by dismissing the Court of Québec decision in light of *res judicata*?

[13] If so, what would be the appropriate remedy?

ANALYSIS

Appeal Division's Mandate

[14] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[15] 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.

[16] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of 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.

Issue 1: Did the General Division make an error by dismissing the Court of Québec decision in light of *res judicata*?

[17] The General Division had to decide whether the Claimant had lost her job because of her own misconduct and whether it was necessary to impose a disqualification under sections 29 and 30 of the EI Act.

[18] Prior to the General Division decision, the Court of Québec gave a decision on March 31, 2017, in the context of a civil liability action involving the same parties (except for the Commission), in which the Court of Québec found that the Claimant had committed fraud by using a scheme to steal more than $8,000 from the Employer.[2]

[19] The General Division found that it was not bound by the Court of Québec decision because it did not have the same evidence. It considered that the decision was not evidence in itself that the Claimant had committed the alleged fraudulent acts. The

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] 2017 QCCQ 3564.

General Division therefore gave little weight and importance to the Court of Québec decision.

[20] The parties had the opportunity to make representations to the Appeal Division regarding the application of *res judicata* relating to the Court of Québec decision. The Employer and the Commission filed submissions.

[21] The Employer argues that the General Division made an error of law by dismissing out of hand the Court of Québec decision. It submits that the General Division decision is not substantiated in this regard and that the theory of *res judicata* did not allow the General Division to give it no weight.

[22] The Commission argues that the General Division is not bound by decisions of other courts. It must draw inferences from the facts presented to it. This way, the General Division can adopt a more flexible and informal approach. The Commission submits that, as an administrative tribunal, the General Division is not bound by formal rules of evidence that are applicable in criminal and civil cases.

[23] For the reasons mentioned below, I am of the view that the General Division made an error of law by not considering the application of *res judicata* relating to the Court of Québec decision.

[24] The application of *res judicata* simply means that, in the case where the competent judicial or administrative tribunal determined, based on evidence or admissions, the existence (or non-existence) of a relevant fact—for example, an error—that same question cannot be argued again in a later proceeding involving the same parties.[3]

[25] The criteria for applying this theory are the following:

(1) that the same question has been decided;

[3] *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 54.

> (2) that the judicial decision was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons.[4]

[26] I am of the view that there is no doubt in this case that the Court of Québec decision has all the characteristics of a final decision. It was not subject to an appeal and was even subject to enforcement measures by the Employer. That meets the second criterion.

[27] The identity of the parties criterion is interpreted fairly broadly by case law.[5] In different qualities sometimes, the parties, with others, find themselves involved in parallel proceedings. In this case, the Employer and the Claimant initially found themselves before the Court of Québec to debate the question of the Claimant's fraud. There was debate and contradictory evidence. The same parties then found themselves before the General Division to debate the question of the Claimant's misconduct. In both cases, the question was whether the Claimant had committed the acts alleged by the Employer.

[28] The legal action and the appeal before the General Division are based on the same facts and involve the same parties. Although the Commission is a party to the file, it does not displace the presumption of *res judicata*, which must be assessed based on the parties common to both disputes.[6] The third criterion has therefore been met.

[29] I am also of the view that the first criterion regarding the existence of a "same question" has been met. The infraction that had to be demonstrated before the Court of Québec was the civil fraud—that is, the theft. The Court found that the scheme developed by the Claimant allowed her to steal $8,134.49 from the Employer.

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[4] *Danyluk v Ainsworth Technologies Inc.*, *supra* at para 25.
[5] *Ungava Mineral Exploration Inc. v Mullan*, 2008 QCCA 1354 (CanLII).
[6] *JC v Canada (Attorney General)*, 2012 QCCA 366 (CanLII); *Ungava Mineral Exploration Inc. v Mullan*, *idem*; *Birdsall inc. c In Any Events Inc.*,1999 CanLII 13874 (QCCA); *Lupien c Aumont*, 2017 QCCS 3998 (CanLII).

[30] In this case, the General Division had to determine whether the Claimant had committed the alleged acts. That same question based on the same facts therefore cannot be debated again in the context of a future proceeding between the same parties.

[31] The three criteria allowing for the application of *res judicata* have therefore been met.

