Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *X v Canada Employment Insurance Commission and I. K.*, 2019 SST 767

Tribunal File Number: AD-18-878

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

I. K.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: August 16, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] I. K. is the Claimant in this case. On January 30, 2018, the Employer, X, dismissed the Claimant for failing to attend work. More specifically, the Employer alleges that the Claimant faked an illness so that he could go on a weekend trip with his wife.

[3] The Claimant first established a claim for Employment Insurance (EI) sickness benefits. In May 2018, however, he applied for EI regular benefits. This prompted the Canada Employment Insurance Commission to look into the reasons why the Claimant was no longer working for the Employer. Ultimately, the Commission concluded that the Claimant lost his job because of his own misconduct and it disqualified him from receiving EI benefits.[1]

[4] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. In short, the General Division believed that the Claimant was unable to work because of his health and concluded that the Claimant's actions did not amount to misconduct, within the meaning of the *Employment Insurance Act* (EI Act).

[5] The Employer is now appealing the General Division decision to the Tribunal's Appeal Division. The Employer argues that the General Division overlooked important evidence and that the Claimant's misconduct should not be rewarded in the form of EI benefits.

[6] In my view, the Employer has not shown that the General Division committed a relevant error in this case. As a result, I am dismissing the appeal. These are the reasons for my decision.

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[1] Section 30 of the *Employment Insurance Act* (EI Act) sets out the Commission's power to disqualify people from receiving benefits when they have lost their job because of their own misconduct.

ISSUE

[7] Did the General Division commit a relevant error of fact or law by concluding that the Claimant lacked the willfulness required to prove misconduct?

ANALYSIS

[8] Before I can intervene in this case, the Employer must convince me that the General Division committed at least one of the three possible errors described in the *Department of Employment and Social Development Act* (DESD Act).[2]

[9] In this case, I considered whether the General Division based its decision on an important error concerning the facts of the case. Critically, not all factual errors can justify my intervention in a case.[3] For example, I cannot intervene in a case because the General Division made an error concerning some irrelevant detail. However, I can intervene in a case if the General Division based its decision on a factual finding that is clearly contradicted by the evidence or has no evidence to support it.[4]

[10] I also considered whether the General Division committed an error of law by failing to engage in a meaningful analysis of the conflicting evidence.[5] Based on the words in the DESD Act, any error of law could justify my intervention in this case.

Did the General Division commit a relevant error of fact or law by concluding that the Claimant lacked the willfulness required to prove misconduct?

[11] No, the General Division did not commit a relevant error of fact or law when it concluded that the Claimant lacked the willfulness element required to prove misconduct.

[2] Section 58(1) of the DESD Act describes the three possible errors (also known as grounds of appeal) that would allow me to intervene in this case.
[3] More specifically, section 58(1)(c) of the DESD Act allows me to intervene in a case if 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.
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[5] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498 at para 51; *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 at paras 7–9; *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at paras 3 and 7.

[12] Section 30 of the EI Act disqualifies claimants from receiving benefits if they lose their job because of their own misconduct. The courts have said that "misconduct" under the EI Act requires an element of wilfulness: claimants must know or should know that their conduct could result in dismissal.[6]

[13] In this case, the Employer argued that it made clear to the Claimant that he would be dismissed if he left the jobsite to go on a trip with his wife. The Employer made this clear, for example, in emails to the Claimant dated January 23 and 26, 2018.[7]

[14] The Employer also refused to believe that the Claimant was genuinely sick, or at least that he remained sick after January 26, 2018. The Employer highlighted that, at the time it terminated the Claimant's employment, he had only provided a single medical note confirming that he was unfit to work on January 25 and 26, 2018.[8]

[15] In addition, the Claimant was well enough to tolerate the eight-hour drive from the jobsite back to Canada and then to go on a planned trip with his wife. According to the Employer, the Claimant's earlier and multiple requests for time off made clear that this weekend getaway was the real reason for missing work.[9]

[16] In the appeal before me, the Employer argues that the General Division essentially ignored its theory of the case. For example, it made little reference to the evidence above. The Employer also argued, on the one hand, that the General Division should have refused to consider evidence that the Employer did not have at the time it decided to dismiss the Claimant. On the other hand, however, the Employer continued to ask for additional evidence that might strengthen its case.[10]

[17] In my view, the Employer's submissions highlight the difficulty with this appeal: the Employer (and to some extent the Claimant) were asking the Tribunal to approve or disapprove of the Employer's decision to dismiss the Claimant for cause.

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[6] *Canada (Attorney General) v Lemire*, 2010 FCA 314 at paras 11–16.
[7] GD3-37; GD3-40.
[8] GD3-39.
[9] GD3-32; GD3-35.
[10] See, for example, AD1-3 and AD1-7.

[18] As the General Division emphasized, however, it is not for this Tribunal to determine whether the Claimant was unjustly dismissed. The General Division's exclusive role was to determine whether the Claimant had lost his job because of his own wilful misconduct within the meaning of the EI Act.[11] Wilful misconduct and just cause for dismissal are not the same.

[19] When deciding the distinct issue before it, therefore, the General Division was entitled to look at all of the relevant evidence. It was not bound to the short timeline adopted by the Employer. Nor was it restricted to the evidence on which the Employer based its decision to dismiss the Claimant.

[20] Concerning the Employer's submissions, I agree that the General Division could have done a better job of acknowledging the Employer's theory of the case and some of the documents that it advanced. I am not convinced, however, that the General Division committed a relevant error in this case.

[21] Importantly, in paragraphs 7, 9, and 11 of its decision, the General Division did acknowledge the Employer's theory and referred to some of the documents that it had advanced.

[22] Ultimately, however, the General Division decided that circumstances changed on January 24, 2018, when the Claimant developed a health condition requiring medical treatment. In addition, the General Division accepted that the Claimant's medical condition was legitimate.[12] By making this finding, the General Division was responding to the Employer's theory that the Claimant missed work for an illegitimate purpose.

[23] In other words, the Employer made clear to the Claimant that he would be dismissed if he missed work to go on a trip with his wife. However, the Claimant did not know that he would also be dismissed for missing work to seek treatment for a legitimate medical condition.

[24] In my view, the conclusion reached by the General Division was open to it. In making my decision, I note that the General Division was not required to mention every piece of evidence

[11] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140 at para 20.
[12] General Division decision at para 9.

that it had in front of it.[13] In addition, I am entitled to assess the quality of the General Division decision in the context of the whole file.[14]

[25] As part of its submissions, the Employer also argues that the General Division gave too much weight to some pieces of evidence and not enough weight to others. But this is not a relevant ground of appeal listed under the DESD Act. In other words, even if I agreed with this submission, it would not provide me with a legal basis to intervene in this case.

[26] Finally, it is also worth highlighting that the Commission initially sided with the Employer in this case. On appeal, however, the Commission submits that the General Division did not commit any relevant errors. As a result, it agrees that I should not intervene in this case.

[27] Overall, therefore, I am satisfied that the General Division did not commit a relevant error of fact or of law when it concluded that the Claimant lacked the willfulness element required to prove misconduct.

CONCLUSION

[28] The appeal is dismissed.

Jude Samson
Member, Appeal Division

HEARD ON:	June 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	X and X, representatives for the Appellant I. K., Claimant/Respondent X, representative for the Claimant/Respondent

[13] *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.
[14] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

	S. Prud'Homme, representative for the Commission/Respondent (written submissions only)

Relevant Legal Provisions

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

(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.

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Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

Employment Insurance Act

Disqualification — misconduct or leaving without just cause

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless…