



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. S. v Canada Employment Insurance Commission*, 2019 SST 1478

Tribunal File Number: AD-19-453

BETWEEN:

S. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: December 17, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] S. S. is the Claimant in this case. She used to work for the Employer, the X. While the Claimant was on sick leave, the Employer started an investigation and later terminated her employment. Specifically, the Employer alleged that the Claimant had colluded with the (former) acting executive director to create a fraudulent employment contract. The Claimant then improperly enrolled herself in the Employer's group benefits plan, changed her status to that of a salaried employee, and gave herself a pay raise of some \$1,800/year. In addition, the Employer alleged that the Claimant had bullied and harassed her co-workers.

[3] The Claimant later applied for Employment Insurance (EI) regular benefits. At first, the Canada Employment Insurance Commission approved her application. However, the Employer challenged the Commission's decision, which prompted a more thorough review. In the end, the Commission concluded that the Claimant had been terminated because of her own misconduct. As a result, the Commission disqualified her from receiving EI benefits, which created an overpayment on her account.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed her appeal. She is now appealing the General Division decision to the Tribunal's Appeal Division.

[5] I have concluded that the General Division did not properly apply the legal test for misconduct to the facts of this case. In the circumstances, I am allowing the appeal and giving the decision that the General Division should have given. In my view, the Commission failed to prove that the Claimant was guilty of misconduct. As a result, the Commission has no grounds to disqualify the Claimant from receiving EI benefits. These are the reasons for my decision.

ISSUES

[6] When reaching this decision, I focused on the following issues:

- a) Should I consider new evidence in this case?
- b) Did the General Division commit an error of law in the way that it applied the test for misconduct to the facts of this case?
- c) If so, what is the best way to fix the General Division's error?
- d) Does the Commission have grounds to disqualify the Claimant from receiving EI benefits?

ANALYSIS

[7] I must follow the law and procedures set out in the *Department of Employment and Social Development Act* (DESD Act). As a result, I can intervene in this case only if the General Division committed one or more of the errors listed under section 58(1) of the DESD Act.¹

[8] In this case, I focused on whether the General Division decision contains an error of law.² Based on the wording of the DESD Act, any error of law could trigger my powers to intervene in this case.³ In cases where I can intervene, the DESD Act also defines the powers that I have to try to fix the General Division's error.⁴

Issue 1: Should I consider new evidence in this case?

[9] No, I have not considered any new evidence in this case.

¹ These errors are also known as grounds of appeal.

² Section 58(1)(b) of the DESD Act says that I can intervene in a case whenever the General Division errs in law in making its decision, whether or not the error appears on the face of the record.

³ *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.

⁴ These powers are established in section 59(1) of the DESD Act.

[10] The Claimant submitted new evidence after the General Division had finalized its decision. This new evidence includes arguments mixed with statements by the Claimant,⁵ statements made by others (with supporting documents),⁶ emails and more.⁷

[11] As mentioned above, the DESD Act gives the Appeal Division a limited role. The Appeal Division is not a place for the parties to strengthen their case or to correct gaps that the General Division might have identified.

[12] My starting point is to determine whether the General Division made an error listed in the DESD Act. As a general rule, I make that assessment based only on the evidence that the General Division had in front of it. I recognize that there are exceptions to the general rule against considering new evidence,⁸ but none of those exceptions apply in this case.

[13] In particular, the Claimant's new evidence does not provide general background information, highlight findings that the General Division made without supporting evidence, or reveal ways in which the General Division acted unfairly. Instead, it goes to the core of the dispute between the parties.

[14] As a result, I refused to consider the Claimant's new evidence.

Issue 2: Did the General Division commit an error of law?

[15] Yes, the General Division committed an error of law by improperly applying the test for misconduct to the facts of this case.

[16] The General Division started its analysis of the case by correctly noting that section 30 of the *Employment Insurance Act* (EI Act) disqualifies people from receiving EI benefits if they lose a job because of their own misconduct. Under the EI Act, misconduct does not require that

⁵ AD2; AD5.

⁶ AD4.

⁷ AD1B is a large mix of documents that the General Division did and did not have in front of it.

