



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v L. H.*, 2019 SST 612

Tribunal File Number: AD-19-11

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 26, 2019

DECISION AND REASONS

DECISION

[1] The Commission's appeal is dismissed.

OVERVIEW

[2] The Respondent, L. H. (Claimant), was dismissed from her employment after she pled guilty and was convicted of certain offences that related to her performance of work duties. She applied for Employment Insurance benefits but the Appellant, the Canada Employment Insurance Commission (Commission), denied her claim, finding that she was dismissed for misconduct. The Commission maintained this decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal.

[3] The General Division allowed her appeal. It found that the Claimant could not reasonably have foreseen that she would be dismissed for her convictions. The Commission is now appealing to the Appeal Division.

[4] The General Division made no error in finding that the conduct for which the Claimant was dismissed was the Claimant's convictions, and it did not err in law in finding that the Claimant's dismissal was not a foreseeable result of her conviction.

ISSUES

[5] Did the General Division make an error in law by applying the legal test to the conviction and not to the conduct that resulted in the conviction?

[6] Was the General Division's finding that the Claimant was dismissed because of her conviction made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

[7] The Appeal Division may intervene in a General Division decision only if the Appeal Division can find that the General Division has made one of the types of errors described by the “grounds of appeal” in section 58(1) of the DESD Act.

[8] The grounds of appeal in section 58(1) of the DESD Act are as follows:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success based on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.¹

Issue 1: Did the General Division make an error in law by applying the legal test to the conviction and not to the conduct that resulted in the conviction?

[10] To establish that the Claimant’s conduct amounts to misconduct within the meaning of the Employment Insurance Act, the Commission must show that it is more likely than not that the Claimant engaged in the action or inaction that is said to be the basis for her misconduct. It must also show that she knew, or ought to have known, that her conduct was such as to impair the performance of the duties she owed to her employer and that, as a result, dismissal was a real possibility.² Finally, for the Claimant to be disqualified from benefits under section 30 of the

¹ *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.

² *Mishibinijima v. Canada (AG)*, 2007 FCA 36

Employment Insurance Act (EI Act), the Commission must prove that the Claimant's misconduct was the reason that the employer dismissed her.

[11] The General Division found that the Claimant was dismissed because of her convictions, and not because of the actions on which the convictions were based. It also found that the Claimant could not have foreseen that her convictions would result in her dismissal. Therefore, the General Division concluded that the Commission had not established that the Claimant was guilty of misconduct for having been convicted.

[12] The Commission now argues that the General Division should have applied the test for misconduct to the conduct for which the Claimant was convicted. The Claimant pled guilty to summary conviction offences of fraud, forgery, and uttering a forged document. Therefore, she must be presumed to have committed those offences. In addition, the Claimant committed those offences in the course of the Claimant's work duties.

[13] Even so, the convictions and the conduct giving rise to the convictions are two different things. The judicial finding that the Claimant committed criminal code offences does not necessarily require the General Division to also find, under the EI Act, that the Claimant breached a duty to her employer and that she should have known that the breach would result in her dismissal.

[14] In my leave to appeal decision, I noted that the Federal Court of Appeal in *Canada (Attorney General) v Brissette* said this: “[C]oncluding that the loss of employment resulted from the loss of the [appellant's driver's] licence and not from the licence holder's misconduct amounts to indulging in too narrow an analysis and interpretation of the situation.”³

[15] However, the decision in *Brissette* was based on quite different facts. In *Brissette*, the appellant was a truck driver. The loss of his driver's licence meant that the appellant could no longer work as a truck driver. In this case, there is no evidence that the Claimant's summary convictions would have interfered with her ability to perform her work duties. The fact that the Claimant's actions could foreseeably lead to legal consequences does not *necessarily* mean that it was also foreseeable that the same actions would also lead to employment consequences—as

³ *Canada (Attorney General) v Brissette*, A-1342-92.

was the case with the impaired driving conduct that resulted in the loss of the appellant's driver's licence in the *Brissette* decision.

[16] The Commission has not pointed me to any other legal authority that would require me to treat the actions that gave rise to the investigation and conviction as the misconduct for which the Claimant was dismissed. Similarly, there is no authority that would require me to treat the conviction and the underlying conduct as inseparable for the purpose of determining misconduct under the EI Act.

