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

Citation: *PH v Canada Employment Insurance Commission and X*, 2021 SST 39

Tribunal File Number: AD-20-800

BETWEEN:

P. H.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

and

X

Added Party / Employer

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 8, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. I am returning the matter to the General Division for a rehearing, with directions that the General Division issue the usual order for the exclusion of witnesses.

OVERVIEW

[2] The Appellant, P. H., is appealing the General Division's decision. The General Division found that the Claimant had been suspended for his job for two weeks because of misconduct. In particular, it found that the Claimant was aware of his employer's disciplinary policy and code of conduct, and that he knew or should have known that he had to report an incident to his employer. The General Division also found that because of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits from March 2, 2020 to March 6, 2020.

[3] The Claimant argues that the General Division failed to properly assess whether there was in fact misconduct. He also argues that he did not get a fair hearing.

[4] I have to decide whether there is any merit to these claims. I find that the General Division identified the correct legal test for misconduct. However, it did not properly apply the legal test. It failed to consider whether the Claimant knew or should have known that he could face consequences for his conduct.

[5] Although the Claimant and Commission both urged me to give the decision that the General Division should have given, I am returning this matter to the General Division for a rehearing. There are gaps in the evidence, owing to the quality of the audio recording of the General Division hearing.

ISSUES

[6] There are two issues:

1. Did the General Division properly assess whether there was misconduct?
2. Did the Claimant receive a fair hearing?

ANALYSIS

[7] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) lets the Appeal Division intervene in decisions of the General Division. But, this happens in only a limited set of circumstances. The section does not give the Appeal Division any jurisdiction to conduct any reassessments.

[8] The Appeal Division may intervene if there are errors in law. The Appeal Division may also intervene if the General Division based its decision on any errors of fact, if it made them without regard for the material before it. The Appeal Division may also intervene if the General Division failed to observe a principle of natural justice.

[9] The Claimant argues that the General Division made mistakes under section 58(1) of the DESDA. He argues that the General Division did not properly assess whether there was misconduct for the purposes of the *Employment Insurance Act*. He also argues that the General Division did not give him a fair hearing.

1. Did the General Division properly assess whether there was misconduct?

[10] No. I find that the General Division did not properly assess whether there was misconduct. The General Division did not address whether the Claimant knew or should have known that his employer would discipline him for his conduct.

(a) The General Division failed to consider whether the Claimant knew or should have known about the possibility of being suspended because of his conduct

[11] The General Division set out the correct legal test for misconduct. The General Division defined misconduct as conduct that is wilful. This includes conduct that is conscious, deliberate, intentional, or so reckless that it is almost wilful. The General Division determined that misconduct exists if a claimant knew or should have known that their conduct could get in the way of carrying out their duties towards their **employer and that there is a real possibility of being suspended or dismissed as a result**.[1]

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[1] General Division decision, at paras. 18 and 19. The General Division also referred to *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para. 14.

[12] The General Division concluded that the Commission had proven misconduct. In coming to this conclusion, the General Division wrote:

> I find the Commission has proven there was misconduct for the following reasons:
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> First: The Claimant should have known (or ought to have known) to report the fire – or the burning of food and dust particles—to the employer. I realize the Claimant testified that he disclosed the incident to the site manager. However, the text messaging listed in GD11-2 indicates that site manager was the one that asked the Claimant about a burning smell in the apartment he was working on. Furthermore, the Claimant confirmed in his testimony that he did not report the incident to the employer.
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> Second: The Claimant confirmed in his testimony that he was aware of the employer's disciplinary policy and Code of Conduct. Based on his own testimony, the Clamant should have known to report the fire or burning incident to the employer. I recognize the Claimant testified that it was not a fire, but a minor incident involving some burning of food and dust. Nevertheless, the incident was a health and safety matter which the Claimant should have known to report immediately to the provincial manager …[2]

[13] To determine whether there was misconduct, the General Division had to examine whether the Claimant was or should have been aware of the consequences that could possibly result from his conduct. Yet, the General Division failed to consider and address this issue in its analysis.

[14] The General Division focused on whether the Claimant was or should have been aware that he had to report the incident, rather than whether he knew or should have known that there was a real possibility of being suspended as a result of his conduct.

