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

Citation: *Canada Employment Insurance Commission v SK*, 2021 SST 40

Tribunal File Number: AD-20-810

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. K.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 8, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal and I am returning the matter to the General Division for a reconsideration.

OVERVIEW

[2] The Respondent, S. K. (Claimant), worked at a daycare as an early childhood educator (ECE). Her employer dismissed the Claimant after accusing her of striking a child in her care. She applied for Employment Insurance benefits and the Appellant, the Canada Employment Insurance Commission (Commission), initially accepted her claim. Her employer did not think that the Commission should accept her claim, but it did not give the Commission evidence to support its accusation.

[3] The employer then supplied a brief video of the incident to the Commission and asked for a reconsideration. After considering the video evidence, the Commission changed its decision. It found that the employer had dismissed the Claimant for her misconduct, and it decided that the Claimant should be disqualified from receiving benefits.

[4] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed her appeal. The General Division found that the Commission had not proven that the Claimant knew or should have known that her conduct interfered with her duties to her employer and that there was a real possibility that the employer would dismiss her because of it.

[5] The Commission is appealing the General Division decision to the Appeal Division.

[6] I am allowing the appeal. The General Division based its decision on a finding of fact that was perverse or capricious[1]. I am returning the matter to the General Division for a reconsideration.

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[1] Section 58(1)(c) of the DESD Act says that the General Division makes an error if it has "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. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[7] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[2]

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

ISSUES

[8] Did the General Division make an error of law by ignoring court decisions that say violence in the workplace is always unacceptable?

[9] Was it perverse or capricious for the General Division to find that the Commission had not proven that the Claimant knew or should have known that striking a child interfered with her duties to her employer and that her dismissal was a real possibility?

ANALYSIS

[10] A claimant who is dismissed from employment because of the claimant's own misconduct is disqualified from receiving benefits under the *Employment Insurance Act* (EI Act).[3] It is up to the Commission to prove that a claimant is guilty of misconduct and that he or she was dismissed because of that misconduct.[4]

[11] The EI Act does not define "misconduct." However, the courts have defined misconduct to include the following elements:

"marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

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

[3] Section 30 of the EI Act.

[4] *Minister of Employment and Immigration v Bartone*, A-369-88.

- 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 wilful. Wilful conduct may include deliberate or even reckless conduct.[5]
    - The claimant's conduct was such that the claimant knew or should have known that
        - the conduct was such as to impair the performance of the duties he or she owed to the employer;[6] and
        - as a result of the conduct, the claimant's dismissal was a real possibility.[7]

[12] The General Division did not analyze what the Claimant knew or should have known about the effect of her conduct on her employment separately from what she knew or should have known about the consequences of her conduct. It considered the two parts together. This is consistent with the approach that was taken by the Federal Court of Appeal in a case called *Meunier v Canada*.[8] The Court held that misconduct involves "a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal."

[13] The General Division found that the Commission had not proven that the Claimant knew or should have known that her conduct could interfere with her duties to her employer and that there was a real possibility that the employer would dismiss her as a result.[9]

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[5] *Canada (Attorney General) v Secours*, A-352-94 ; *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] *Ibid*.
[8] *Meunier v Canada (Employment and Immigration Commission)*, A-130-96.
[9] General Division decision, para 32.

Issue 1: Did the General Division make an error of law by ignoring court decisions saying that violence in the workplace is always unacceptable?

[14] The Commission argued that the General Division made an error of law because it ignored the "jurisprudence."[10] It stated that there is abundant and consistent jurisprudence that physical violence in the workplace is unacceptable.[11]

[15] The Commission submitted the Federal Court of Appeal decision in *Canada v Kaba*.[12] In the facts of that case, a claimant had slapped a female co-worker after the co-worker insulted his family. The Court found that the claimant should have known his conduct could lead to his dismissal because "[p]hysical or verbal violence in the workplace is unacceptable and must not be condoned by an entitlement to benefits."

[16] Because the Commission referred to "abundant and consistent jurisprudence," I asked the Commission representative if she wanted me to consider any other authorities. I was particularly interested in decisions that had similar facts or could help to define "violence" in the context of misconduct. I gave the Commission 10 days to supply any additional authorities.

