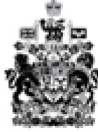

Citation: *X v Canada Employment Insurance Commission and RT*, 2024 SST 736

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	X
Representative:	David Fanjoy
Respondent:	Canada Employment Insurance Commission
Representative:	Adam Forsyth
Added Party:	R. T.

Decision under appeal:	General Division decision dated January 26, 2024 (GE-23-2998)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	June 5, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative Added Party
Decision date:	June 25, 2024
File number:	AD-24-167

Decision

[1] The appeal is dismissed. The General Division failed to address one of the issues before it. However, it does not change the outcome.

Overview

[2] The Appellant, X (the Employer) is appealing the General Division decision dated January 26, 2024. The General Division determined that the Canada Employment Insurance Commission (Commission), had not proven that the Added Party, R. T. (Claimant), lost his employment on June 26, 2023, because of misconduct. As a result, the Claimant was not disqualified from receiving Employment Insurance benefits.

[3] The Employer argues that the evidence clearly shows that the Claimant misappropriated funds and disclosed confidential information to third parties. The Employer argues that the General Division failed to address the evidence that showed the Claimant misappropriated funds. The Employer also argues that the General Division made factual errors inconsistent with the evidence before it.

[4] The Employer says that if the General Division had not made these errors, it would have necessarily concluded that the Claimant committed misconduct, and that it led to his dismissal from his employment. The Employer asks the Appeal Division to overturn the General Division decision and to substitute its own decision. The Employer asks the Appeal Division to find that the Claimant lost his employment due to misconduct.

[5] The Commission agrees that the General Division made a factual error. However, the Commission says that the error does not change the outcome. The Commission says the evidence falls short of establishing any misconduct.

[6] The Claimant argues that the General Division did not make any errors. The Claimant denies that he committed any misconduct. Both the Commission and Claimant ask the Appeal Division to dismiss the appeal.

Issues

[7] The issues in this appeal are as follows:

a) Can the Appeal Division accept new evidence?

b) Did the General Division fail to address any of the evidence?

c) If so, how should the error be fixed?

Analysis

[8] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[1]

[9] For these types of factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[2]

The parties cannot rely on evidence that was not part of the record before the General Division

[10] Both the Employer and Claimant wish to rely on new evidence to support their respective arguments. This evidence was not part of the record before the General Division.

[11] The Employer wishes to rely on the shareholders' agreement with the Claimant. Both the Employer and Claimant wish to rely on evidence that speaks to the allegations that the Claimant disclosed confidential information and misappropriated funds.

[12] However, the courts have consistently held that, generally, the Appeal Division does not consider new evidence. In *Gittens*, the Federal Court of Appeal said:

> [13] … Under the rules set by Parliament, hearings before the Appeal Division are not redos based on updated evidence of the hearing before the General

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[1] See section 58 (1) of the *Department of Employment and Social Development* (DESD) Act.
[2] See section 58(1)(c) of the DESD Act.

> Division. They are instead reviews of General Division decisions based on the same evidence.[3]

[13] The Court of Appeal has set out the circumstances when the Appeal Division may allow new evidence. New evidence can be considered when it provides general background information, shows procedural defects, or exceptionally, in cases where both parties agree that an important document should be considered.[4] Those circumstances do not exist here.

[14] New evidence is not permitted where it is used to bolster a party's case, particularly when that party could have produced this evidence previously. Neither the Employer nor the Claimant has shown why the new evidence should be accepted. I am not accepting any of the new evidence from either the Employer or the Claimant.

The General Division failed to address the Employer's evidence

[15] The General Division overlooked some of the evidence when it considered whether the Claimant had committed misconduct.

[16] As I set out in my decision granting leave (permission) to appeal, the Employer had argued in its Notice of Appeal that the Claimant "was involved in the theft of company funds and company inventory."[5]

[17] The Commission recognized that the theft allegations involving the Claimant were at issue. The Commission argued that the Employer had not provided clear evidence to show that the Claimant was involved in the theft of funds or company inventory.[6]

[18] Despite the fact that the Employer had alleged that the Claimant "was involved in theft of company funds and company inventory," and the Commission had specifically responded to the allegation, the General Division did not consider nor address this issue. The General Division focussed solely on whether the Claimant was involved in the theft of

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[3] See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 13.
[4] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at para 39.
[5] See Notice of Appeal – Employment Insurance - General Division at GD 2-5.
[6] See Representations of the Commission to the Social Security Tribunal - Employment Insurance Section, at GD 4-6.

the employer's information. The General Division did not discuss any aspect of the Employer's arguments that it had dismissed the Claimant partly because he had misappropriated funds and inventory.

