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

Citation: *N. B. v Canada Employment Insurance Commission*, 2020 SST 152

Tribunal File Number: AD-19-788

BETWEEN:

N. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 20, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The Claimant is not disqualified from benefits because her actions were not misconduct.

OVERVIEW

[2] The Appellant, N. B. (Claimant), was employed as an early childhood educator when a child in her care went missing. The Claimant could not locate the child on the premises, so she drove to the child's home, where she found the child with his mother. The employer dismissed the Claimant because she had not called 911 and because she had not called her supervisor until after she found the child. According to the employer, this was a breach of its serious incident policy.

[3] When the Claimant applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), refused her claim, finding that the employer had dismissed the Claimant for misconduct. The Commission maintained this decision on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. The Claimant is now appealing the General Division decision to the Appeal Division.

[4] The appeal is allowed. The General Division made an erroneous finding of fact that the employer's policy clearly prohibited the Claimant from searching for the child off-site before calling 911. I have made the decision that the General Division should have made and held that the Claimant's actions were not misconduct within the meaning of the *Employment Insurance Act* (EI Act). Therefore, she is not disqualified from receiving benefits.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] I may only allow the appeal where 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.

ISSUE

[6] Did the General Division make an important error of fact by misunderstanding the employer's serious incident policy, or by ignoring evidence relevant to interpreting the employer's policy?

ANALYSIS

The employer's policy

[7] The General Division made an important error of fact in finding that the Claimant recklessly failed to follow the employer's policy.

[8] The employer's policy defined a missing child as one of several serious incidents. It described the appropriate response to a serious incident as follows:

1. Apply first aid.
2. Call 911: Police/Fire/Ambulance or in the event that an ambulance is not required, call a taxi.
3. Contact the Parent/Legal Guardian/Emergency Contact Person; inform them of what happened and to which hospital you will be going
4. Take the child's file with you to the hospital.

[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).

5. Call one of the following people to report the incident (a list of managers follows).

[9] The General Division considered the serious incident policy to be "clear"[2] but the policy does not provide clear and unambiguous direction for how the Claimant should respond to a missing child. Instead, the policy appears to have been drafted to respond to an injured child situation. As I noted in the leave to appeal decision, none of the individual action items described in the serious incident policy are specific to the "missing child" situation and many are inapplicable. For the Claimant to have applied the policy to the case of a missing child, she would have had to exercise some judgment on which items were actually applicable.

[10] Furthermore, the employer gave its staff other instructions as well. The General Division referred to the "unqualified obligation […] to call 911"[3] from the written policy, as though it was the Claimant's only guidance. It observed that the policy, "does not say an employee is to take matters into their own hands, leave the premises and search off-site for the missing child before alerting emergency services and management."[4] However, other evidence before the General Division reveals that the written policy was not the final, or the only, word on how the employer expected its employees to respond to a missing child.

[11] The employer told the Commission that staff are expected to look for the child first and to notify a supervisor/manager and the police only if the child is not found. The Claimant confirmed that the employer expected staff to search for a missing child, saying that, "employees are expected to immediately look for the child, notify their supervisor/manager and call the police."[5] In other words, there was evidence that the employer instructed its staff that the *first* step in responding to a missing child, even before calling 911, should be some sort of search.. Evidence from both the Claimant and the employer confirmed that the employer's general serious incident policy was inconsistent with its instructions to staff when it comes to missing children. The General Division overlooked this evidence.

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[2] General Division decision, para. 15
[3] *Ibid*.
[4] General Division decision, para. 15.
[5] GD3-26

[12] At the Appeal Division hearing, the Commission conceded that the employer's serious incident policy was unclear about what an employee should do when a child goes missing. It acknowledged that the General Division made an error when it found that the first step in the employer's policy was to call 911.[6] The Commission referred to the statements from both the employer and the Claimant that employers were expected to look for a missing child before doing anything else.

[13] I agree. The General Division made an important error of fact when it ignored or misunderstood evidence that the employer had given instructions that are inconsistent with its written policy document.

[14] The General Division decision is based on this error of fact. If the General Division had considered or understood the statement evidence from the Claimant and the employer, it might have accepted that the guidance of the policy was unclear. Or that it was irreconcilable with the employer's instructions, or superseded by the employer's instructions. If it had done so, it might not have found that the Claimant recklessly disregarded the employer's policy. That would mean that she did not breach a duty to her employer, and that she should not have been expected to know that her actions would lead to her dismissal.

[15] The General Division's finding that the Claimant recklessly disregarded the employer's policy did not consider or understand all of the evidence. Therefore, I find that the General Division made an important error of fact.

[16] Having found an error, I must now turn to consider what I should do about it.

REMEDY

Choice of remedy

[17] I have the authority to change the General Division decision or make the decision that the General Division should have made.[7] I could also send the matter back to the General Division to reconsider its decision.

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[6] General Division decision at para. 20
[7] My authority is set out in section 59 of the DESD Act.