[17] The Commission responded on January 20, 2021. It stated that it could not find other jurisprudence directly on point.[13] However, it referred to the Federal Court of Appeal decision in *Canada v Hastings.*[14] The *Hastings* decision concerned a claimant who struck and destroyed a company computer and printer while using the factory speakers to deliver a message that was vulgar and offensive to the employer. The facts in that case are very different from the present facts. The decision in *Hastings* does not assist me to make my decision.

[18] In my view, there is a significant difference between the facts in *Kaba* and the facts in this appeal, as well. *Kaba* can be "distinguished," which means that the General Division would not have had to follow *Kaba*.

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[10] "Jurisprudence" is a body of laws. In this case, the Commission is referring to judge-made law. How the courts have interpreted or applied legislation or other court decisions is a part of the law that the Social Security Tribunal must follow.
[11] AD1-3.
[12] *Canada (Attorney General) v Kaba*, 2013 FCA 208.
[13] AD4-1.
[14] *Canada (Attorney General) v Hastings*, 2007 FCA 372.

[19] In *Kaba*, the claimant said his co-worker provoked him. He deliberately slapped another co-worker in response to that provocation. Presumably, he was angry or upset, and he likely intended to harm his co-worker, or inflict pain. The Court in *Kaba* based its decision on its view that the claimant's actions were "violence."

[20] Here, the Claimant's actions were not violence. The online Merriam-Webster Dictionary defines violence in a few ways. In one definition, violence is "the use of physical force so as to injure, abuse, damage, or destroy." Another definition of violence is, "intense, turbulent, or furious and often destructive action or force."[15]

[21] Nothing in the video evidence or in the Claimant's statements or testimony suggests that she intended to injure or abuse the child. The child is just a toddler, but the Claimant did not use enough force to even startle or distract the child, let alone injure her. The Claimant's actions were not intense, turbulent, furious, or destructive either. She was calm, and her actions were measured.

[22] The language the General Division used to describe the video implies that the Claimant used more force than is apparent. The General Division stated that the Claimant slapped the child. A slap implies a swinging arm motion. I have viewed the video evidence carefully and repeatedly. The Claimant used a wrist motion. The General Division also said that the Claimant used her palm to slap the child. The video shows that the Claimant hit the child just with the fingers of her open hand. There is no pause or hesitation in the child's crying or struggling; nor does her distress visibly increase.[16]

[23] The Claimant gave evidence of the circumstances surrounding the incident. She told the General Division that she did not intend to hit the child. She explained that the child had not been conditioned to the daycare environment according to their usual procedures. She said that the child had been poking and scratching the Claimant, her co-workers, and the other children. The child had cried continuously during her first day in care and had resumed the continuous crying on the second day, when the incident occurred. The Claimant also told the General Division that parents monitor the daycare by video camera and that they had been calling in to

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[15] Merriam-Webster Dictionary; accessed at https://www.merriam-webster.com/dictionary/violence.
[16] Video evidence is at GD7-A.

complain about how this uncontrolled child was affecting the other children. The Claimant said she had asked her director how to deal with the situation on both days and she had tried to comfort the child.

[24] The Court in *Kaba* said that the claimant (in that case) should have known that he could be dismissed for acting violently. However, this case is different. The Claimant's actions were not "violent." The General Division did not make an error of law by not applying the *Kaba* decision from the Federal Court of Appeal.

Issue 2: Was it perverse or capricious for the General Division to find that the Commission had not proven that the Claimant knew or should have known that striking a child interfered with her duties to her employer and that her dismissal was a real possibility?

[25] The Commission is not arguing that the General Division ignored or misunderstood the evidence. It argues that the General Division's findings were perverse or capricious.

[26] The General Division accepted that the Claimant hit the child but that she did not "intend to hit the child."[17] As I mentioned, I have viewed the video. The Claimant hit the child. It is clear that the Claimant did not hit the child by accident. Nothing in the video or in any other evidence suggests that the Claimant was under some kind of compulsion to hit the child. Therefore, when the General Division said that she did not intend to hit the child, I think it meant that the Claimant had not planned to hit the child. This would be consistent with its finding that the Claimant's conduct was so reckless that it was almost wilful.