⁸ Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at para 28.

the person have bad intentions, but it does require an element of willfulness: Did the person know, or should they have known, that their actions could result in dismissal?⁹

[17] The General Division then identified why the Employer had terminated the Claimant's employment. It found that the Employer was motivated by its belief that the Claimant had colluded with the acting executive director to create, sign, and implement a false employment contract. This contract, the Employer alleged, allowed the Claimant to fraudulently change her employment status, increase her salary, and access employee benefits before completing a mandatory, three-month waiting period. In short, the Claimant breached the Employer's trust.

[18] Although the Claimant's termination letter also accused her of being abusive towards clients and staff, the General Division found that this was not a real reason for her termination.

[19] The next part of the General Division's analysis is the longest. The General Division analyzed two employment contracts to determine which was the most "authentic".

[20] The Claimant maintains that the first employment contract—the one dated November 23, 2017, and signed by both the Claimant and acting executive director—is legitimate.¹⁰ According to this contract, the Claimant was to be paid an annual salary of \$64,500, and became eligible for the Employer's group benefits plan as of December 1, 2017.

[21] The second employment contract—the one dated November 27, 2017, and signed by just the former executive director—is the one that the Employer claims to be legitimate.¹¹ According to this contract, the Claimant was to be paid \$32/hour and had to serve a three-month waiting period before enrolling in the Employer's group benefits plan.

[22] In the end, the General Division looked at various factors and concluded that "the November 27 letter is the one the employer approved and that the terms of this contract are the terms the Claimant accepted when she started the job."¹² It followed, therefore, that the Claimant had breached the Employer's trust and misconducted herself by "signing a false employment

⁹ *Canada (Attorney General) v Lemire*, 2010 FCA 314 at paras 11–16; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.

¹⁰ GD3-123 to 124.

¹¹ GD3-127 to 128.

¹² General Division decision at para 12.

contract, accessing the extended benefit plan before she was eligible, and changing her rate of pay without the organization's approval."¹³

[23] By focusing on the authenticity of competing employment contracts, the General Division asked itself the wrong question. In addition, when the General Division found against the Claimant on the issue of the most authentic contract, it improperly inferred that the Claimant was guilty of misconduct. These are errors of law under section 58(1) of the DESD Act.

[24] The authenticity of the Claimant's employment contract is a hotly contested issue between the Claimant and the Employer. Respectfully, however, it is not an issue that the General Division should have decided.¹⁴

[25] To establish whether the Claimant was guilty of misconduct, the General Division should have considered what the Claimant knew and understood at the time she signed the employment contract dated November 23, 2017. Signing and implementing the contract were conscious acts. However, the Claimant would not have known that doing so would lead to her dismissal if that contract accurately reflected the terms of her employment, as negotiated with a person whom she understood to have the necessary degree of authority.

[26] The Claimant's beliefs are important in a case like this one, where the Employer is said to have been dysfunctional and lacked a clear and effective governance structure.

[27] In short, the General Division failed to answer the relevant question: Did the Claimant know, or should she have known, that signing and implementing the contract dated November 23, 2017, could result in her dismissal? The General Division made an error of law by focusing instead on which contract best corresponded to surrounding circumstances, and then inferring that the Claimant knew those to be the terms of her employment.

¹³ General Division decision at para 36.

¹⁴ Indeed, I find it problematic that the General Division ruled on the most authentic employment contract and denied the Employer's request to be added as a party to this proceeding. See the Employer's email dated January 30, 2019, and the Tribunal's response dated April 17, 2019.

Issue 3: What is the best way to fix the General Division’s error?

[28] This is an appropriate case to give the decision that the General Division should have given.

[29] I have concluded that I have the ability and the information needed to make a final decision in this case.¹⁵ In addition, I have reviewed all the material in the file and listened to the audio recording of the General Division hearing. As a result, little is to be gained by returning the matter to the General Division.

Issue 4: Does the Commission have grounds to disqualify the Claimant from receiving EI benefits?

[30] No, the Commission has not shown grounds to disqualify the Claimant from receiving EI benefits.

[31] To succeed, the Commission has to prove that the Claimant lost her job because of her own misconduct.¹⁶ Indeed, the Commission must prove its case on a balance of probabilities, meaning that its version of events is more likely than not to be true.

[32] Given the seriousness of the allegations and the important consequences associated with a finding of misconduct, the Commission needs clear evidence to prove its case.¹⁷ In my view, it has failed to do so: the Commission has not established grounds to disqualify the Claimant from receiving EI benefits.

[33] Like the General Division, I also find that the Employer’s allegations of bullying and harassment are not the real reason why it terminated the Claimant’s employment.¹⁸ These allegations concern events that happened in February 2018, yet the Claimant was not terminated until many months later. Indeed, in March 2018, the Employer paid benefits to the Claimant and provided her with a record of employment listing “illness or injury” as the reason for its

¹⁵ Section 59(1) of the DESD Act establishes my power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal’s decision in *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16–18.

¹⁶ *Canada (Attorney General) v Larivee*, 2007 FCA 312 at para 11.

¹⁷ *Crichlow v Canada (Attorney General)*, 1998 CanLII 8419 (FCA) at para 4; *Canada (Attorney General) v Granstrom*, 2003 FCA 485 at paras 5, 10, 11.

¹⁸ General Division decision at paras 10–11. The parties did not challenge this part of the General Division decision.

issuance.¹⁹ It is the Employer's later investigation that truly prompted its decision to terminate the Claimant's employment.²⁰

[34] As a result, I will focus on the Employer's allegations of fraud, collusion, and breach of trust.

[35] On the one hand, the Claimant offered an entirely innocent explanation of what happened in this case.

[36] According to the Claimant, the acting executive director and a human resources consultant interviewed her for the position of finance manager. Since the Employer was unable to meet her salary expectations, she asked to be enrolled in the Employer's group benefits plan without having to serve the normal three-month waiting period. After the interview, the acting executive director checked that she had the power to waive the waiting period, then confirmed to the Claimant that she would, in fact, do so.²¹

[37] In terms of her pay, the Claimant acknowledged that she was first hired on an hourly basis, but said that the Employer later changed the finance manager's role to a salaried position. In particular, the Claimant was working a lot of overtime because of

- a) the state of the Employer's books;
- b) its precarious financial situation;
- c) difficulties the Claimant encountered accessing the Employer's electronic records (the previous finance manager had not left any of his passwords); and
- d) urgent matters, like payroll, that she needed to process as quickly as possible.

[38] The acting executive director and former treasurer became concerned, however, that the Employer would not be able to afford the Claimant's overtime bill, should she start to claim all

¹⁹ GD3-51; GD3-85; GD3-117.

²⁰ GD3-85 (para 23) GD3-120 (para 25).

²¹ This paragraph and others below summarize the Claimant's evidence and that given by the acting executive director. I wrote this summary based on written records (for example, GD2-31 to 33; GD2-38; GD2-51; GD3-43 to 45; GD3-163 to 165) and on the oral evidence they gave at the General Division hearing.

the hours that she was working. As a result, they decided to pay the finance manager an annual salary instead of on an hourly basis.

[39] When making this change, the acting executive director and former treasurer decided to give the finance manager a small increase in pay, since they also expected her to work slightly more hours per week. At the General Division level, the Claimant stressed that the Employer initiated this change and, given the overtime hours she was working, did so in its own best interests.

[40] The Employer's former acting executive director—the person with whom the Claimant negotiated the terms of her employment—gave written and oral evidence at the General Division level. She strongly agreed with the Claimant's evidence.²² In particular, she agreed that she had the power to set the Claimant's terms of employment and that the employment contract dated November 23, 2017, best reflected those terms of employment. The Claimant also provided a notice to all staff from the Employer's board of directors as evidence of the acting executive director's authority.²³

[41] The Claimant and acting executive director acknowledged that there were problems with the employment contract dated November 23, 2017, but chalked them up to innocent mistakes and to the inexperience of the acting executive director's assistant. The Claimant and acting executive director also emphasized how they were working in a chaotic and dysfunctional environment.²⁴ For example, the Employer had recently changed from an operational board to a management board, though some board members were finding it difficult to give up control.

[42] The Commission, on the other hand, accepted the Employer's allegations that the Claimant was guilty of fraud, collusion, harassment, and breach of trust.

[43] In support of its position, the Commission relied heavily on

²² See, for example, the acting executive director's statement at pages GD2-31 to 33.

²³ GD2-23 to 24.

²⁴ See, for example, GD2-21 and GD2-29 to 30.

