Citation: *X v Canada Employment Insurance Commission and MA*, 2021 SST 864

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	X
Representative:	Slader E. Oviatt
Respondent:	Canada Employment Insurance Commission
Added Party:	M. A.

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (421140) dated June 23, 2021 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	Videoconference
Hearing date:	September 14, 2021
Hearing participants:	Appellant Appellant's representative Added Party
Decision date:	September 21, 2021
File number:	GE-21-1163

Decision

[1] The appeal is dismissed.

Overview

[2] A claim for employment insurance benefits was established by the Added Party effective February 7, 2021.. The Canada Employment Insurance Commission (Commission), on April 1, 2021, determined that the Added Party was not disqualified from receiving benefits because he had not lost his employment due to his own misconduct. The Appellant here, the employer, sought and was granted a reconsideration of this decision resulting in the Commission maintaining the original decision. (GD3 – 347). The Appellant then appealed the decision to allow benefits to the Social Security Tribunal on July 8, 2021.

[3] The Tribunal must decide whether a disqualification should be imposed pursuant to sections 29 and 30 the Employment Insurance Act (Act) because the Added Party lost his employment by reason of his own misconduct.

Matter I have to consider first

[4] The Appellant submitted documents after the hearing to bolster their case. Adequate opportunity was given at the hearing for both sides to present their case and each was given the opportunity for rebuttal. For these reasons I have not considered the additional submissions in deciding this case.

Issue

[5] Issue #1: Should the Tribunal allow this claim to remain free from disqualification as it was determined by the Commission that the Added Party's loss of employment was not by reason of his own misconduct pursuant to sections 29 and 30 of the Act?

Analysis

[6] The relevant legislative provisions are reproduced GD4.

[7] The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. **(Tucker A-381-85)**

[8] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (**McNamara 2007 FCA 107; Fleming 2006 FCA 16).**

[9] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities **LARIVEE A-473-06, FALARDEAU A-396- 85.**

[10] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (**Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).**

[11] The fact that the claimant acted impulsively is not relevant to determine whether his actions constitute misconduct. In acting as he did, the claimant ought to have known that his conduct was such that it might lead to his dismissal (**Kaba 2013 FCA 208; Hastings 2007 FCA 372).**

Issue 1: Should the Tribunal allow this claim to remain free from disqualification as it was determined by the Commission that the Added Party's loss of employment was not by reason of his own misconduct pursuant to sections 29 and 30 of the Act?

[12] The Respondent submitted that the Added Party is eligible to receive benefits because:

[13] The decision to allow benefits was made and upheld because in order to refuse benefits due to misconduct, the onus is on the Commission and the employer to prove that the act or alleged act constitutes a breach of an implied or express obligation in the employment contract of such seriousness that the employee should normally have known it would result in their dismissal and there must also be a causal relationship between the misconduct and the claimant's dismissal.

[14] Furthermore, conflicting evidence should be resolved by accepting the evidence that is reasonable reliable and credible while having regard to all of the circumstances and in cases where the evidence on each side of the issue is equally balanced, the Commission shall give the benefit of doubt to the claimant.

[15] *In the present case, the Commission concluded that the claimant / Added Party did not lose his employment by reason of his own misconduct because the Commission deemed the statements of the employer and the claimant to be equally credible and plausible, and therefore gave the benefit of the doubt to the claimant. The Commission finds as fact that the claimant was dismissed on November 4, 2020. The various restraining orders and legal challenges put forth by both parties occur only after the claimant was terminated. The Commission draws the Tribunal's attention to that fact in the employer's affidavit point 10, (GD3-178). The claimant's termination was not as a result of the employer's contract with their client being affected. The claimant had already been terminated.*

[16] Having studied all relevant submissions and testimony in great detail, I have reached the same conclusions as the Commission.

[17] I find that, given equal credibility to both the Appellant and the Added Party here, I must and do rule in favour of the Added Party.

[18] The Commission has submitted that it cannot show sufficient grounds for a finding of misconduct.

[19] I find that neither has the Appellant / employer here.

[20] Therefore I find that the Commission and the employer have not shown, as the onus is on them to do so, that the Added Party's actions were willful to the point that he would / could assume they would lead to his dismissal.

[21] I find that the Added Party did not lose his employment as a direct result of his own misconduct and is therefore not disqualified from receiving benefits

[22] At the hearing much of the documented submissions were addressed by the Appellant / employer. Many accusations were made regarding the character and actions of the Added Party / Claimant.

[23] The Added Party's response consisted of much of the same.

[24] There were very disturbing accusations made that were not pertinent to the case before me but will, I am sure, be addressed in the pending court case scheduled between the parties. The Tribunal process and decision are not precedent setting or binding in any way on that court decision.

[25] The Tribunal "Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment" (**Meunier A-130-96).**

Conclusion

[26] In having done so, the Member finds that, having given due consideration to all of the circumstances, the Added Party's actions in this case, in agreement with the conclusion of the Commission, did not amount to misconduct under the Act therefore the appeal is dismissed.

John Noonan

Member, General Division – Employment Insurance Section