



Citation: *X v Canada Employment Insurance Commission and AM*, 2023 SST 815

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: X
Appellant's Representative: K. W.

Respondent: Canada Employment Insurance Commission

Added Party: A. M.

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (547156) dated December 5, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: May 24, 2023

Hearing participant: Appellant's representative

Decision date: ~~June 9, 2023~~

CORRIGENDUM DATE **July 4, 2023**

File number: GE-23-208

Decision

[1] I am allowing X's (the Appellant or company) appeal.

[2] The Appellant has proven that A. M. lost her job for a reason the law considers to be misconduct.

[3] This means she is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[4] The Appellant dismissed A. M. (the Added Party) for cause. The Appellant is an interior design firm that specializes in staging houses for sale. The Added Party worked for the Appellant as a Project Coordinator up until mid-July 2022.

[5] The Appellant says it dismissed the Added Party for cause after it discovered messages between the Added Party and another employer (SM) on the office Slack account.² In those messages the Added Party was insubordinate and disrespectful to K. W. (Owner and Lead Stager of the company) and wrote about engaging in time theft. The Appellant says the company suffered a financial loss and prejudice as a result.

[6] The Added Party doesn't deny she wrote the Slack messages. But she says the Appellant violated her privacy. The Appellant broke into her personal email account to get her Slack login credentials. She says she didn't engage in time theft. And the Appellant was looking for an excuse to terminate employees during a slow period for the company.

[7] The Commission decided the Added Party didn't lose her job because of misconduct under the *Employment Insurance Act* (EI Act). It says the Added Party, "had

¹ Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

² Slack ([Slack is your productivity platform | Slack](#)) is a communications and collaboration platform used by organizations. "Slack isn't just a tool for sending messages. It's a place where workflows between all your teams, tools, customers and partners—wherever and whenever you're working."

an expectation to privacy and it is not readily and clearly evident or proven that the employer had reasonable access to the conversation through their work credentials”.³ So it allowed her claim for EI regular benefits.

[8] The Appellant says it stands behind its decision to dismiss the Added Party for cause. Her conduct was misconduct.

[9] I have to decide if the ~~Appellant~~ **[Added Party]** lost her job because of misconduct.

Matters I have to consider first

The Added Party didn't participate in the hearing

[10] The Tribunal added A. M. (Added Party) to this Appeal because she had a direct interest in this Appeal.⁴ This appeal could overturn the Commission's decision to pay her EI benefits.

[11] A week before the hearing, the Tribunal registry staff called the Added Party to remind her about the hearing. The ~~Appellant~~ **[Added Party]** said she wasn't sure if she would attend the hearing. She said if she wasn't on the teleconference, go ahead without her, not to reschedule. She doesn't want to go through this because its stressful for her.⁵

[12] The Added Party didn't log in to the teleconference. I was aware of what she had told the Tribunal registry staff.

[13] The Tribunal's rules say I can go ahead with an oral hearing without a party if I find the party got the notice of hearing.⁶

³ See the Commission's representations, GD4.

⁴ See GD5.

⁵ This is what the Tribunal Registry staff member wrote in the Telephone Conversation Log, dated May 17, 2023, 10:09 AM.

⁶ Section 58 of the *Social Security Tribunal Rules of Procedure* say that "An oral hearing may take place without a party if the Tribunal is of the opinion that the party received the notice of hearing."

[14] Based on the telephone conversation between the Added Party and the Tribunal registry staff, I found the Added Party got notice of the hearing.

[15] So I went ahead with the hearing.

[16] The Added Party submitted four sets of documents (evidence and arguments) to the Tribunal.⁷ I reviewed them when I prepared for the hearing. And I considered them when I made this decision.

Appellant's Representative was representative and witness

[17] Normally a representative doesn't give evidence at the appeal hearing.⁸ In other words, they don't testify or answer questions at the hearing. They ask the appellant and witnesses questions. And present the Appellant's legal case.

[18] The Appellant is a small company. K. W. is the owner, along with her husband. She has firsthand knowledge of almost all of the events that are relevant to the legal issue I have to decide.