- a) notes of telephone conversations between the Commission's agents and the Employer's new finance manager;²⁵ and
- b) documents that the Employer filed with different tribunals while defending other proceedings brought by the Claimant, including an affidavit sworn by the new finance manager.²⁶

[44] In my view, the Commission has not provided the clear evidence required to prove misconduct in this case. I arrived at this conclusion because:

- a) The Commission obtained the bulk of its evidence from the Employer's new finance manager, even though he was not working for the Employer at the relevant time. As a result, he based much of his evidence on assumptions and hearsay;
- b) The affidavit of the Employer's new finance manager is incomplete. It does not attempt to provide all relevant documents, but just those that support the Employer's case in a different proceeding. In addition, the Employer did not provide the Commission with all the exhibits to the affidavit;
- c) The new finance manager's affidavit provides little or no evidence to undercut the acting executive director's authority to negotiate the terms of the Claimant's employment, nor does it seem to acknowledge that the terms of her employment might have changed over time;
- d) In addition, the affidavit does not explain why the administrator of the Employer's group benefits plan enrolled the Claimant in the plan if it was a breach of the eligibility requirements to do so. On her application to the plan, the Claimant did not pretend to have three months of continuous employment with the Employer;²⁷
- e) Similarly, the new finance manager suggests that the Claimant inappropriately gave herself a pay raise. However, the new finance manager seems to ignore the risk to the

²⁵ GD3-26 to 27; GD3-112 to 114; GD3-150.

²⁶ GD3-29 to 42; GD3-55 to 67; GD3-78 to 93; GD3-116 to 149; GD3-152 to 163; GD3-188 to 192.

²⁷ GD3-129.

Employer if the Claimant was working overtime. Indeed, the Claimant and acting executive director said that the Claimant was working large amounts of overtime, but chose not to claim those hours because of a concern for the Employer's financial wellbeing;

- f) The Commission's evidence fails to address key issues, like negotiations around the Claimant's terms of employment and the Claimant's state of mind when she signed the contract of employment dated November 23, 2017. For the purposes of this case, it matters less whether the acting executive director had the actual authority to set the Claimant's terms of employment as whether the Claimant genuinely believed that she had those powers;
- g) The Claimant identified at least two independent witnesses who would have had relevant evidence in this case: the Employer's former human resources advisor and former treasurer. However, the Commission did not attempt to contact these people; and
- h) The Commission did not participate in the hearing at the General Division level. As a result, the Claimant was unable to test the Commission's evidence.

[45] For all these reasons, I am not persuaded by the Commission's evidence. It was not strong enough to counter the innocent explanation put forward by the Claimant and the acting executive director, both of whom gave evidence under oath. They also produced evidence of the acting executive director's authority, and provided straightforward, consistent, and believable answers to the General Division member's questions. Finally, their oral evidence was consistent with previous statements that they had made in writing and to the Commission's agents.

[46] Given the issues in this case, I was somewhat troubled by the fact that the General Division allowed the Claimant and acting executive director to give their evidence together. It would have been better if the acting executive director had been outside the hearing room while the Claimant was giving her evidence. At the very least, the General Division could have informed the Claimant of this possibility.

[47] I recognize, however, that the General Division is not required to strictly follow courtroom-like procedures and that the hearing proceeded without the Commission's participation, meaning that it was less adversarial in nature. For the reasons that I have already noted, the oral evidence of the Claimant and former acting executive director also showed many signs of reliability.

[48] Overall, the Commission failed to prove misconduct in this case. Its evidence was not persuasive enough to show that the Claimant knew, or should have known, that she was likely to be dismissed for signing and implementing the contract of employment dated November 23, 2017. As a result, the Commission has no grounds to disqualify the Claimant from receiving EI benefits.

CONCLUSION

[49] In this case, the General Division committed an error of law by misapplying the legal test for misconduct. The General Division's error allowed me to intervene in this case, and I decided to give the decision that the General Division should have given. The Commission failed to prove that the Claimant was guilty of misconduct, as defined under the EI Act. As a result, it has no reason to disqualify the Claimant from receiving EI benefits.

Jude Samson
Member, Appeal Division

HEARD ON:	November 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. S., Appellant Rachel Paquette, Representative for the Respondent

Relevant Sections of the Law

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.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

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 [...]