[18] The Commission argued that I should send the matter back to the General Division so that the new evidence may be considered. It observes that the Claimant has submitted additional evidence that helps to clarify the employer's policy as it relates to missing children,[8] and that the Appeal Division is not the place for parties to strengthen their positions. Therefore, the Commission suggests that the matter be returned to the General Division so that the General Division may make a decision that considers the new evidence.

[19] I must respectfully decline. Instead, I will make the decision that the General Division should have made. While I agree that the Appeal Division cannot consider this kind of new evidence, I consider the record to be complete even without it. This means that I accept that the General Division has considered all the issues raised by this case and each party has already been given an opportunity to present their best evidence related to those issues. The new evidence may have supported one position or undermined the other, but I cannot return the file to the General Division for the sole purpose of giving either party an opportunity to build a better case.

New decision

[20] This decision will rest on the evidence that has already been presented to the General Division. The Commission had the burden of establishing that the Claimant's actions amount to misconduct under the EI Act and that she was dismissed for misconduct. It was up to the Commission to bring forward positive evidence of that misconduct to the General Division.

[1] Section 30 of the *Employment Insurance Act* states that a claimant who is dismissed from employment because of the claimant's own misconduct is disqualified from receiving benefits. "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 which may have been deliberate or even reckless;[9]

[8] AD2
[9] *Canada (Attorney General) v Secours*, A-352-94

- The claimant's conduct was such that the claimant knew, or ought to have known as to impair the performance of the duties he or she owed to her employer;[10] and,
- That the claimant's dismissal was a real possibility as a result of the conduct.[11]

[21] The misconduct that was alleged by the employer in this case was that the Claimant failed to follow "protocol" in how she responded to a missing child. The employer has not suggested that the Claimant was negligent in allowing the child to slip out of the care facility to go home without telling the facility staff where he was going. It did not claim to have dismissed her for this.

[22] The employer dismissed the Claimant because it believed the Claimant breached its protocol for responding to a missing child situation. The Claimant had tried to manage the missing child situation by searching for the child herself instead of calling for help. The Claimant and her co-worker first searched the facility together. Then, the Claimant tried to telephone the child's home but she could not get through. She left her co-worker at the facility to keep trying to call, while the Claimant drove directly to the child's nearby home. She found the child safe at home with his mother, returned to the facility and then called her supervisor.

[23] Reading the employer's serious incident policy, the General Division understood the employer's protocol was to require staff to call 911 immediately. However, I find that the employer's written "serious incident policy" is not a complete statement of what the employer expects its staff to do in a missing child situation. Based on the ambiguity in the written policy and what the employer and the Claimant told the Commission, I find that the employer's "protocol", requires staff to look for a missing child before calling a supervisor or the police.

[24] The nature and extent of the search is open to interpretation. The employer told the Commission that staff were "expected to do a preliminary check at the facility", before taking steps—including calling a supervisor or the police—if the missing child is not "immediately found". The Claimant said only that she knew she should look for the child before doing anything else. There was no other evidence of how, or even if, the employer's expectations were communicated to staff, or to the Claimant in particular. There was no evidence of whether the

[10] *Mishibinijima v. Canada (*AG), 2007 FCA 36
[11] *Ibid.*

employer defined “preliminary check” for its staff. This means that staff could not have known when to deem that a missing child had not been found “immediately.”

[25] The employer said that it is the job of the police to go to a child’s home and locate a child.[12] When asked by the Commission, the Claimant conceded that she had never been instructed to look outside the school for missing children.[13] However, the Commission did not ask if the employer had ever prohibited staff from extending a search beyond the premises, and the employer did not say. The General Division was likely correct to observe that the outcome could have been tragic because the Claimant did not immediately mobilize a 911 response. At the same time, it was the employer that had instructed the Claimant to conduct some kind of search as the first step in responding to a missing child. The Claimant may well have expected that her employer would be pleased if she could quickly find the child without involving emergency services.

[26] In my view, the Claimant acted quickly and purposefully to locate the child in what must have been a stressful situation, and without a clear idea of what was expected from her. Thinking only of the interests of the missing child, it would have been wiser or more prudent for the Claimant to have conducted a more limited search and to have then called 911 or a supervisor; or for the Claimant to have her co-worker call 911 at the same time that the Claimant drove to the child’s home. However, the employer’s written policy guidance was unclear, and it was contradicted in some ways by the employer’s instructions.

[27] Therefore, the Commission has not established that the Claimant knew or ought to have known that she was acting in breach of the employer’s protocol when she searched off-site for the missing child. Neither has it established that the Claimant should have known that dismissal was a real possibility.

[28] Therefore, the Commission has not made out that the Claimant’s actions were misconduct under the EI Act. The Claimant is not disqualified from receiving benefits for the reason of having been dismissed for misconduct.

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[12] GD3-25
[13] GD3-26

CONCLUSION

[29] The appeal is allowed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. B., Appellant J. Lachance, Representative for the Respondent