Citation: *X v Canada Employment Insurance Commission and CG*, 2023 SST 2026

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	X
Representative:	J. K.
Respondent:	Canada Employment Insurance Commission
Added Party:	C. G.
Representatives:	Charles Osuji & Lyon Ezeogu

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (573387) dated March 10, 2023 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing dates:	August 1, 2023 & September 29, 2023
Hearing participants:	Appellant Appellant's representative Added Party Added Party's representatives
Decision date:	October 13, 2023
File number:	GE-23-1043

Decision

[1] X is the Appellant in this appeal. I am dismissing its appeal.

[2] The Appellant hasn't proven the real reason the Added Party (C. G.) lost her job was because of her alleged misconduct.[1] The Appellant used her alleged conduct as an excuse to terminate her employment for cause.

[3] In other words, I am upholding the Canada Employment Insurance Commission's (Commission) decision to grant Employment Insurance (EI) benefits to the Added Party. This means she can get benefits.

Overview

[4] The Appellant operates a teeth whitening business in several locations. In May 2019 the Added Party started working for X. In August 2020 she invested $100,000 in X and became a shareholder.

[5] In August 2022, the Added Party went on sick leave and applied for the EI sickness benefits. The Appellant issued a record of employment.

[6] In September 2022, the Appellant terminated the Added Party's employment for cause. The Appellant filed a record of employment that said that.

[7] In December 2022, the Added Party applied for EI regular benefits.

[8] The Commission decided the Appellant hadn't shown the Added Party lost her job because of misconduct under the *Employment Insurance Act* (EI Act). So the Commission granted her claim for EI regular benefits and informed the Appellant of its decision.

[9] The Appellant asked the Commission to reconsider it decision. The Commission maintained its original decision.

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[1] Section 30 of the *Employment Insurance Act* (EI Act) says that people who lose their job because of misconduct are disqualified from receiving benefits.

[10] The Added Party denies any misconduct. She says the Appellant dismissed her because of a dispute about ownership and control of the business. The Added Party and the Appellant are litigating their dispute in court.

[11] I have to decide if the Added Party lost her job because of misconduct.

Matters I considered first

No post-hearing evidence

[12] The Added Party sent the Tribunal a document with evidence after the first hearing.[2] At that hearing I had asked the parties not to send evidence until we dealt with post-hearing evidence at the conclusion of the second hearing.

[13] Near the end of the second hearing, I gave Appellant and the Added Party an opportunity to discuss whether they wanted to submit post-hearing evidence. They agreed they would not submit post-hearing evidence.

[14] So when I made my decision, I didn't review or consider the document the Added Party sent in after the first hearing.

President of X: Appellant and witness

[15] S. C. (S. C.) is the president of X, the Appellant. S. C., as president, is an officer of X. Because X is a corporation, it speaks and acts through its officers, including its president. So S. C. participated in the hearing on behalf of X, the Appellant.

[16] S. C. was also a witness at the hearing. S. C. has first-hand knowledge that is relevant to the legal issues in this appeal. She gained that knowledge as president of X.

[17] When I write Appellant I mean X. When I write S. C. I am referring to her, what she said, and what she did.

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[2] See GD24.

[18] X also had a legal representative. S. C. was in a position to give instructions to X's legal representative.

Issue

[19] Did the Added Party lose her job because of misconduct?

Analysis

Interpreting misconduct strictly and the burden of proof

[20] A person who loses their job because of misconduct under the EI Act can't get EI benefits.[3]

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

- The reason the Added Party lost her job.
- Whether that reason is misconduct under the EI Act.

[22] The Appellant must prove it's more likely than not the Added Party lost her job for misconduct. In legal terms, the Appellant bears the burden of proving this on a balance of probabilities.

[23] The Added Party said I should give the benefit of the doubt to the Added Party if the evidence on each side of the issue is equally balance.[4] I disagree, which I said at the hearing, for two reasons. First, the benefit of the doubt applies to the Commission, not this Tribunal. The Federal Court of Appeal agrees.[5] Second, the benefit of the doubt section doesn't fit logically with the Appellant's obligation to prove its case on a balance of probabilities. The balance of probabilities is often expressed in plain language as "50% +1" or "more likely than not." If I find the evidence is equally balanced (in other words, 50-50), this means the Appellant hasn't proven its case, and I can't decide in its

[3] See section 30(1) of the EI Act.
[4] See section 49(2) of the EI Act.
[5] See *Haoui v Canada (Attorney General)*, 2005 FCA 66, at paragraph 4.

favour. So I can't rely on the balance of probabilities section of the EI Act. Applying the wrong burden of proof is an error of law.

