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

Citation: *X v Canada Employment Insurance Commission and HM*, 2021 SST 88

Tribunal File Number: AD-20-829

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

H. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: March 10, 2021

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Added Party (Claimant) lost her job of 22 years in the accounting department of the Appellant's (Employer) resort hotel and spa. The Employer dismissed the Claimant for theft of $172,660.00 that occurred in 2017, or, in the alternative, it dismissed the Claimant for gross negligence in the performance of her duties for failure to detect the missing money during 2017.

[3] The Respondent, the Canada Insurance Commission of Canada (Commission), determined that the Claimant had lost her job because of her own misconduct. On reconsideration, the Claimant provided a court decision that acquitted her on two charges of theft and fraud under the *Criminal Code*. The Commission then reviewed its initial decision in the Claimant's favor. The Employer appealed the Commission's reconsideration decision to the General Division.

[4] The General Division found that the Employer did not prove, on a balance of probabilities, that the Claimant committed theft. It further found that the Employer did not prove that the Claimant was grossly negligent in the performance of her duties. Based on its findings, the General Division concluded that the Claimant did not lose her job because of misconduct.

[5] The Appeal Division granted the Employer leave to appeal. The Employer submits that the General Division made errors in law, and based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[6] I must decide whether the General Division made errors in law, and based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[7] I am allowing the Employer's appeal.

ISSUES

[8] Did the General Division make an error of law by not considering the application of res judicata relating to the Queen's Bench for Saskatchewan decision?

[9] Did the General Division make an error in law by ignoring the Employer's evidence and by rendering its decision based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

Appeal Division's mandate

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[11] 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.[2]

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

PRELIMINARY MATTERS

[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.

[13] In view of the Employer's grounds of appeal, I proceeded to listen to the recordings of the Employer's investigation and to the recording of the General Division hearing.

[14] Because the Appeal Division powers are limited by section 58(1) of the DESD Act, my decision only takes into consideration the evidence presented before the General Division.

[15] Furthermore, in view of my decision to allow the Employer's appeal, there is no need for me to decide whether any exceptions apply in order to accept new evidence before the Appeal Division.

Did the General Division make an error in law by not considering the application of res judicata relating to the Queen's bench for Saskatchewan decision?

[16] No. I am of the view that the General Division did not make an error in law by not considering the application of res judicata relating to the Queen's bench for Saskatchewan decision.

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

> (1) that the same question has been decided;
>
> (2) that the judicial decision was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons.[3]

[18] Although the identity of the parties criterion is interpreted broadly by case law, I do not find that the parties found themselves in parallel proceedings.[4]

[19] Before the Queen's bench, the Claimant defended herself against Her majesty the Queen of accusations of theft and fraud. The Employer was not involved as a party. The

[3] *Danyluk v Ainsworth Technologies Inc.*, supra at para 25.
[4] *Ungava Mineral Exploration Inc. v Mullan*, 2008 QCCA 1354.

parties who found themselves before the General Division to debate the question of the Claimant's misconduct were not the same.

[20] Therefore, one criterion is missing and the theory of res judicata does not apply.

[21] For these reasons, I find that the General Division made no error of law by not considering the application of res judicata relating to the Queen's bench for Saskatchewan decision.

Did the General Division make errors in law by ignoring the Employer's evidence and by rendering its decision based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it?

[22] The role of the General Division is to examine the evidence presented by both parties in order to identify the relevant facts, namely the facts that concern the particular dispute that it must decide, and to explain in writing the decision that it made concerning these facts.

[23] The General Division determined that the Employer terminated the Claimant's employment for theft of money in 2017, and, if she did not steal the money, the Employer dismissed the Claimant for gross negligence in the performance of her duties because she failed to detect that $172 660.00 was missing.

[24] However, the General Division found that the Employer did not prove, on a balance of probabilities, that the Claimant committed theft. It further found that the Employer did not prove that the Claimant was grossly negligent in the performance of her duties. Based on its findings, the General Division concluded that the Claimant did not lose her job because of misconduct.

[25] With great respect, and for the reasons more fully described below, I must intervene because I find that the General Division ignored the Employer's evidence and statements from the Claimant in order to conclude that the Claimant did not lose her job

because of her misconduct. I find that the General Division did not consider all the relevant facts of the case and therefore committed an error in law.[5]

[26] I will therefore give the decision that the General Division should have given pursuant to section 59(1) of the DESD Act.

[27] The Claimant worked for the employer for a period of 22 years before her dismissal on February 24, 2018.

[28] The undisputed evidence shows that in 2017, it was part of the Claimant's job to fill out the two ATM machines (ATMs) of the Spa or Hotel side of the resort.[6] In order to do so, she would prepare a cheque for the CEO/GM to sign, go to the local Affinity Credit Union bank in X, sign the back of the cheque, and cash it. Each cheque equaled 3 000 $ worth of 20 $ dollars bills to load in the resort's ATMs.

[29] Upon the Claimant's return from the bank, she and another employee, LDM, would take the cassettes out of the ATMs, take them to the office, refill the ATMs, do a complete count on how much money they put into the ATMs and both sign the ATM ledger.

[30] The Claimant and LDM would stock the ATMs regularly on Friday. The Claimant would sometimes take out extra money from the bank to cover long weekends and store it in the safe so that if the machine was low on Monday or Tuesday, they could quickly stock it up.[7] There was no ledger of the extra money put in the safe.