[19] So I decided to let her be the Appellant's representative **and** give evidence. And I assessed her evidence based on its credibility and reliability.

Issue

[20] Did the Appellant **[Added Party]** lose her job because of misconduct?

⁷ See GD6, GD7, GD9, and GD10.

⁸ See the Tribunal's website for an explanation of what representatives do: [Representatives \(sst-tss.gc.ca\)](http://Representatives(sst-tss.gc.ca)).

Analysis

[21] To answer the question whether the Appellant **[Added Party]** lost her job because of misconduct, I have to decide two things.

- why the Appellant **[Added Party]** lost her job
- whether the law considers that reason to be misconduct

Why the Appellant **[Added Party]** lost her job

[22] I find the Appellant dismissed the Added Party from her job “for cause” because of what she wrote in her Slack conversation with SM.

[23] To prove misconduct, the first thing the Commission (or the employer in an employer appeal) has to show is the employee lost their employment “by reason of their own misconduct”. So the Tribunal must be satisfied that the employee’s alleged misconduct was **the reason** for the dismissal **not the excuse** for it.⁹

[24] The Commission says the Added Party was dismissed from her employment for insubordination and time theft discovered in Slack messages.¹⁰ She disparaged the employer and made comments about how time was managed for her and other employees.

[25] The Added Party has said two things about why she was no longer working. In her EI application she says it was because of a shortage of work.¹¹ When she first spoke to the Commission about three weeks later she said two things. First, she said she was dismissed for the Slack messages, which her employer labelled insubordination and time theft, and said the company suffered harm. Second, she and

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88; *Davlut v Canada (Attorney General)*, A-241-82, [1983] S.C.C.A. 398. Courts have referred to this part of the legal test for misconduct as the **causal relationship** between the conduct the employee is accused of and their loss of employment. See for example *Canada (Attorney General) v Cartier*, 2001 FCA 274; *Canada (Attorney General) v Brissette*, A-1342-92 (FCA).

¹⁰ See GD4-3.

¹¹ See her EI application at GD3-7.

SM were scapegoats, dismissed because the Appellant was looking to get rid of staff to save money.

[26] When she next spoke to the Commission, the Added Party said she was dismissed because there was a toxic work environment, unrealistic demands, and bad management.¹² Her employer went through her private messages where she and SM were discussing this. And terminated her and SM.

[27] The Added Party followed up with letter to the Commission agent she had spoken with.¹³ She wrote: "I didn't agree with the way the company conducted business and once I made them aware of it, they were looking for a reason to terminate my employment." She also wrote they were looking for any reason to terminate my employment. And she filed a claim with the ministry of labour for wrongful dismissal because "whistle blowing" or sharing personal opinion about the company owner and way of conducting business shouldn't be grounds for dismissal.

[28] At the reconsideration stage, the Added Party emailed the Commission agent.¹⁴ She says she feels like the Appellant directly breach her privacy with the intent of terminating her employment.

[29] The Added party never denied she wrote the Slack messages. She told the Commission she stands by what she wrote. She insists it was a personal and private conversation. She denies it harmed the company.

[30] The Appellant's letter of termination says it is dismissing the Added Party "for cause". The Added Party's Slack conversation shows insubordination, disrespect towards the company owner, and time theft. And the company suffered a financial loss and prejudice as a result.

[31] At the hearing the Appellant's Representative denied the company wasn't doing well and it was looking for reasons to terminate employees. She explained the

¹² See Commission's notes of it's call with the Added Party at GD3-29.

¹³ See GD3-179.

¹⁴ See GD3-193.

company's business is tied to the real estate market, and its annual cycle. So it is very busy in the spring through mid-July. From then through August they work on bigger picture things. At the time she was dismissed, the Added Party's job was shifting to take on more big picture things. And SM had been hired to work closely with the Added Party. The Representative added that revenue has continued to grow, and they replaced the Added Party shortly after she was dismissed.