[24] The courts have said I have to apply the misconduct section of the EI Act strictly because it can lead to a kind of "punishment"—disqualification from getting EI benefits.[6] It is an exception to the general rule that says people can get benefits where they don't cause their unemployment. So there is a heavy burden on the party alleging misconduct.[7]

The reason the Added Party lost her job

[25] I find the Appellant hasn't proven the real reason the Added Party lost her job was because of her alleged misconduct. The Appellant used her alleged conduct as an excuse to terminate her employment for cause. Here are my reasons for that finding.

– Added Party's conduct has to be the reason, not the excuse

[26] The Tribunal must be satisfied that the employee's alleged misconduct was **the reason** for the dismissal **not the excuse** for it.[8]

[27] The Tribunal isn't bound by any party's subjective assessment or characterization of the facts or the employee's conduct.[9] I have to look at the facts objectively and decide the reason the Added Party lost her job.[10]

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[6] See *Goulet v Canada Employment and Immigration Commission,* A-358-83 (FCA); *Canada (Attorney General) v Tucker*, A-381-85 (FCA).
[7] See *NS v Canada Employment Insurance Commission*, 2014 SSTGDEI 33.
[8] 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 also 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).
[9] See *Choiniere v CEIC*, A-471-95 (CAF), where the court writes: " … in light of the decisions of this Court, which has gone to great lengths on many recent occasions to repeat that it was a mistake to think for one moment that the employer's opinion concerning the existence of misconduct that would warrant dismissal might suffice to trigger the penalty, now so arduous, of section 28 and that on the contrary an objective assessment was needed sufficient to say that misconduct was in fact the cause of the loss of employment."
[10] See *CUB 8206*, affirmed in *Canada Employment and Immigration Commission v Coupal*, A-429-83 (FCA).

– **The context: a complicated relationship now being litigated**

[28] The evidence in this appeal (including the testimony at the hearing) shows the Appellant, its president, and the Added Party had a complicated legal and interpersonal relationship. The rights and liabilities flowing from the legal relationship are being litigated in civil court as an action for wrongful dismissal and breach of an investment agreement.[11] The relationship among the Appellant, its president, and the Added Party is highly relevant to the reason the Appellant dismissed the Added Party.

[29] S. C. is the President of X.

[30] The Added Party started at X as a clinic technician in May 2019.[12] S. C. was clinic manager. And the Added Party reported to SC.

[31] The Added Party says at the time her employment was terminated, she was a shareholder (owner), a vice-president, and a director of X. The Added Party says she was a shareholder because in August 2020 she invested $100,000 in X, based on SC's promise that she would own 25% of the business.[13] In the termination letter, the Appellant refers to the Added Party as a director and a shareholder.[14] And the Added Party and S. C. are listed as the two shareholders of X on a tax shareholder information document (CRA schedule 50).[15]

[32] By agreement, S. C. and the Added party started to pay themselves equal salary at some point after the Added Party became a shareholder. They exercised roughly equal supervisory and other responsibilities for the day-to-day management and operation of X. Both S. C. and the Added Party individually entered into contracts that state they have the power to legally bind X. They discussed personnel decisions, including salary, whether to pay employees in cash, and how to assist employees in

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[11] See for example the Statement of Claim and supporting documents filed by the Added Party, at GD6-5 to GD6-325.
[12] See the offer of employment letter (dated May 10, 2019) at GD3-54 to GD3-57, including a position description for Clinic Technician.
[13] See a copy of the bank draft (dated August 18, 2020) made out to X at GD6-70. See also a transaction report for X showing the August 20, 2020 deposit of $100,000 with the memo description, "Sale of 25% of Business to C. G."
[14] See the termination letter, at GD2-43.
[15] See GD6-108 for tax year 2021. And see GD6-72 for tax year 2020.

getting EI benefits.[16] And each took on major projects and initiatives—for example, S. C. took the lead on opening the Edmonton location, while the Added Party worked with contractor Zanoti to develop a database/software.