[32] However, I must point out that, although the three conditions for the application of *res judicata* are present, its application is not necessarily required. I can exercise my discretionary power and refuse the application of *res judicata*. However, this discretionary power is limited in its application.[7]

[33] The theory of *res judicata* invites the courts to exercise their discretionary power to avoid any form of injustice. It calls for a case-by-case review of the circumstances to determine whether its application would result in an injustice, even though, like in this case, the conditions for applying it have been met.

[34] In the exercise of this discretionary power, I must ask myself the following question: In this case, is there a circumstance in which the application of *res judicata* would create an injustice?

[35] Generally, the factors identified in the case law show that unfairness can arise in two main ways, which overlap and are not mutually exclusive. First, the unfairness of applying *res judicata* may arise from the unfairness of the earlier proceedings. If the earlier proceedings were unfair to a party, binding that party to the resulting outcome for the purposes of any future proceeding would be to double the injustice. Second, even where the earlier proceedings conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.[8]

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[7] *Danyluk v Ainsworth Technologies Inc.*, *supra*, at para 62.
[8] *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 SCR 125, at para 39.

[36] I find that the Claimant was represented by a lawyer before the Court of Québec. She had the opportunity to testify and present a full case. The Claimant did not argue any grounds before me that would allow me to conclude that the earlier proceeding was unfair or improper.

[37] Having found that the earlier proceeding was conducted fairly and properly, I must decide whether it would be unfair to oppose the Court of Québec decision in the appeal before the General Division.

[38] The proceeding before the General Division seeks to determine the Claimant's entitlement to Employment Insurance benefits. However, this process does not provide for compensation or costs in favour of the Employer. In contrast, a civil action provides a forum for the injured party to be compensated, where appropriate. This affects the reasonable expectations of the parties as well as the nature and extent of their participation in the process.

[39] The hearing before the Court of Québec took place in May and November 2016—that is, well before the hearing before the General Division. The Claimant knew that she had to defend herself before the Court of Québec for stealing money from her Employer and that she might eventually have to defend herself, to some extent, in parallel and overlapping proceedings.

[40] As a result, the Claimant could reasonably consider that the Court of Québec decision would have a decisive influence on the outcome of her claim for Employment Insurance benefits and encourage her to participate actively and fully in the process. This is especially true given that the burden of proof (that is, the balance of probabilities) is the same in both proceedings. Therefore, it would not be unfair to oppose the Court of Québec decision at the appeal proceeding before the General Division.

[41] In light of this, I am of the view that there is no circumstance in which the application of *res judicata* would create an injustice.

Issue 2: If so, what would be the appropriate remedy?

[42] Given my finding that the General Division made an error of law by not considering the application of *res judicata* relating to the Court of Québec decision, I am justified to intervene and give the decision that the General Division should have given under section 59(1) of the DESD Act.

[43] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to constitute misconduct, the alleged act must have been wilful or at least of such a careless or negligent nature that it could be said that the employee wilfully disregarded the effects their actions would have on their performance.[9]

[44] As noted earlier, the Employer demonstrated before the Court of Québec that the Claimant stole sums of money from it. The Court found that the scheme developed by the Claimant had allowed her to steal $8,134.49 from the Employer. Applying *res judicata*, I must conclude that the Claimant committed the act alleged by the Employer—that is, stealing money.

[45] I must also conclude that the scheme developed by the Claimant allowing her to steal $8,134.49 from the Employer also constituted misconduct under the EI Act. She knew, or ought to have known, that her conduct was such as to impair the performance of the duties she owed to her employer and that, as a result, dismissal was a real possibility.

[46] The relationship of trust between the Claimant and her employer was broken when she stole sums of money. The Employer could not continue to employ an employee in whom it had no trust. Dismissal was therefore the logical result of the Claimant's behaviour.

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

[47] It is well established in case law that theft committed by an employee at the employer's expense constitutes misconduct under the Act.[10]

CONCLUSION

[48] For the reasons stated above, it is appropriate to allow the Employer's appeal.

Pierre Lafontaine
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	Sébastien Sénéchal, Representative for the Appellant Manon Richardson, Representative for the Respondent

[10] *Carrier v Canada (Attorney General)*, 2002 FCA 12; *Canada (Attorney General) v Caul*, A-441-05; *Canada (Attorney General) v Brissette*, A-1342-92.