[27] The General Division allowed the appeal because the Commission had not proven all of the elements of the misconduct test. It accepted that the Claimant engaged in the alleged conduct and that she did so willfully. However, it did not accept that the Claimant should have known that her actions could interfere with the duty she owed to her employer and that her dismissal was a real possibility.

[28] In its leave to appeal application, the Commission argued that the evidence could only support a conclusion that the Claimant lost her employment because of misconduct. The Commission expanded on its arguments during the Appeal Division hearing. It stated that the

[17] General Division decision, para 27.

Claimant is a trained ECE and that the employer has policies that prohibit corporal punishment. It also noted that the Claimant worked in a childcare facility and that she hit a child in her care. The Commission argued that—on these facts—the General Division could only find that the Claimant's conduct violated the trust relationship between the Claimant and the employer. The Commission submitted that it was perverse or capricious for the General Division to fail to find that the Claimant should have known her conduct could result in her dismissal.[18]

[29] I agree that the General Division made an error of law. It determined that the Commission had not established that the Claimant knew or should have known that her conduct could result in her dismissal. This was a perverse or capricious finding of fact.

[30] I will now consider the Commission's arguments about what the Claimant knew or should have known in more detail.

The Claimant's training as an Early Childhood Educator

[31] One of the Commission's arguments is that the Claimant's ECE training is evidence that she knew or should have known that her conduct could result in her dismissal.

[32] The Claimant testified about what she learned in her ECE training. She said that she was supposed to be patient and positive and make sure children are healthy and safe. She knew that hitting a child, "doing harm" to a child, is a bad thing. She said that her training involved three placements in childcare centres, and none had spoken of the consequences of physical or corporal punishment.[19]

[33] The Claimant said that she knew she should not harm a child and; there was no evidence that she did actually did harm a child. Therefore, her actions were consistent with what she recalled of her ECE training.

[34] The Commission seems to be saying that the Claimant must have known she could not act in the way she did because of her ECE training. However, the General Division could not make assumptions about the content of the ECE training. It could not assume that the Claimant

[18] Audio record of Appeal Division hearing at timestamp 00:24:30.
[19] General Division decision, para 22.

had been trained not to use physical force under any circumstance. It could not assume she had been told that every employer would consider the use of corporal punishment to be a breach of her duty to that employer. It could not assume that she would have been warned that she could be dismissed from any child care employment for using corporal punishment.

[35] The Commission has the burden of proof of showing that the employer dismissed the Claimant for misconduct. The Claimant testified to what she learned, and the General Division found her to be generally credible.[20] The Commission did not answer the Claimant's evidence with any specific evidence of what was involved in ECE training and accreditation generally, or in the Claimant's program in particular.

[36] The fact that the Claimant was trained as an ECE does not mean that the General Division must find that the Claimant knew or should have known that she could be dismissed because of her conduct.

The employer's policies

[37] The Commission also argued that the Claimant was aware of the employer's policies prohibiting corporal punishment.

[38] The Claimant testified that she did not remember everything that was in the employer's behaviour management policies. She also said that she did not know whether she had ever understood all the policies. She told the General Division that this was her first job, and she was overwhelmed by the full binder of policies. She said she was required to sign the employer's policy document but that the employer did not give her a printed copy to keep, or access to an electronic copy. She also said that the employer had never gone over the policies with her, or discussed its corporal punishment policy.[21] The Claimant testified that she was not aware of what would happen if she contravened the behaviour management policies.

[39] The General Division referred to the behaviour management policies provided by the employer. This information included policy statements on use of physical or corporal

[20] General Division decision, para 24.
[21] General Division decision, para 21.

punishment. The policy says that the employer does not permit corporal punishment.[22] It also states that physical or corporal punishment to any child will result in the immediate release of the employee.[23]

[40] However, the General Division said that there was no evidence that the version of the policy that the employer gave the Commission was the same policy that the Claimant reviewed and signed. The Claimant had apparently reviewed and signed the employer's policies on or about April 15, 2019, when she started working for the employer. However, the General Division noted that the behaviour management policy excerpts the Commission received from the employer were not signed by the Claimant. The policy materials supplied by the employer were also undated. The employer did not supply any of these materials until some point after the Commission's July 14, 2020, request.[24] This was almost 15 months after the Claimant would have reviewed and signed the employer's policies.