[33] In mid-July 2022, S. C. emailed her lawyer advising that the Added Party had become a partner in X and asking him to put their initial agreement into a legal document. The initial agreement referred to in the email shows S. C. owns 100 shares and GC owns 33 shares of X. Those were all the shares. There was no other shareholder.

[34] The business and interpersonal relationships between S. C. and the Added Party deteriorated over the rest of the summer of 2022. The Added Party hired a lawyer to advise her personally. The Appellant and Added Party never signed a formal shareholder agreement. They were in ongoing negotiations, while trying to open a new clinic location, in July and August 2022.[17]

[35] In July and August 2022, S. C. and the Added Party had disputes about the salary they would draw. S. C. had the bookkeeper/accountant reduce both their salaries. The Added Party disagreed with this, so she changed her salary back. They also had disputes about shareholder loans, liability for credit card bills, and bank account access.

[36] S. C. and the Added Party emailed each other about developing a role or job description for the Added Party. She didn't have one that reflected her new role and responsibilities. They didn't develop and agree on a job description before the Appellant terminated the Added Party's employment.

[37] The Appellant and the Added Party both sent the Commission and Tribunal emails and text messages between S. C. and the Added Party. A text string from

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[16] See for example message string (dated July 2, 2021), at GD13-13 to GD13-16.
[17] See for example: email string between SC, the Added Party and the bookkeeper/accountant (dated July 31, 2022), at GD6-423 to GD6-425. And see the email string (dated August 10, 2022), at GD3-426 to GD6-428.

August 12, 2022 reflects their working relationship at that time. Here is one section of it:[18]

> SC: Don't send me laughy faces and winks in emails or thru messages. I will tolorate no type of insubordination from you. You should get educated on where you stand in the company. I have always been and remain your boss. You report to me and you'll do it with respect or you won't continue in your role.
>
> Added Party: I have only ever communicated with emojis, my form of communicating has never changed. You can look above in prior correspondence for reference as to which way we've been communicating for the last 3 years. I'm very confused on what you are implying. Another threat? Please remind me of my role, and current obligations to the company.
>
> SC: Not a threat. Policy. Your role will be added to the agenda for the October 16th directors meeting.
>
> Added Party: Thumbs up okay? Would that be considered disrespectful? Please let me know where to draw the line of respectful communication.
>
> SC: Grow up

[38] The Added Party wanted the shareholders meeting moved up to August 2022. S. C. refused.

[39] In August 2022, before she went on medical leave, the Added Party consulted her lawyer. She got advice on potential options, including taking a sick leave and constructive dismissal.

[40] The Added Party went on sick leave on or about August 12, 2022.

[41] The Appellant terminated the Added Party's employment while she was on sick leave. The termination letter (dated September 13, 2022) is three pages single-spaced, extremely detailed, relies heavily on legal language and style. and is cc'ed to the

[18] See GD3-84 to GD3-88. See also the email strings between S. C. and the Added Party (various dates August 2022), at GD6-423 to GD6-437 email string (dated September 7 and 8, 2022), at GD10-18;

Appellant's lawyer. It covers without giving specific details the grounds the Appellant is relying on for cause.

[42] The termination letter includes a paragraph recognizing the Added Party as a director. It reminds her of her duties as a director and informs her X and its board will be taking steps under Alberta corporate law to remove the Added Party as a Director.

[43] The termination letter also addresses the Added Party's "status as a shareholder" with X. It says this will be assessed separately. And it asks for the name and contact information of the Added Party's lawyer to contact and communicate with them directly.

– **The Appellant's position**

[44] The Appellant says it terminated the Added Party's employment for cause.[19] It says the Added Party was surreptitiously engaging in activities relating to the business of X from August 15, 2022 to September 13, 2022. And these activities damaged and harmed the business operation and reputation of both X and is president (S. C.).

[45] The Termination letter, other documents, and the Appellant's submissions say the following conduct by the Added Party (prior to and during her critical illness period) are the grounds for termination and misconduct:[20]

- Failed to maintain and secure confidential information.
- Misrepresented to S. C. her employment activities (including communications with customers and potential customers, employees and potential employees, commercial partners and potential commercial partners).
- Knowingly made misrepresentations of X.
- Ignored specific directives from S. C.

