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

Citation: *Canada Employment Insurance Commission v A. K.*, 2020 SST 155

Tribunal File Number: AD-19-823

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. K.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 24, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made an error of law. I have corrected the error but I must still confirm the General Division decision.

OVERVIEW

[2] The Respondent, A. K. (Claimant), was dismissed from her employment because she went on vacation without her employer's permission to take time off. She applied for Employment Insurance benefits but the Applicant, the Canada Employment Insurance Commission (Commission), denied her claim. It found that the Claimant was dismissed because of her own misconduct.

[3] The Claimant appealed to the General Division of the Social Security Tribunal where her appeal was allowed. The Commission is now appealing to the Appeal Division.

[4] The appeal is dismissed. The General Division made an error of law by not correctly applying the test for misconduct. However, I have made the decision that the General Division should have made, and I must still find that the Claimant was not dismissed for actions that meet the definition of misconduct.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] I may only allow the appeal if I find that the General Division made an error or errors that are related to the "grounds of appeal". These grounds would be where the General Division:[1]

1. did not act fairly in some way.
2. did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. based its decision on an important error of fact.
4. made an error of law when making its decision.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[6] Did the General Division make an error of law when it assessed whether the employer dismissed the Claimant for misconduct?

ANALYSIS

The test for misconduct

[7] Section 30 of the *Employment Insurance Act* (EI Act) states that a claimant who is dismissed from employment because of the claimant's own misconduct is disqualified from receiving benefits. The Commission has the burden of proving that a claimant was dismissed for misconduct.

[8] "Misconduct" is not defined in the legislation but the courts have described misconduct to require the Commission to establish the following elements:

- The claimant engaged in the action or inaction that is said to be the basis for his or her misconduct;
- The claimant's conduct was willful. Willful conduct may include deliberate or even reckless conduct;[2]
- The claimant's conduct was such that the claimant knew, or ought to have known that their conduct was such as to impair the performance of the duties he or she owed to the employer;[3] and,
- As a result of the conduct, the claimant's dismissal was a real possibility.[4]

[9] The General Division did not clearly analyze the elements of the legal test. It found that the Claimant was confused by the employer's rules regarding the leave approval process and that she mistakenly thought her leave was approved until the "last minute". However, the General Division did not consider whether the Claimant's choice to take vacation after being refused leave was willful. It also did not consider whether she knew or ought to have known that her

---

[2] *Canada (Attorney General) v Secours*, A-352-94.
[3] *Mishibinijima v. Canada (*Attorney General), 2007 FCA 36.
[4] *Ibid*.

actions breached a duty that she owed to her employer, or that she could be dismissed for doing so.

[10] I agree with the Commission that the General Division failed to apply the test for misconduct. This is an error of law.

Irrelevant considerations

Relevance of the Claimant's mistaken belief

[11] The Commission also argued that the General Division made an error by relying on the Claimant's mistaken belief that her vacation was approved. According to the Commission, the Claimant's mistaken belief was irrelevant because she no longer had that belief by the time of the conduct for which she was dismissed. It is not disputed that the employer told her she needed to come in to work as scheduled and warned her that she would lose her job if she did not.

[12] However, I disagree that it was irrelevant that the Claimant only believed that her leave was approved before she received the final warning. Misconduct requires that a claimant's actions breach a duty that the claimant owes to his or her employer. I accept that employees owe their employer a general duty to follow their employer's lawful directions related to the performance of their duties. However, I do not accept that this duty extends to any and all of the employer's directions, however unreasonable.

[13] In this case, the Claimant had booked airline tickets at a time when she understood that her leave was approved. The Claimant submitted her request more than two months before her anticipated leave. According to the employer's leave request form, the employer decided to deny the leave within two weeks of receiving the request, but the employer did not inform the Claimant that it was denying her leave until the day before her leave was to start.

[14] The Claimant testified that she had worked for the employer for 30 years and had had the same shift rotation for 14 years. In all that time, she had never received any kind of response to any of her leave requests, either to approve or refuse her request. However, she had always taken the days off that she requested and there had never been a problem.[5] The Claimant said that her

[5] Audio recording of General Division hearing at timestamp 00:09:35.

co-workers had also been able to assume that their leave requests were approved.[6] She stated that the only way any of them had confirmed that their leave was approved was by checking the upcoming schedule and observing that they had not been put on the schedule to work. The Claimant said that this had been the practice under her old boss[7] and also the practice for the last 5-7 years that she worked under her current supervisor. [8]

[15] Shortly before her requested leave days, the Claimant checked the upcoming schedule as she had always done in the past, and she noticed that she was scheduled to work during the days she expected to be away. She spoke to her manager and her manager informed her that no one else could work her shift her and that her leave was not approved. Her manager was unmoved when the Claimant explained that she had already booked tickets. The manager told the Claimant that she would be considered a no-show if she did not come in for her shifts, and that this would result in her dismissal.