[19] There is a general presumption in law that a decision-maker considers all of the evidence before it. But the decision-maker is obligated to address any evidence if it is of any probative value. In other words, if the evidence is such that it could have an impact on the outcome, the decision-maker must address that evidence.

[20] But a decision-maker also has to address that evidence if it is relevant to the issues that a party raises.

[21] Given that the Employer clearly argued that it had dismissed the Claimant because he had stolen funds and inventory from the company, the General Division should have addressed this evidence.

[22] The Employer argues that the General Division made other errors as well. The Employer says the General Division made a perverse and capricious finding that it dismissed the Claimant because it was dissatisfied with how he was conducting his work. The Employer argues that this specific finding is inconsistent with the evidence.

[23] The Employer says the evidence clearly shows that it dismissed the Claimant partly because he breached the implied duties of acting in good faith and being loyal to the company. This included maintaining the company's confidences.

[24] I have already determined that the General Division made an error by failing to address the Employer's evidence about whether the Claimant had misappropriated funds. The nature of the error requires me to determine the appropriate remedy. Therefore, it is unnecessary to consider whether the General Division made other errors.

Fixing the error

[25] Having determined that the General Division failed to consider some of the evidence before it, I now have to decide how to remedy that error.

[26] The Appeal Division can either return the matter to the General Division for a redetermination or it can substitute its own decision in place of the General Division's decision. However, if it does the latter, there should be no gaps in the evidence and there must be a legal and sufficient evidentiary base to give the decision.

[27] I will come to my own assessment on the evidence. None of the parties are asking to have this matter returned to the General Division and there is a complete evidentiary picture to enable me to make my own decision.

– **When misconduct arises**

[28] The General Division properly defined misconduct. The parties agree that for misconduct to arise, a claimant has to know or should know that their conduct is such that it may lead to consequences, including dismissal. As well, the misconduct "must constitute a breach of an express or implied duty resulting from the contract of employment."[7]

– **The Employer argues that the Claimant committed misconduct**

[29] The Employer argues that employees owe their employers duties of good faith, loyalty, and fidelity. This includes maintaining the confidentiality of all information outside of normal disclosures made in the course of business. The Employer argues that any breach constitutes misconduct.

[30] The Employer says that the test for misconduct has been met. The Employer argues the evidence shows that the Claimant clearly breached his duties:

i. The Claimant communicated with his Employer's customers and suppliers using an email address associated with his father-in-law's business,

ii. The Claimant diverted business to his father-in-law's business, enriching himself and his father-in-law,[8]

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[7] See *Canada (Attorney General) v Lemire*, 2010 FCA 314 at para 14.
[8] The Employer largely relies on exchanges of correspondence between a supplier and the Claimant and a third party.

iii. The Claimant was complicit in transferring funds from the Employer’s bank accounts without the prior knowledge, approval, or authority of the other shareholders of the Employer.[9]

[31] The Employer says that it is irrelevant whether the Claimant also served as a shareholder and ostensibly acted in his capacity as a shareholder when he was involved in transferring funds from the Employer’s bank accounts. The Employer says his role as a shareholder cannot be divorced from his role as an employee.

[32] The Employer says the Appeal Division should find that the Claimant committed misconduct and that it led to his dismissal from the company.

– **The Claimant denies that he committed any misconduct**

[33] The Claimant does not deny that he was aware of his employer’s confidentiality policy and the consequences that he faced if he were to violate the policy. However, he denies that he violated the policy. He denies that he disclosed confidential information to any third parties.