[19] See the termination letter, at GD2-41 to GD2-43.
[20] The other documents include: the reconsideration request filed by the Appellant (at GD3-41); a letter S. C. wrote to Service Canada (February 2, 2023; at GD2-33 to GD2-37), which she cc'ed to her lawyer;

- Actively hampered the ability of X to conduct and operate its business.
- Solicited an employee to take pictures of X's confidential information and send it to her.
- Intimidated and manipulated X staff.
- Changed access passwords for security system, caused security camera footage to be deleted, and refused to give S. C. new codes.
- Changed online access codes and passwords for X business accounts (including social media).
- Accessed the payroll system and changed her pay, without the consent of SC.

[46] At the hearing, the Appellant's representative argued that between August 2020 and August 2022, S. C. and the Added Party had a typical relationship. S. C. was her boss. During the spring and summer of 2022, they were working with counsel on various agreements. Then, rather than follow that process with counsel, the Added Party violated the relationship of trust with S. C. and other employees in three clinic locations.

[47] The Appellant's representative argued the Appellant started the investigation that led to termination in mid-August 2022. He said S. C.'s evidence showed during July and August 2022 S. C. was in Edmonton for extended periods to open a new location. When the Added Party went on medical leave in mid-August, S. C. returned to Calgary. S. C. discovered that the Added Party had taken extremely disturbing actions against the interests of X. So it was then that S. C. gathered evidence to support the September 13, 2022 termination for cause.

– **The Added Party's position**

[48] At the hearing, the Added Party's representatives argued because the Appellant fired her while she was on sick leave, this clearly negates misconduct in the

circumstances. The Appellant terminated the Added Party when she was most vulnerable. The representative characterized this as an “attack.”

[49] The Added Party’s representatives emphasized that at the time her employment was terminated she was a co-owner with a 25% share in X. So the relationship was not one of employer-employee and was beyond the reach of misconduct.

[50] The Added Party’s representatives also argued cases say, in order to be misconduct, the employer has to show that progressive discipline had been put into play. The evidence didn’t show a trigger, a prior warning, or prior discipline.

[51] The Added Party’s representatives argued that the Appellant didn’t terminate the Added Party for cause. This was a shareholder dispute made to look like termination for cause. That shareholder dispute is currently being litigated in court, and that’s where it belongs. Her representatives pointed to the sections of the termination letter that acknowledge the Added Party as a director and shareholder.

[52] Finally, the Added Party argued that it could hardly be said the Added Party’s behaviour was misconduct given her investment in X and her contribution to the success of the business.

– The Commission’s position

[53] The Commission says it concluded the Added Party didn’t lose her employment by reason of her own misconduct. It says the employer was unable to provide direct evidence of the allegations it made against her. But the Commission admits it didn’t properly consider information provided by the Appellant on March 9, 2023. And admits it didn’t give the parties an opportunity to respond to that information.

– My findings about the evidence

[54] At this stage I have to objectively assess the **evidence about the reason the Added Party lost her job**. There is an unusually large amount of evidence in this appeal—over 800 pages. I have reviewed all of it. Not all of the evidence is relevant to

the reason for dismissal. I don't have to refer to every piece of evidence (document or testimony) in this decision.

[55] I accept the evidence establishes the facts I set out in the "context" section, above, with one exception. Other than what the Added Party said, there is no evidence she was a vice-president of X. I got the facts from testimony by S. C. or the Added Party (or both), original or official documents, texts, or emails—and those sources also corroborate the facts. I have no reason to doubt this supporting evidence is authentic, and there is no evidence that goes against it.[21] And S. C. and Added Party agree on the preponderance of facts I set out in the context section.

[56] I find the Appellant and the Added Party didn't have a typical employer-employee relationship, and S. C. and the Added Party didn't have a typical supervisor-subordinate relationship. They were co-owners of X, and shared overall responsibility for the day-to-day operations, financial oversight, and special projects of X.

[57] The evidence I have accepted shows me that the business and interpersonal relationship between S. C. and the Added Party started to deteriorate in July 2022. And those relationships were irreparably broken by the end of August 2022. It also shows me they both contributed to the breakdown in their relationship, and that no one else played a significant role in that breakdown. In other words, they were both responsible for the breakdown in their business and interpersonal relationship. They no longer trusted one another. And both said they were at the point where their ongoing disputes were getting in the way of each doing their job. Both of them stated this in emails and texts to one another.