[16] I accept that the Claimant did not learn that her leave was denied until the day before her leave was to start. This is consistent with what she told the Commission in her application and with her statement to the Commission. In her first communication with the Commission in her application for benefits, the Claimant had said that this conversation with the manager occurred on June 14.[9] In an August 22 discussion with the Commission, she said that her flight was the "next day"(i.e. the day after she spoke to her manager).[10] The Claimant also testified to the General Division that she told the employer in this conversation that she was "leaving tomorrow."[11] The employer confirmed the leave days requested were June 15-18,[12] and the Commission confirmed that it had a copy of her request for those days.[13] If June 15 was the "next day" after her conversation with the employer, then the conversation took place on June 14, 2019.

---

[6] Audio recording of General Division hearing at timestamp 00:05:48.
[7] Audio recording of General Division hearing at timestamp 00:09:00.
[8] Audio recording of General Division hearing at timestamp 00:09:15.
[9] GD3-10.
[10] GD3-32.
[11] Audio recording of General Division hearing at timestamp 00:06:50.
[12] GD3-47.
[13] GD3-46.

[17] I appreciate that there is some discrepancy about whether this discussion between the Claimant and her manager took place on June 12 or June 14. While the employer acknowledged the conversation, it said that it occurred "approximately a couple of days" before the requested leave period, admitting that she did have specific dates available, including the date of this meeting.[14] In one of the Commission's notes, the Claimant is recorded as having said that the conversation with her manager took place on June 12.[15] However, all of the Claimant's evidence clearly links the date of her departure to the date after her conversation with the employer, which would have been June 14, 2019. The employer's evidence as to the date is comparatively vague. I accept that either the Claimant made a mistake when it put the date at June 12, or the Commission recorded her information incorrectly.

Relevance of employer conduct

[18] The Commission argued that the courts have held that the employer's conduct is irrelevant to a claimant's misconduct.

[19] I appreciate that there is judicial authority that suggests the conduct of the employer is irrelevant.[16] However, in the recent decision in *Astolfi v. Canada (Attorney General)*,[17] the Federal Court clarified that authority. It said that there are circumstances where the employer's conduct may be relevant. In *Astolifi*, the employer warned the claimant that he would be dismissed if he failed to come into the office to work. The claimant refused because he felt harassed by the employer. The Federal Court said that the claimant's conduct was a direct result of the employer's actions and that the employer's conduct prior to the misconduct should be considered.

[20] In the present case, the Claimant refused to come to work on what she believed to be her leave days, because she felt that the employer acted unreasonably in refusing or withdrawing approval. This was a consequence of the employer's conduct in two ways. First, the employer had a long-standing practice of allowing leaves without formal approval. Second, the employer

[14] GD3-40.
[15] Supra, note 11.
[16] Such as *Canada (Attorney General) v. McNamara*, 2007 FCA 107; *Canada (Attorney General) v. Caul*, 2006 FCA 251.
[17] *Astolfi v. Canada (Attorney General)*, 2020 FC 30.

did not inform her that her leave was denied within 14 days of her request as it was obligated to do under her union's agreement with the employer (the Collective Agreement).

[21] I accept that the relevant circumstances include the employer's past practices, the terms of the collective agreement, the miscommunication between the employer and the Claimant, and the late date that the Claimant understood her leave to be denied. All of these circumstances are relevant to whether it was reasonable for the employer to demand that the Claimant come in to work after the Claimant had committed herself to travel arrangements in the belief that her leave request had been approved. These circumstances are relevant to whether the Claimant was obligated to obey the direction of the employer when following that direction would result in significant prejudice to the Claimant.

[22] The General Division did not make an error of law by considering the circumstances of the Claimant's belief that her leave was approved, how the employer's conduct contributed to her belief, or the prejudice to the Claimant that would have resulted from her following the employer's direction.

Summary of errors

[23] I have found that the General Division did not base its decision on irrelevant considerations but that it still made an error of law when it failed to assess the Claimant's actions according to the legal test for misconduct. That means I must consider what manner of remedy is appropriate.