[32] I accept the Appellant's evidence. I prefer the Appellant's evidence about the reason the Added Party lost her job to the Added Party's evidence about this, for seven reasons:

- the Commission's evidence and finding supports the Appellant's evidence
- the added party didn't deny she wrote the Slack messages
- the Appellant had firsthand knowledge of the company operations, its market, its financial situation, and its staffing needs
- the Added Party gave no evidence to support what she said about the company looking to terminate employees because it was looking to save money
- there is no evidence that supports the Added Party's belief she was a whistleblower or was otherwise involved in uncovering wrongdoing at the company, let alone fired for that reason
- the timing of the events strongly points to the Slack messages as the real reason the Added Party lost her job, rather than other reasons the Added Party offered
- the Appellant's Representative testified in a forthright manner, answered all my questions in detail and without hesitation, and referred me to documents to support what she said

[33] So based on the evidence I have accepted, I find the Appellant terminated the Added Party's employment "for cause" because the Slack messages she wrote showed insubordination, disrespect for the company owner, time theft, and harmed the company.

The reason is misconduct under the EI Act

[34] The reason the Added Party was dismissed is misconduct under the law.

– The law about misconduct

[35] The Appellant has to prove that the Added Party lost her job because of misconduct. The Appellant has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Added Party lost her job because of misconduct.¹⁵

[36] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁷ The Added Party doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.¹⁸

[37] There is misconduct if the Added Party **knew or should have known** that her conduct could **get in the way of carrying out her duties toward her employer** and that there was a **real possibility of being let go** because of that conduct.¹⁹

[38] The role of the Tribunal isn't to determine whether the employer's decision to dismiss the employee was reasonable, justified, or the appropriate sanction.²⁰

¹⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁸ See *Attorney General of Canada v Secours*, A-352-94.

¹⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁰ See *Canada (Attorney General) v Caul*, 2006 FCA 251; *Canada (Attorney General) v Marion*, 2002 FCA 185.

[39] As a general rule, the misconduct analysis should focus on the employee's conduct, not the employer's conduct. However, the Tribunal can consider an employer's conduct before the alleged misconduct if caused or contributed to the misconduct. This is important when considering whether the employee's conduct was intentional.²¹

– **What the Commission, Added Party, and Appellant say**

[40] The Commission says the Added Party, "had an expectation to privacy and it is not readily and clearly evident or proven that the employer had reasonable access to the conversation through their work credentials".²² So her conduct wasn't misconduct because her employer breached her privacy to find out about the conduct.

[41] The Added Party says she did nothing wrong. The Appellant hacked her email to get into her personal and private Slack conversation with SM. The messages between her and SM were "my own private sentiments and concerns that I shared with [SM] who was also a very close friend of mine".²³

[42] The Added Party gave the Commission and Tribunal information from the Slack platform website about user privacy, administration, and exporting conversations. And some legal blog posts about employee privacy and computer applications at work. She says these webpages support her argument the Appellant didn't have a right to access her Slack conversation.

[43] The Appellant says the Added Party's conduct was misconduct. The Appellant's representative testified that after she read the Slack conversation, she decided the company could not continue to employ the Added Party. There was a fundamental breach in the relationship of trust and no way to go forward.

[44] At the hearing the Appellant's Representative testified the Slack account was a company account. Slack was important to their business because it allowed employees to communicate and collaborate among staff in the office, in the warehouse, on the

²¹ See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

²² The Commission relies on three cases, at GD4-4.

²³ See GD10-3.

road, and at properties where the company was doing staging. Employees relied heavily on Slack to do their work.

[45] She also testified that her spouse (who is also her business partner) discovered the Slack messages on a company-owner computer at the office. It was a common workstation. He had just returned from being away. SM was away that day. When he went to the computer workstation he saw the Slack conversation between the Added Party and SM. In other words, SM had left the conversation open on the computer. He was concerned by the Slack conversation and called the Appellant's Representative to tell her.

– **My findings about the evidence and the law**

[46] The Appellant's **[Added Party's]** conduct counts as misconduct under the EI Act.