[58] I find that the root of these disputes was a difference of opinion about the future direction of the business, the financial affairs of the business, and the terms of ownership and control of the business. These three things had big implications for how

[21] In legal terms, I find the facts I set out in the "context" section are established by credible and reliable evidence.

much money they would draw out of the business as salary versus how much money they would reinvest in the business.

[59] I find the fact S. C. and the Added Party hadn't formalized in writing the ownership of X and their respective responsibilities was a significant contributing factor to the breakdown in the relationship. Both parties had a role to play to get this done. But based on my review of the evidence, I find that the Added Party tried repeatedly to make this happen. S. C. resisted those efforts by putting off these tasks. I find it is very important that she refused the Added Party's request to move the next scheduled board meeting from October up to August. This shows me the Added Party was putting pressure on S. C. to resolve the root causes of their disputes.

[60] I am not making any findings about why the Added Party pressured SC, or why S. C. didn't move forward with these things as the Added Party wanted her to do. Their motivations aren't important to my objective assessment of the reason the Added Party lost her job. Both S. C. and the Added Party testified that they acted in the best interests of X. I accept that evidence. I have no reason to doubt what they said. And it makes sense in the circumstances—each had a significant ownership interest in X and would lose out if the business was harmed. But S. C. and the Added Party had fundamentally different ideas about how to promote and protect X's interests and value.

– **The Appellant hasn't proven the Added Party lost her job for alleged misconduct**

[61] Based on the evidence I have accepted and the law, I find the Appellant hasn't proven it's more likely than not the reason it dismissed the Added Party was her alleged misconduct. I find it's equally likely the Appellant used "termination for cause" as an excuse to force a resolution of the ownership and control struggle between S. C. and the Added Party.

[62] The legal relationship among the Appellant, S. C., and the Added Party was complex, and not the usual employee-employer relationship. In the final two months it was characterized by profound disputes about ownership and control of X. A logical way to resolve their disputes was to force an end to their relationship. And to call on their

lawyers to play the lead role in clarifying the ownership and financial stakes in X, and to bring their co-ownership of X to an end. Objectively, that is what the Appellant did when it terminated the Added Party. The termination letter shows this purpose.

[63] The text message exchange I wrote out above and the termination letter support my finding that the reason the Appellant gave wasn't the cause, it was an excuse. So do many of the text message and email strings between the Appellant and Added Party, which they submitted into evidence.

[64] The sequence of events over the summer of 2022 also supports my finding. For example, the fact both parties had "lawyered-up" by the end of July 2022 is a strong indication of the parties' profound disputes and lack of trust in one another. The mutual mistrust and conflict escalated from mid-August 2022, around the time the Added Party went on sick leave.

[65] I don't accept the Appellant's argument that S. C. found out about the Added Party's alleged misconduct in mid-August, which led her to investigate, which led her to terminate the Added Party's employment for cause. Those events preceded the termination—but were not the cause. The text messages and emails (which I have no reason to doubt are authentic) show that the disputes between S. C. and the Added Party, and the deterioration of their relationship, started by the end of July 2022.

– Decisions that support my decision

[66] Because I have found the Appellant hasn't proven the reason the Added Party lost her job was her alleged misconduct, I don't have to consider whether that conduct is misconduct under the EI Act.

[67] Even so, I will note tribunal decisions that support my decision the Appellant hasn't proven misconduct. These decisions say the following situations won't necessarily count as misconduct under the EI Act:

- Personality conflicts or clashes between employer and employee[22]
- Uncooperative behaviour[23]
- Loss of employment due to a mutual incompatibility between the working style of the employer and employee, where both wanted to terminate the employment relationship[24]

[68] This last decision is especially relevant in this appeal. By mid-August 2022 the relationship between S. C. and the Added Party was dysfunctional. S. C. and the Added Party both played a role in this. And their contempt for each other and inability to work productively with each other was mutual. Each was consulting a lawyer. And both were exploring ways to end their legal relationships (including the employment relationship).

Conclusion

[69] The Appellant hasn't proven the Added Party lost her job for a reason the EI Act considers to be misconduct.

[70] So I am dismissing the appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

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[22] See *CUBs 19060, 18855, 12105, 11241C, and 10377*.
[23] See *CUB 19112*.
[24] See *CUB 18258*.