[34] The Claimant also denies that he stole any funds from the Employer. From his perspective, as a shareholder, he was safeguarding the Employer’s funds and his own investment in the company by placing those funds in a lawyer’s trust account. As he alleges in unrelated litigation, the other shareholder transferred significant sums of the company’s monies to her personal account, without any notice to him as a shareholder, and without any apparent benefit to the company.[10]

[35] The Claimant also denies that there is any evidence that shows the Employer terminated his employment because of the alleged theft of funds. He says that the Employer dismissed him on the same date that the funds were transferred out of the account. In other words, the Employer did not know that the funds had been removed, and therefore could not have dismissed him for any misappropriation of funds. The

[9] See Employer’s Written Arguments, at AD 5-5 to 5-6. The Employer relies on paragraphs 71, 73 and 74 of a notice of civil claim filed by the Claimant in Québec Superior Court. The Claimant admitted that they removed funds from the Employer’s account.
[10] See Claimant’s legal claim against Employer, at GD 6-11 to GD 6-18.

Claimant says the Employer ostensibly dismissed him because of the alleged disclosure of confidential information, which he denies he committed.

– The Commission says that there is insufficient evidence of misconduct

[36] The Commission argues that there is insufficient evidence to prove the Employer's allegations of misconduct against the Claimant, whether it was for theft or disclosure of confidential information.

– The conduct has to be a reason for the dismissal

[37] There has to be a causal relationship between a claimant's misconduct of which they are accused and the loss of their employment.[11] An employer cannot cite conduct as giving rise to the termination if it only learns of that conduct after the dismissal already took place.

[38] The Employer argues that the Claimant misappropriated funds and that this led to his termination. The Employer claims that it discovered that the funds had been removed on June 23, 2023, causing it to dismiss the Claimant on June 26, 2023. The Employer states that the theft caused irreparable damage: It says that because of the theft, it was unable to meet its financial obligations, thus harming its reputation.

– The evidence falls short of showing that any alleged theft of funds was a contributing cause or a reason for the dismissal

[39] However, none of the evidence at the General Division showed when the Employer learned of the alleged theft. It is not evident from the termination letter, for instance, that the Employer was yet aware of the alleged theft.

[40] More importantly, neither the termination letter nor any of the Employer's communications showed that the theft contributed to the Claimant's dismissal from his employment.

[11] See *Canada (Attorney General) v Brissette*, A-1342-92, and *Canada (Attorney General) v Cartier*, 2001 FCA 274 at para 14.

[41] The termination letter reads:

> Recently, the Corporation warned [the Claimant] about the importance of respecting his legal and contractual obligations concerning the confidentiality of the information related to the Corporation, after it became apparent that information related to the Corporation had leaked.
>
> Unfortunately, [the Claimant] has also shown constant insubordination, negative attitude and time-wasting attention seeking. That was bad enough but now, the Corporation has learned that your client is attempting to divert customers and vendors away from the Corporation. That is in direct violation of his loyalty obligation as an employee (2088, Civil Code of Québec).
>
>> 2088. The employee is bound… To act faithfully and honestly not use any confidential information he obtains in the performance or in the course of his work. …
>
> [The Claimant] is actively working against the interests of the Corporation.
>
> For all the reasons stated above, [the Claimant's] employment contract is resiliated, effective immediately.

[42] The termination letter suggests that the Employer suspected the Claimant of disclosing confidential information, of being insubordinate, being unproductive, and of diverting customers and vendors from the company.

[43] The Employer asks me to infer that the alleged theft was a cause for the dismissal. Because of the magnitude of the theft, the Employer says that it is obvious that it would not be ignored and would be grounds for an immediate dismissal once it was discovered.

[44] The alleged theft was of a sufficient magnitude that, if it had been the cause or a contributing cause for the dismissal, it should have been part of the termination letter, or at least evident elsewhere.

[45] The evidence is insufficient to prove that the alleged theft was a reason for the Claimant's dismissal from his employment.

[46] As an aside, even if the termination letter had included the theft allegations, I might have been unprepared to find that the alleged theft constituted misconduct, for two reasons:

i. The Claimant was acting in his capacity as a shareholder (rather than as an employee), and

ii. The Employer's conduct led the Claimant (in his capacity as a shareholder) to remove the funds. The Claimant and his colleague allege that the Employer participated "in several extremely unusual and disturbing banking transactions." In particular, the Claimant alleges that there were significant sums transferred to the majority shareholder's personal account, without any authorization, shareholder resolution, explanation, or disclosure, to its shareholders.[12]

[47] There are also some parallels to the *Astolfi*[13] case, although the facts are distinguishable. That case involved harassment of the employee. The Federal Court determined that an employer's conduct prior to the "misconduct" could be relevant and should be considered, as part of the broader context, in analyzing whether a claimant committed misconduct.

