Citation: *X v Canada Employment Insurance Commission*, 2024 SST 737

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: X

Respondent: Canada Employment Insurance Commission

Added Party: R. T.

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (613576) dated September 29, 2023 (issued by Service Canada)

Tribunal member: Jean Yves Bastien

Type of hearing: Videoconference
Hearing date: January 18, 2024
Hearing participants: Appellant
Added Party
Decision date: January 26, 2024
File number: GE-23-2998

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant (the Employer).

[2] The Respondent, the Canada Employment Insurance Commission (the Commission) has proven that the Added Party (the Employee) did not lose his job because of misconduct. This means that the Employee **is not** disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Employee lost his job on June 26, 2023. The Employer said that he was let go because he violated the Employer's confidentiality policy.

[4] Even though the Employee doesn't dispute that he lost his job, he says that he didn't violate any company policy on confidentiality. The Employee says that the Employer actually let him go because the business was experiencing difficulty and that an antagonistic relationship had developed between him and the Employer.

[5] The Commission accepted the Employee's explanation for the dismissal. It decided that the Employee **did not** lose his job because of misconduct. Because of this, the Commission decided that the Claimant is qualified to receive EI benefits.

[6] The Employer was not happy that the Employee he had dismissed was receiving EI benefits. The Employer intervened with the Commission, including requesting that the Commission conduct a Reconsideration of their decision to grant the Employee benefits.

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

[7] The Commission reconsidered the Employee’s file, and on September 29, 2023, it sent a Notice of Decision to the Employer stating that they were maintaining their original decision of the issue, which was that the Employee did not lose his job because of misconduct.

Issue

[8] Did the Added Party, the Employee, lose his job because of misconduct?

Analysis

[9] To answer the question of whether the Employee lost his job because of misconduct, I have to decide two things. First, I have to determine why the Employee lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Employee lose his job?

[10] I find that the Employee lost his job because the Employer dismissed him because the Employer was dissatisfied with how he was conducting his work.

[11] The Employer and the Commission don’t agree on why the Employee lost his job. The Commission says that the reason the Employee gave is the real reason for the dismissal. The Employee told the Commission that the Employer dismissed him suddenly when he was emailed a termination letter on June 26, 2023.[2] This termination letter accused the Employee of “time wasting”.

[12] The Employer disagrees. The Employer says that the real reason the Employee lost his job is that he was sharing confidential company information to other customers and suppliers. The Employer said that the Employee was diverting company business to his father-in-law’s company.

[2] See page GD3-24 of the appeal record.

Is the reason for the Claimant's dismissal misconduct under the law?

[13] The reason for the Claimant's dismissal **is not** misconduct under the law.

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[5]

[15] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[6]

[16] The Commission has to prove that the Employee lost his job because of misconduct. The Commission 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 Employee lost his job because of misconduct.[7]

[17] The Commission says "based on the facts on file [it] determined that the claimant did not loose his employment by reason of his own misconduct.[8]

[18] The Commission argues that there **was no** misconduct, because:[9]

- The Employer sent out an email to employees warning them not to share company information or to use any property of the company for their own benefit because there was a "leaker" in their midst. But this email was sent after the fact, and also it doesn't't' implicate the Employee in any wrongdoing. The email appears more of a general email sent out to all employees.

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See page GD4-1 of the appeal record.
[9] See page GD4-7 of the appeal record.

- The email doesn’t specifically address the Employee or identify any violations that he may have performed. The email doesn’t provide any evidence of wrongdoing on the part of the Employee.
- There is no evidence to show that the Employee received and understood this email to be a warning and that his employment could be in jeopardy.
- There is no signed statement of acknowledgement of the email and policy as a specific warning to the Employee.
- The Employer submitted copies of emails sent between the Employee and one of the Employer’s suppliers. These emails show that the Employee was doing his job as an employee of another company, but there is no evidence that the Employee was sharing the Employer’s company information or using any property of the Employer for his own benefit.
- The Employee’s Confidentiality Policy doesn’t prohibit the Employee from working for any other company, even in the same field.
- There is no evidence that the Employee knew, or ought to have known, that his actions could result in dismissal or other disciplinary measures.
- The email sent from the employer to the claimant on May 10, 2023, discusses confidential information being leaked and the introduction of a new Confidentiality Policy. The email nor the policy indicate that employees are prohibited from working for another company, concurrently in the same field
- Therefore, it cannot be said that the claimant would have known that he was jeopardizing his employment.
- Furthermore, the employer has not provided evidence to show that the client had leaked confidential company information or that the client had diverted customers away from his business. The emails the employer has provided (GD3-32 toGD3-35) do not show any confidential company information being leaked, or that the claimant was diverting customers away.
- In this case, the claimant was not provided a warning advising that his specific behavior could have a negative impact on the employment relationship

- In addition, the employer has not provided any clear evidence to show theft of funds or company inventory.
- There is nothing to show that the client was dismissed due to a deliberate, willful, or negligent act that was so careless that it appears deliberate.

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[19] The Commission cites case law which says that: "The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as willful misconduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment.[10]

[20] The Employer says that there was misconduct because the Employee was warned multiple times, including by lawyer's letter, not to share company information or use any property of the company to his own benefit and profit. After all warnings the Employee was still discovered using company information and equipment to profit for himself, brother in law, and father in law.[11]

[21] For an employee's actions to amount to misconduct it can be said that:

- The employer had a policy or rule.
- The employee was made aware of this rule, or he "ought to have known about it".
- The employee was made aware of the consequences of not following the policy.
- Despite all the above, the employee wilfully went against the employer's policy.

[10] See: *Canada (AG) v. Doucet,* 2012 FCA 105*; Canada (AG) v. Gagne,* 2010 FCA 237*; Canada (AG) v. Lemire*, 2010 FCA 314.

[11] See page GD2-5 of the appeal record.

[22] In this case I prefer the Commission's evidence. The Commission had proven that:

- The Employer issued a letter with broad, non-specific direction **after** they had suspected a breach of confidential company information.
- The Employee received this letter, like all other employees. He was aware of the policy but didn't think that it applied to him because this was never communicated to him. The policy was vague enough that it can't be argued that the Employee "ought to have known".
- The Employee was never made aware of the consequences of not following the policy. He was never warned or told that he was the target of this confidentiality policy.
- If the Employee wasn't aware that the policy applied to him and that that there could be consequences for non-compliance, then it can't be said that did anything that was wilful.

So, did the Claimant lose his job because of misconduct?

[23] Based on my findings above, I find that the Added Party, the Employee, **did not** lose his job because of misconduct.

Conclusion

[24] The Commission has proven that the Added Party, the Employee, did not lose his job because of misconduct. Because of this, the Employee **is not** disqualified from receiving EI benefits.

[25] This means that the appeal is dismissed.

Jean Yves Bastien

Member, General Division – Employment Insurance Section