[15] The General Division found the Claimant knew that he should have reported the incident. It also found that the Claimant was aware of his employer's disciplinary policy and code of conduct. But, knowing whether he had to report an incident is a completely distinct matter altogether from knowing whether there was a possibility of disciplinary consequences for not reporting a matter.

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[2] General Division decision, at paras. 24 and 25.

[16] The General Division did not complete its assessment. It did not look beyond the fact that the Claimant had not reported the incident to his employer. It did not determine whether the Claimant knew or should have known that he could possibly face disciplinary consequences.

[17] This constituted an error because it did not properly assess whether there was misconduct.

(b) The General Division made a perverse finding that the Claimant should have known from the employer's code of conduct and disciplinary policy that he had to report the incident

[18] The employer argued that it should have been obvious to the Claimant that he had to report any incidents—however minor—because there was a risk of catastrophic consequences. The General Division did not make any findings regarding the employer's evidence on this point. Instead, the General Division found that the Claimant should have known that he had to report the incident because he was familiar with the employer's code of conduct and disciplinary policy.

[19] The Claimant acknowledges that he was responsible for the incident. However, he testified that he considered incident so minor that it never occurred to him that his employer would expect him to report it, or that he would face any discipline for failing to report the incident. The incident did not lead to any physical damage and no one suffered any personal injuries.

[20] The Claimant agrees that he was familiar with his employer's code of conduct and disciplinary action policy. But, he argues that there was no way that he could have known from either document that he had to report the incident. Neither the employer's code of conduct nor its disciplinary action policy spelled out any obligation to report every incident, including any minor ones.

[21] The Claimant suggests that, if such an incident were that significant, surely the code of conduct or some other document would have required him to report it.

[22] The employer's code of conduct did not require employees to report every incident. The employer's disciplinary action policy also did not suggest that employees had to report even minor incidents that took place.

[23] It is unclear why the General Division found the Claimant knew or should have known he had to report the incident from the code of conduct and the disciplinary action policy when neither document required an employee to report such incidents. In this regard, the General Division's finding that the Claimant knew or should have known from the documents that he had to report the incident was perverse.

(c) The General Division overlooked the employer's evidence on misconduct

[24] The General Division also overlooked some of the evidence when it examined why the Claimant was dismissed from his job.

[25] The General Division found that the Claimant was suspended from his job because he failed to report a small fire that he accidentally caused.[3]

[26] However, the employer had claimed that there was a second reason why it suspended the Claimant: The Claimant had not only failed to report the incident, but he had also allegedly tried to minimize or conceal that it had happened. The employer alleges that the Claimant asked another worker to misrepresent what had happened. The Claimant denies that he ever asked his colleague not to report what occurred. The Claimant maintains that he went to see his colleague to check on his wellbeing.

[27] The Respondent, the Canada Employment Insurance Commission, adopted the employer's arguments. The Commission also argued that the Claimant's misconduct consisted of failing to report the incident and then denying that it happened.[4] The General Division noted the Commission's arguments on this point. The General Division wrote:

> The Commission says that there was misconduct because the Claimant ought to have known that failing to report the incident—no matter how small—**and then denying that**

[3] General Division decision, paras. 11, 14 and 15.
[4] Representations of the Commission to the Social Security Tribunal – Employment Insurance section, at GD4-6.

> **it happened** would break the bond of trust that must exist in an employee-employer relationship.[5]
>
> (My emphasis)

[28] However, the General Division did not make any findings—one way or the other—about any of this evidence or these arguments.

[29] The employer's explanation that it suspended the Claimant in part because of his alleged "cover up" should have formed part of the General Division's analysis into whether there was any misconduct. In other words, the General Division's analysis was incomplete in the first instance because it failed to consider and address the employer's allegations that it suspended the Claimant because he failed to report the incident AND because he then allegedly tried to "cover it up."

[30] It was inadequate for the General Division to just examine the issue of whether the Claimant knew or should have known that he had to report the incident. After all, the Claimant's alleged "cover-up" of the incident was purportedly part of the reason the employer suspended him.