[47] I find the Appellant's alleged privacy breach isn't relevant to the legal test for misconduct under the EI Act. The alleged privacy breach happened **after** the Added Party participated in the Slack conversation. So it didn't cause or contribute to the Added Party's alleged misconduct. And has nothing to do with whether the Added Party's conduct was wilful (conscious, intentional, deliberate, or reckless to the point of being wilful).

[48] I have reviewed the Slack conversation between the Added Party and SM. I find it shows the Added Party's conduct was:

- extremely insubordinate towards the company owner
- extremely disrespectful of the company's owner because it demeaned her business practices and judgment, her ethics, her mental health, her fitness to manage employees, and her relationship with her spouse
- harmful to the company because it undermined company morale and motivation, and breached the duty of loyalty she owed to the company and its owner

- unethical (and potentially against the law) in so far as she counselled or conspired to defraud the company through time theft, by counselling SM to claim for herself and other employees wages for time they were not working, or to extend their working hours beyond the hours approved by the company

[49] Based on those findings, I find the Added Party breached numerous duties owed to the Appellant and the company owner.

[50] I also find that **she knew or should have known** that:

- her Slack conversation **on the company's account**, which SM was participating in using **a company computer in the company office**, breached those duties
- if the Appellant found out about the Slack conversation, the Appellant would probably terminate her employment

[51] So I find that the Added Party participated in the Slack conversation consciously, intentionally, and deliberately. And she was extremely reckless about the very real potential the Appellant would find out about the Slack conversation—and terminate her employment because of it.

[52] The fact the Appellant found out about her conduct, or how the Appellant found out, doesn't change what the Added Party knew or should have known **at the time she engaged in the conduct**.

– **The Appellant didn't breach the Added Party's privacy**

[53] Even if I am wrong—meaning I need to consider the Appellant's conduct when I consider whether the Added Party's conduct was intentional—this doesn't change my decision.

[54] As a matter of fact, I find **the Appellant didn't breach the Added Party's privacy**, for two reasons:

- the Appellant and her spouse accidentally found out about the Slack messages
- nothing in the Slack terms of service, or any other evidence or argument offered by the Added Party, shows me she had a right to privacy in her workplace Slack messages

[55] I prefer the Appellant's Representative's evidence about how she and her spouse learned about the Slack conversation, for four reasons.

[56] First, the Added Party gave no evidence to support her theory that the Appellant Representative (or her spouse) hacked her personal email to get her Slack credentials to access the Slack conversation.

[57] Second, the Appellant's testified in a straightforward and detailed way. Even though she wasn't there when the Slack messages were discovered, and she got the details second-hand, I have no reason to doubt her testimony. And there is no evidence that goes against what she said.

[58] Third, there is no evidence the Appellant was looking for reasons to dismiss staff in general, or specifically the Added Party. And the Added Party didn't give another reason why the Appellant would hack her email to get access to her Slack.

[59] Fourth, the Appellant's Representative's explanation makes the most sense in the circumstances. Her spouse found the Slack conversation by accident. Not as part of a scheme to dismiss the Added Party and SM, or because the business was in financial difficulty, or because they knew she was about to become a "whistle-blower".

[60] I reviewed the Slack terms of service the Added Party gave to the Commission and the Tribunal.²⁴ Unlike the Commission, I don't see how they support the Added Party's argument she had a right to privacy in her Slack messages on the Appellant's account.

²⁴ See GD3-195 to GD3-199.

[61] I also reviewed the blog posts the Added Party says show she had a right to privacy in her workplace Slack messages in relation to the Appellant.²⁵ I find that evidence doesn't support her argument. It's either about the law in another place (California) or says "there is no simple answer" to this issue.

[62] For these reasons, I find the Appellant didn't violate or breach the Added Party's privacy.

[63] So I can't accept the argument made by the Commission and the Added Party that her conduct isn't misconduct because the Appellant breached her privacy.

Conclusion

[64] The Appellant has proven the Added Party lost her job for a reason the EI Act considers to be misconduct.

[65] Because of this, the Added Party is disqualified from getting EI benefits.

[66] So I am allowing the Appellant's appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

²⁵ See GD3-200 to GD3-211.