REMEDY

Nature of remedy

[24] I have the authority to change the General Division decision or make the decision that the General Division should have made.[18] I could also send the matter back to the General Division to reconsider its decision.

[18] My authority is set out in section 59 of the *Department of Employment and Social Development Act*.

[25] I consider that the record is complete. That means that I accept that the General Division has already considered all the issues raised by this case and that I can make a decision based on the evidence that the General Division received.

New decision

[26] The Claimant does not dispute that her employer dismissed her because she took an unauthorized leave. She also does not dispute that she knew that her leave was unauthorized by the time she took it, and that the employer warned her that she would be dismissed if she did not come into work as scheduled. She acknowledged that she responded to the employer by saying that she was going to take her vacation anyway and that she did not care whether she was fired.[19] In other words, the Claimant has admitted that she engaged in the conduct of taking an unauthorized leave, that she was dismissed because of that conduct, and that she knew that dismissal was at least a real possibility.

[27] To determine that the Claimant's actions were misconduct, I must also find that she owed a duty to her employer to follow its instructions to come into work as scheduled. The Claimant argues that she was entitled to assume her leave was approved without a formal response, based on the employer's past practice. She also argued that the employer was required to comply with the Collective Agreement and inform her of its decision to refuse her in writing, and within 14 days of her request. She suggests that she acted reasonably and that the employer's last-minute instructions to abandon her vacation plans were unreasonable. In essence, the Claimant is arguing that she did not have a duty or obligation to follow the employer's instructions because they were unreasonable and prejudicial.

[28] The Claimant requested her vacation in writing on April 8, 2019, which was in compliance with Article 22 (a) of the Collective Agreement.[20] The Collective Agreement requires the employer to respond in writing within 14 days. Her employer apparently completed a written refusal of her leave request which it dated April 16, 2019,[21] but it did not give the

[19] GD3-40.
[20] GD2-8.
[21] GD3-42.

refusal to the Claimant. The Claimant's manager told the Commission that she expected the Claimant to come to see her (the manager) in response to her request.[22]

[29] The employer stated that it held staff meetings on April 23, 2019, and May 8, 2019, in which it communicated a new process that would require its employees to come and get the response to their leave requests. Partially redacted minutes of those meetings record that staff were informed on April 23 that they should "see D. regarding "vacation requests" and that they would "no longer be available at the back door."[23] The minutes are not clear whether this was a discussion of outstanding requests or future requests, or whether it was the request forms or responses to requests that would no longer be available.

[30] According to the minutes of the May 8 meeting, staff were told to check with "D." to "inquire if vacation is approved or not."(sic)[24] No attendance was taken for the May 8 meeting but a person with the same first name and same last name initial as the Claimant was present at the April 23 meeting. The Claimant cannot confirm or deny that she was at either meeting. However, she recalls that she attended one staff meeting but had to leave early. She does not recall that a new leave approval process was discussed at the meeting she attended.

[31] I find that the employer did not comply with the terms of the Collective Agreement. Holding a meeting in which the employer explains to those staff in attendance how it intends to respond to leave requests is not the same as actually responding to a particular request for leave. I do not accept that the employer "responded" to the Claimant's request for leave until it communicated that response to her.

[32] I accept that the employer meant to change a long-standing practice by which employees had simply assumed their leave requests were approved unless they heard otherwise. Apparently, refusals had been rare, as the Claimant had never had one of her leave requests denied. In such circumstances, I would expect the employer to ensure that its change did not prejudice anyone with an outstanding leave request. At a minimum, the employer should have directed employees with outstanding requests to collect the decision on their leave request immediately or as soon as

[22] GD3-40.
[23] GD3-44.
[24] GD3-45.

practicable. This would allow employees to mitigate any losses arising from having to cancel their plans, and to avoid wasting additional time and money on their plans.

[33] Regardless of the new procedures that the employer may have implemented for its own convenience, the employer still had an obligation under the Collective Agreement to respond to its employees' leave requests within 14 days. At the time of that April 23 staff meeting, more than 14 days had already passed since it received the Claimant's request and it had not "responded" by any definition. If the Claimant's request was denied on April 16, I find that it was unreasonable of the employer to fail to inform the Claimant that her particular request was denied at or about the same time that it informed all staff that it was changing its procedures.

[34] The Claimant has also questioned the employer's reason for denying her request for leave. The employer did not tell the Commission why it denied the Claimant's request but the Claimant told the Commission that the employer informed her that no one could work her shift.[25] This is consistent with her testimony, where she repeated that her manager told her that she could not find anyone to work in her section. [26]She testified that her manager also told her that the employer was not approving any leaves for the entire summer because it was short-staffed.