[17] Furthermore, the facts in this case support drawing a distinction between the conviction and the underlying conduct on which the conviction was based. Although the Claimant acknowledged that she understood (at some point) that her actions were against the law, she also stated that she had not known she was doing anything wrong by signing for the Elders (of the First Nations band with which she was employed). She stated that she had permission to sign for the other Elders (although the employer disputed this⁴) and that she had followed the process that her employer required of her. She stated that she believed signing for others had been the practice for 20 years and that it was the normal procedure in her organization. She said it had never been an issue in the past.⁵

[18] There was no evidence that the Claimant was disciplined, that she failed to perform her work duties in a legal, ethical, or responsible manner, or that she caused the employer any concern whatsoever during the several years that she continued to work for the employer. The employer initially stated that the Claimant had been suspended until February 2018, during the time the investigation was ongoing.⁶ However, the Claimant said that the actions that led to her dismissal happened a number of years earlier, and that she had continued to work in a different position for more than six years. She said that she had always received excellent reviews⁷ and she supported this with a commendation letter from the employer dated April 2014,⁸ well after the investigation began, but before the laying of charges in late 2017. In a later statement, the

⁴ GD3-41

⁵ GD3-40 and 42; GD3-36-37

⁶ GD3-24

⁷ GD3-29

⁸ GD3-38

employer confirmed that the Claimant was not suspended until charges were laid.⁹ These facts suggest that the Claimant's relationship with the employer had not been significantly affected by her earlier actions, and that the Claimant would not have been dismissed but for the conviction.

[19] The Commission has not satisfied me that the General Division made an error in law under section 58(1)(a) of the DESD Act by treating the conviction separately from the underlying conduct, or in applying the test for misconduct to the conviction and not to the conduct on which the conviction was based.

Was the General Division's finding that the Claimant was dismissed because of her conviction made in a perverse or capricious manner or without regard for the material before it?

[20] The Commission's appeal related to the manner in which the General Division applied the legal test of misconduct. Specifically, the General Division disagreed that the General Division should have assessed whether, as a result of her conviction, it was foreseeable that the Claimant could lose her employment. I have already found that the General Division did not make an error of law. However, I accept that the General Division applied the misconduct test to what if found to be the actual cause for the Claimant's dismissal, and that the Commission disagrees with this. Therefore, I will also consider the Commission's appeal as a challenge to the General Division finding that the Claimant's conviction was the reason for his termination.

[21] The facts before the General Division were as follows: The Claimant pled guilty and was convicted in 2018 for offences related to forging documents in the course of her work duties. The forgeries took place several years earlier, and the investigation began in or around 2011,¹⁰ or perhaps as early as 2008.¹¹ The employer dismissed the Claimant on February 6, 2018,¹² immediately after the Claimant's guilty plea on January 29, 2018.¹³ The employer had not disciplined the Claimant in the meantime, and the Claimant continued to perform her duties in a satisfactory, or even exemplary, manner.¹⁴

⁹ GD3-41

¹⁰ GD3-36

¹¹ GD3-39

¹² GD3-27

¹³ GD3-36

¹⁴GD3-38

[22] I am not satisfied that the General Division made an error when it found that the Claimant was dismissed because of the conviction. The letter of dismissal identifies the conduct on which the conviction is based, and says that the conduct undermines the foundation of the employment. However, the same letter clearly states that the reason for termination is that the Claimant engaged in *criminal* activity. The letter relates that criminality to her *summary convictions*. The criminal investigation would not have prevented the employer from reaching its own conclusions about whether the Claimant willfully breached her duty to the employer. The Claimant's continuing relationships with the employer does not suggest that her earlier actions had "undermined the foundation" of her employment, but the employer might have communicated or demonstrated this at any time over a period of years, completely independent of the criminal investigation. Instead of terminating the Claimant's employment, the employer maintained her as an active employee and continued to rate her performance positively, at least to the time she was charged in October 2017.¹⁵

[23] Having found that the Claimant was dismissed for the convictions, the General Division turned to whether the Claimant could have foreseen her dismissal for pleading guilty to the offences. It accepted that the Claimant was convicted of summary offences only. It also accepted the Claimant's testimony that the employer's Human Resources policy talked about dismissal for indictable offences, but not for summary offences, and that the Claimant's lawyer had advised her that her guilty plea would not jeopardize her employment.¹⁶ The General Division found that the Claimant could not have foreseen that she would be dismissed for summary convictions.

[24] I do not accept that this finding is either perverse or capricious, or that it is made without regard for the material that was before the General Division, and therefore I do not accept that the General Division erred under section 58(1)(c) of the DESD Act.

CONCLUSION

[25] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

¹⁵ GD3-19

¹⁶ General Division decision, para. 25

HEARD ON:	June 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, Representative for the Appellant L. H., Respondent Malian Levi, Representative for the Respondent