



Social Security  
Tribunal of Canada  
[TRANSLATION]

Tribunal de la sécurité  
sociale du Canada

Citation: *J. V. v. Canada Employment Insurance Commission*, 2018 SST 923

Tribunal File Number: AD-18-230

BETWEEN:

**J. V.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: September 20, 2018

## DECISION AND REASONS

### DECISION

[1] The Tribunal dismisses the appeal.

### OVERVIEW

[2] The Applicant, J. V. (Claimant), was dismissed by his employer for sleeping while on duty, which the employer considered unacceptable because he was a security guard. The Respondent (Commission) concluded that the Claimant lost his employment by reason of his own misconduct. The Claimant requested reconsideration of this decision. The Commission, however, maintained the initial decision. The Claimant appealed that decision to the Tribunal's General Division.

[3] The General Division found that the Claimant had lost his employment by reason of his own misconduct. It did not accept the theory of accidentally falling asleep. The General Division found that the Claimant's action was wilful or so reckless as to approach wilfulness.

[4] The Tribunal granted leave to appeal. The Claimant submits that the General Division erred in its interpretation of the concept of misconduct within the meaning of the *Employment Insurance Act* (Act). He also argues that the General Division overlooked certain evidence and that it erred in its credibility assessment.

[5] The Tribunal must determine whether the General Division erred in its interpretation of the concept of misconduct under the Act, ignored some of the evidence, and erred in its assessment of the Claimant's credibility.

[6] The Tribunal dismisses the Claimant's appeal.

## ISSUES

[7] Did the General Division err by overlooking some of the evidence and in its interpretation of the concept of misconduct under the Act?

[8] Did the General Division err in its assessment of the Claimant's credibility?

## ANALYSIS

### Appeal Division's Mandate

[9] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act*.<sup>1</sup>

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division. It does not exercise a superintending power similar to that exercised by a higher court.

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

### **Issue 1: Did the General Division err by overlooking some of the evidence and in its interpretation of the concept of misconduct under the Act?**

[12] The Tribunal finds that this ground of appeal is without merit.

[13] The General Division's role is to determine whether the employee's conduct amounted to misconduct within the meaning of the Act and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal.<sup>2</sup>

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<sup>1</sup> *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

<sup>2</sup> *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[14] In addition, the concept of misconduct does not necessarily imply that the wrongful behaviour was a result of wrongful intent; it must simply be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on his or her performance.<sup>3</sup>

[15] The Claimant maintains that the General Division could not set aside the medical evidence about his diabetes in its analysis of the wilful or reckless nature of his actions. He claims that he simply closed his eyes to deal with a moment of dizziness. He also submits that the General Division erred in law by not considering the evidence before it, specifically the events leading to his illness: two shifts without prior notice, missing a meal, and his colleague not coming to help him.

[16] After analyzing all of the evidence, the General Division found that the Claimant had been dismissed because he fell asleep on duty on April 28, 2017, and that the employer had a zero-tolerance policy for this kind of negligence. The Claimant's supervisor filmed him for several minutes while the Claimant slept in his car instead of watching over the area. The supervisor had to knock on the window of the Claimant's car to get his attention. The Claimant had previously received a guide stating that an employee sleeping on duty would be dismissed on the spot.

[17] The General Division found that the Claimant's actions were deliberate and of such an extent that he ought to have known that such actions were likely to lead to his dismissal.

[18] The Claimant submits that the General Division erred by ignoring his uncontested medical evidence solely on the ground that he had not informed his employer of his medical problem. He submits that it is a right that is protected by the *Charter of Rights and Freedoms*.

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<sup>3</sup> *Canada (Attorney General) v. Hastings*, 2007 FCA 372; *Tucker*, A-381-85; *Mishibinijima*, A-85-06.

[19] The Tribunal is of the opinion that the General Division did not reject the Claimant's medical evidence solely on the ground that he had not informed his employer of the state of his health.

[20] The General Division found that the Claimant's version of events was not very credible, namely that he only dozed off for a few moments as a result of his health problems, because his previous statements, including his testimony at the hearing, were full of "maybes" and because he did not notice the presence of his supervisor near his window for several long minutes before his supervisor knocked on the window of his vehicle.

[21] Furthermore, the Tribunal notes that in his statements from June 2 and 7, 2017, the Claimant made no mention of his health condition to the Commission's representative, even though he had already lost his job. He stated only that he dozed off for a few minutes because he was exhausted after so many consecutive hours. This version of events that the Claimant presented was corroborated by the employer, who said that the Claimant initially stated that he dozed off because he was really tired.

[22] The Tribunal also notes that the Claimant only mentioned his health condition after the Commission's initial decision of June 8, 2017, refusing him Employment Insurance benefits.

[23] Furthermore, the Tribunal notes that the Claimant worked for his employer for 11 years without his health condition causing him problems and that he abandoned his grievance process for unlawful dismissal against the employer.

[24] The Tribunal is of the opinion that it would have been significantly better for the Claimant to refuse the shift if he was not, at that specific moment, in a state to do it adequately. His job was to be on watch as a security guard, so he should have had all of his faculties about him when he arrived at work. Unfortunately, this was not the case.

[25] The Tribunal finds that the evidence before the General Division shows that the alleged actions were wilful or of such a careless or negligent nature that one could say

that the Claimant wilfully decided to disregard the effects his actions would have on his job performance.

[26] The Tribunal finds that the General Division made its decision based on the evidence before it and that the decision complies with both the legislative provisions and the case law regarding misconduct.

[27] There is nothing to warrant the Tribunal's intervention.

**Issue 2: Did the General Division err in its assessment of the Claimant's credibility?**

[28] The Tribunal finds that this ground of appeal is without merit.

[29] It is settled case law that, except in certain obvious circumstances, the issue of credibility must be left to the General Division, which is in a better position to decide on the matter.

[30] The Tribunal will only intervene if it becomes obvious that the General Division's findings on this matter do not take into account the evidence before it.

[31] The Tribunal finds that nothing in this case justifies its information with regard to the Claimant's credibility as it was evaluated by the General Division.

**CONCLUSION**

[32] For the reasons mentioned above, the Tribunal dismisses the appeal.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	September 13, 2018
METHOD OF PROCEEDING:	Teleconference

APPEARANCES:	J. V., Appellant  Jérémie Dhavernas, Representative for the Appellant
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