[35] If the employer refused the Claimant's request on April 16 and its reason for doing so was that it expected to be short staffed then the employer could have easily avoided any confusion by explaining to its staff that it was denying all summer leaves in that first April 23 meeting. According to the minutes, the employer said only that employees should ask D. about their vacation requests. In the May 8 staff meeting, the employer again said nothing about its decision to deny all summer leave requests. Staff were just told to check with D. to see if their vacation was approved.

[36] However, it is also possible that the employer did not anticipate a staff shortage or decide to refuse summer leave requests until some later date. I note that some of the Claimant's testimony challenges the April 16 leave refusal date on her own leave request form. The Claimant said that she believes a replacement was available for at least two of the days that she took as vacation leave. The Claimant testified that one of her co-workers had mentioned to her

[25] GD3-32.
[26] Audio recording of General Division hearing at timestamp 00:06:25.

that she was working for the Claimant on the weekend.[27] According to the Claimant, the co-worker also told her that when the co-worker went in to work on the Saturday, the co-worker's name wasn't on the schedule (and the Claimant's was "back"[28]). The co-worker said that she was certain she was supposed to work those days.[29] This testimony suggests that the employer may have initially replaced her with another worker on the schedule for the week that the Claimant was expected to be off work, but then put the Claimant back on at the last minute. If this were true, it would imply that the employer had not refused her leave—and actually anticipated allowing her to take leave—until some time after that week's schedule was posted.

[37] In the absence of contrary evidence from the employer, I accept the Claimant's evidence about what the employer told her about why her leave request was denied. I accept that the employer expected to have difficulty finding replacements and did not want staff taking time off during the summer. This was likely the reason that it changed its process to talk individually to employees. Other employees might also have wanted to take time off in the summer and might also assume that their leave requests would be approved based on the employer's past practice.

[38] I also accept that the employer made an effort to cover the Claimant's shifts during her leave but that it was not able to do so, as it told the Claimant. This would explain why the Claimant's co-worker was originally scheduled to take the Claimant's shifts on the weekend but was then taken off the schedule between the time when she checked the schedule and when she showed up for a shift on Saturday.

[39] I acknowledge that the leave refusal is dated April16, but I do not accept that the employer had already decided to refuse the Claimant's leave request in April. The employer said nothing to the Claimant until June 14, appears to have tried to cover at least some of the Claimant's shifts, and then told her that it was not approving her leave because it could not find someone to work for her. I find that the employer did not actually decide to deny the Claimant's leave until sometime after it posted the schedule that included the week of the Claimant's anticipated leave.

---

[27] Presumably, the weekend of June 15-16 was included in the four days of leave the Claimant requested.
[28] This was not clearly audible on the hearing tape but it sounded like "back".
[29] Audio recording of General Division hearing at timestamp 00:09:55.

[40] I appreciate that it would have been more prudent for the Claimant to have confirmed that the employer had allowed her leave before she made travel plans. However, the employer did not respond to her request with a written refusal in the time allotted by the Collective Agreement, and the Claimant was relying on long experience and the employer's well-established practice. Given these facts, I find that the Claimant acted reasonably when she made vacation plans and booked her travel. Either the employer did not make a final decision to refuse the Claimant's leave request until the Claimant was ready to go on her leave, or it made the decision but failed to communicate its decision in a timely manner. Either way, it was unreasonable of the employer to demand that the Claimant abandon her travel plans on the eve of her departure, heedless of the cost or other consequences to the Claimant.

[41] There must be a limit to what an employer might require of its employees, and a limit to the duty that an employee owes to its employer. In most cases, an employer may expect an employee to obey its directions and not be absent from work without excuse. However, in this case the employer's actions or its inaction would have been largely responsible for actual and significant prejudice to the Claimant if she had followed the employer's directions. On these particular facts, I find that the Claimant did not owe a duty to obey the employer's direction to come in for work. I also find that she had a reasonable excuse for being absent for her scheduled shifts.

[42] The Commission has the burden of proving that the Claimant was dismissed for misconduct. I find that it has not established that the Claimant breached a duty or obligation to her employer and that it has therefore not shown that the Claimant's actions amount to misconduct.

CONCLUSION

[43] The appeal is dismissed. The General Division made an error of law. I have made the decision that the General Division should have made but I still find that the Claimant was not dismissed for misconduct under section 30 of the EI Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 11, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Anick Dumoulin, Representative for the Appellant A. K., Respondent