[31] When the professional accountant came to the complete financial records in February of 2018, respecting the 2017 financial year, he found that there was $172 660.00 in ATM funds missing, and uncounted for.

[32] The Employer puts forward that the Claimant personally cashed every single ATM cheque in the record and her signature is contained on every single ATM cheque. It

[5] *Bellefleur v Canada (Attorney general)*, 2008 FCA 13; *Parks v Canada (Attorney general)*, A-321-97.
[6] GD3-10, GD3-42, GD3-57.
[7] GD3-42.

submits that the Claimant was the only person who took the cash from the bank to the business. The Employer also puts forward that the Claimant was involved in every single instance of loading the cash into the ATMs. It submits that the preponderant evidence shows that the Claimant took the Employer's missing ATM funds.

[33] The Claimant puts forward that at least three other individuals had access to the safe, including the CEO/GM, his wife and LDM. She submits that the Employer's evidence is circumstantial and that there is no direct evidence that she took the missing funds. She puts forward that the Queen's bench for Saskatchewan found her credible and acquitted her of all charges.

[34] Before this Tribunal, and more precisely in Employment Insurance cases, the Employer has the burden of proving the Claimant's misconduct on a balance of probabilities and not beyond a reasonable doubt. The present proceeding is not a criminal proceeding.

[35] The question I must answer based on the evidence presented to the General Division is the following:

> -Has the Employer met its burden of proving on a balance of probabilities that the Claimant took the missing ATM funds?

[36] The Employer provided evidence of handwritten pages, referred to as the "Claimant's ledger", with columns from January 13, 2017, to December 29, 2017, showing the date the Claimant and LDM loaded cash into the ATMs, the number of $20.00 bills added, and the initials of the two employees who loaded the ATMs.[8] It also provided evidence of all the ATM cheques the Claimant signed and cashed in the year 2017 in order to load the ATMs.[9]

[8] GD3-32 to 34.
[9] GD7-13 to GD7-290.

[37] The Claimant decided not to testify before the General Division. She did not dispute that her signature appeared on all the 2017 ATM cashed cheques, and that she carried the ATM funds from the bank to the hotel, and finally, that it was her 2017 ATM ledger.

[38] In her application for benefits, the Claimant states "*some extra money was taken out for long weekends to have enough money on hand and put in company safe* ***but*** *there is a large amount missing that shows in the 2017 year end audit*".

[39] This initial statement by the Claimant, only days after her dismissal, implies that the amount of money missing is larger than the amount of money placed in the company safe for long weekends.

[40] When answering questions from a Commission agent, the Claimant confirmed she was in charge of the ATMs and restocking them with money from cashed cheques at the bank. The Claimant declared that she would **occasionally bring a little extra money** back because of the holiday weekends and store it in the safe so that if the machine was low on Monday or Tuesday, they could quickly stock it up.[10]

[41] During the Employer's internal investigation, the Claimant again stated that storing extra cash in the safe did not occur "*very often*".[11]

[42] LDM, the employee loading the ATMs with the Claimant and signing the ATM ledger altogether, confirmed these statements made by the Claimant during her testimony at the Claimant's Preliminary Inquiry. LDM testified that they would always put all the cash contained in a black bag into the ATMs upon the Claimant's return from the bank except **sometimes** there would be extra cash put in the safe but only for long weekends. LDM also testified that, as long as a cheque cleared the business' account in the month, the cheque would clear the monthly reconciliation; [12]

[10] GD3-42.
[11] GD-14A at 4:53.
[12] GD-11.

[43] From this evidence, I can only find it highly improbable that the sum of $172 660.00 was put in the safe to cover occasional long weekends. The missing funds cannot be considered “a little extra money” to “sometimes” cover twelve long weekends in a year. The missing funds represent almost 35% of all the ATM cheques cashed by the Claimant in 2017.

[44] The preponderant evidence does not support that such rare instances of cash being placed in the safe would account for a shortfall of funds totalling $172 660.00. The fact that there was no camera footage produced by the Employer from the camera facing the safe cannot change this obvious conclusion drawn from the evidence.

[45] I find that the evidence shows that it is more probable than not that the ATM funds never made it from the bank to the hotel. The Claimant and LDM both confirmed that the amount of money the Claimant had in her black bag at her arrival at the hotel was loaded in the ATMs or, on occasion, a little extra money went to the safe. The only person who had access to the funds from the bank to the hotel was the Claimant.

[46] I therefore find, on a balance of probabilities, that the Claimant took ATM funds from her employer. She recognized in her application for benefits that the Employer had zero tolerance for theft. Therefore, the Claimant knew of should have known that such actions would lead to her dismissal. The preponderant evidence also shows that the Employer dismissed the Claimant for this reason. Based on these findings, I conclude that the Claimant lost her employment because of her own misconduct.

[47] It is well established in case law that theft committed by an employee at the employer’s expense constitutes misconduct under the *Employment Insurance Act* (EI Act).[13]

[48] Moreover, even if I had concluded that the Claimant did not take the funds, as the individual directly responsible for cashing the cheques and stocking the ATMs, the Claimant acted in such a careless or negligent matter that it could be said that she wilfully

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

disregarded the effects her actions would have on her performance. This also constitutes misconduct under the EI Act.[14]

[49] For the above-mentioned reasons, I will allow the Employer's appeal.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	February 2, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Jacob Watters, representative for the Appellant Melanie Allen, Representative for the Respondent Attila Hadjirezaie, Representative for the Respondent John Will, Representative for the Added party

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