[48] In other words, the fact that the Claimant was not simply an employee and was also a shareholder with a vested financial interest in the company, and the fact that the Claimant perceived that the majority shareholder was involved in the misappropriation of funds from the company, could all figure into the analysis of whether there was misconduct.

– **The employer alleges that the Claimant disclosed confidential information and diverted business**

[49] The Employer says it also dismissed the Claimant because he had disclosed confidential information and diverted business to its competitor.

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[12] See paragraphs 39 to 53 of legal proceedings commenced by the Claimant, at GD 6-11 to 11-16.
[13] See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

[50] Disclosure of confidential information and diverting business away from an employer would be a cause for termination. However, for misconduct to arise, it has to be established that the Claimant committed that act(s). An allegation is insufficient to prove misconduct.

[51] The Claimant denies that he disclosed confidential information or that he diverted business from the Employer. The Employer says there is overwhelming evidence that the Claimant committed these acts. The Employer largely relies on the documents that are found at Tab 5 of the Employer's submissions to prove that the Claimant disclosed information and diverted business away from the company.[14]

[52] The Employer says the documents show that the Claimant's father-in-law's company did business with one of the Employer's suppliers. The supplier provided a quote to the Claimant's brother-in-law.[15] These particular documents were not in evidence at the General Division. Even so, I accept that the Claimant's father-in-law's company did business with this supplier.[16] There is other evidence in the hearing file that shows the father-in-law's relationship with the supplier.[17]

[53] However, even if these documents had been in evidence, I find that neither they, nor any of the other documents on the record,[18] prove what the Employer claims they show, or that they were even the basis for the termination:

i. The documents are dated after the Employer had already dismissed the Claimant from his employment on June 26, 2023. So, they cannot possibly show that the Employer relied on these documents to terminate the Claimant's employment.

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[14] See documents at TAB 5, at AD 5-23 to 5-32.
[15] See email exchange dated May 17 and 23, 2023, at GD 8-6 to 8-9 and AD 5-23 to 5-24.
[16] See email with a supplier, dated June 8 to 16, 2023.
[17] See, for instance, Purchase Order dated July 7, 2023, billed to Claimant's father-in-law's business, at GD 8-14. See also email exchange on June 28 and 29, 2023, involving father-in-law's business, at GD 8-15 to 8-16.
[18] See footnote 17 above. Also see email dated November 1, 2023, confirming a purchase order with the Claimant's father-in-law's business, at GD 8-12.

ii. The documents show that the father-in-law's business purchased supplies from the vendor. Contrary to the Employer's arguments, these documents do not show that the Claimant diverted business away from the Employer. The documents do not show that the supplier ceased to purchase goods or services from the Employer, or that there was any harm to the Employer.

iii. The documents also do not show that the Claimant disclosed the Employer's information to the supplier.

[54] Furthermore, there is evidence that the supplier invoiced the Claimant's father-in-law's business as early as 2019.[19] In other words, the father-in-law's business already had an established relationship with the supplier dating back to at least as early as 2019, which predated the Claimant's employment with the Employer.[20]

[55] The Employer alleges that the Claimant's father-in-law had recently begun operating under a name similar to the Employer's name. The Employer alleges that the Claimant took advantage of the similarities between the business names from the Employer. However, the 2019 document undermines the Employer's arguments. It shows that the father-in-law's business was already established under that name.

[56] The Employer has failed to produce any evidence that shows that the Claimant disclosed confidential information or diverted business from the Employer. The Employer has not established that the Claimant lost his employment because of misconduct.

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[19] See invoice dated March 12, 2019, billed to Claimant's father-in-law's business, at GD 6-9.
[20] The Record of Employment at GD 3-21 shows that the Claimant started working for the Employer in 2021.

Conclusion

[57] The appeal is dismissed. The General Division failed to address one of the issues before it. However, the error has no impact on the outcome.

Janet Lew

Member, Appeal Division