[31] The General Division should have determined whether the denial and "cover-up" were factors that played into the Claimant's suspension, whether the Claimant actually committed the actions that his employer accused him of having performed, and, if so, whether these actions constituted misconduct.

2. Did the Claimant receive a fair hearing?

[32] No. The Claimant did not receive a fair hearing.

[33] The Claimant argues that the General Division member deprived him of a fair hearing because he allowed the employer's witnesses to collaborate and discuss evidence before testifying.

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[5] General Division decision, at para. 21.

[34] I asked the Claimant to provide evidence of witness collaboration during the General Division hearing. The Claimant did not produce any evidence of this.[6]

[35] The Commission's representative asserts that there is no sign of any witness collaboration. She listened to the audio recording of the General Division hearing and could not detect any instances where the two witnesses discussed the evidence they were about to give.

[36] I agree. I was unable to find any evidence of witness collaboration. The audio recording simply did not detect any of this happening.

[37] Despite the lack of evidence of witness collaboration, the General Division member should have ordered the exclusion of witnesses, even if the Claimant had not sought one. The member should have done so in the interests of fairness and accuracy in fact finding. The absence of an exclusion of witnesses runs the risk of witnesses improperly influencing the evidence of others, or lending itself to that perception.

REMEDY

[38] The General Division erred under section 58(1) of the DESDA. Therefore, I am now turning to the issue of the appropriate remedy. I have various options.[7] I can give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration (with directions), or rescind or vary the decision in whole or in part.

[39] Both the Claimant and the Commission urge me to render a final decision. They claim that the evidence on file is complete and that there is no need to return the appeal to the General Division for a new hearing.

[40] If I render my own decision, this would require me to examine why the employer suspended the Claimant from his job. As I noted above, the General Division did not make any findings regarding the employer's evidence that it suspended the Claimant in part because of an alleged "cover-up."

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[6] Claimant's letter dated December 22, 2020, at AD12-3.
[7] Section 59 of the DESDA.

[41] The employer claims that it suspended the Claimant because he failed to report an incident and because he then attempted to "cover-up" the incident. There is evidence from both parties regarding the allegations of a "cover-up."

[42] However, the Claimant's testimony at the General Division hearing regarding any alleged "cover-up" is illegible, owing in part to the quality of the audio recording.

[43] The employer's counsel examined the Claimant about whether he asked his work colleague not to discuss the incident with anyone. The employer's counsel noted that there appeared to be conflicting evidence to explain the Claimant's visit to his colleague's home. Much of the Claimant's response and explanation on the audio recording of the General Division hearing sounded muffled.[8]

[44] I understand that the Claimant denied that he asked his colleague not to discuss the incident with anyone, but the Claimant appears to have had a lengthier explanation for why he visited his colleague at home. The Claimant testified that he questioned his colleague about why he was "escalating this when there was no fire,"[9] but this represented only a portion of his evidence. The audio recording simply did not pick up the remainder of the Claimant's testimony.

[45] The Claimant's testimony is likely integral to the following issues:

- whether the Claimant was less than forthright with his employer and whether he tried to "cover-up" the incident. In other words, did the Claimant commit the actions or conduct that resulted in his suspension? And

- if the Claimant committed the actions or conduct that resulted in his suspension, did the Claimant know or should he have known that his actions or conduct could impair the performance of his duties owed to his employer, and, as a result, could result in his suspension.

[8] At approximately 42:59 to 47:04 of the audio recording of the General Division hearing.
[9] *Ibid*.

[46] Because the Claimant's testimony is illegible on these critical issues, I am declining to render my own decision in this matter. I am returning this matter to the General Division for a rehearing, with directions that the General Divisions make the usual order for the exclusion of witnesses.

[47] I am also recommending that the parties (the Claimant in particular) speak slowly and clearly. They should seat themselves near the microphone. They should also ensure a reliable internet connection.

CONCLUSION

[48] The appeal is allowed. I am returning the matter to the General Division for a rehearing, with directions that the General Division issue the usual order for the exclusion of witnesses.

Janet Lew
Member, Appeal Division

HEARD ON:	December 21, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	P. H., Appellant David Brown (counsel), Representative for the Appellant Mélanie Allen, Representative for the Respondent No one appearing for the Added Party