[41] The General Division weighed the evidence and concluded that the Commission had not proven that the Claimant was aware of the employer's specific policies. There was some evidence to support the General Division's conclusion, and it follows rationally from the General Division's weighing of the evidence.

[42] It was open to the General Division to conclude that the Claimant did not know about specific policies under which her employer could dismiss her for using corporal punishment. Therefore, the simple fact that the employer currently has policy on corporal punishment does not mean that the General Division had no choice but to find that the Claimant knew or should have known that her conduct could result in her dismissal.

What the Claimant "should have known."

[43] Finally, the Commission argued that that the General Division's finding was perverse or capricious because the conduct in this case involved a physical assault by a childcare worker against a child in her care. According to the Commission, the nature of her job, and the nature of

[22] GD3-37.
[23] GD3-38.
[24] GD3-36 to 39.

the conduct were such that the General Division would have had to find that the Claimant should have known she could be dismissed.

[44] The Commission did not need to show that the Claimant had actual knowledge that her conduct could result in her dismissal. The Commission only needed to prove to the General Division that the Claimant **should have known** or should have foreseen that her conduct would interfere with her duties to her employer and that she could be dismissed as a result. The question is not what the Claimant actually knew. The question is what a person in the Claimant's circumstances could reasonably be expected to know.

[45] It is reasonable to expect everyone to know and to follow the law. The Claimant's actions were contrary to the law.

[46] Childcare legislation in Ontario prohibits the use of corporal punishment in licensed daycare facilities. It is an offence for a daycare worker to use corporal punishment in a childcare facility.[25] The Ontario legislation does not define corporal punishment but corporal punishment is commonly understood as any kind of physical discipline or punishment. It is against the law for a childcare worker to use corporal punishment even if the level of force used is very low.

[47] It is also an offence under the *Criminal Code* for a person to commit an assault. I am sure that the Claimant does not think of her conduct as an "assault" on the child. However, the *Criminal Code* says that a person commits an assault if the person applies force intentionally to another person without the other person's consent.[26] The *Criminal Code* does not require the force to be unreasonable or excessive.

[48] The *Criminal Code* offers a defence to a criminal charge of assault for parents or teachers who use reasonable force to correct a child.[27] However, the Supreme Court of Canada has interpreted the meaning of "reasonable force." The Court held that corporal punishment of a

[25] Section 78(1) at item 13 and section 79 of the *Child Care and Early Years Act, 2014*; and section 48(2) of the *Ontario Regulation 137/15.*
[26] Section 265(1) and section 266 of the *Criminal Code of Canada.*
[27] Section 43 of the *Criminal Code of Canada*.

child under two years of age or that involves a strike to the head of a child cannot be considered to be "reasonable force."[28]

[49] The Claimant's conduct was unlawful under the Ontario childcare legislation, and likely unlawful under the *Criminal Code*. The evidence before the General Division established that the Claimant applied physical force to a one-year-old child who was in her care. It also established that the Claimant's conduct was so reckless that it was almost wilful.

[50] I understand that the Claimant may not have known her actions were against the law, or even given it much thought. The Claimant used a very minor level of force on the child and her actions were clearly not violent. She did not intend to harm the child in any way, and she did not actually harm the child.

[51] However, it does not matter what she actually knew about the law because she was reckless about whether her conduct was unlawful. Society presumed that its members are aware of the laws that apply to them. "Ignorance of the law" is not a shield to the consequences of the law.

[52] The Claimant was a childcare worker. It is reasonable to expect that childcare workers have some knowledge of those activities that are expressly prohibited for childcare workers. It is also reasonable to expect the Claimant to avoid conduct that is prohibited by the criminal law in Canada.

[53] I have to agree with the Commission. It was perverse or capricious for the General Division to fail to find that the Claimant should have foreseen that her conduct might result in her dismissal. Her conduct was unlawful, and it directly involved her duties to her employer.

[54] I have found that the General Division made an error. That means I must decide how to remedy (that is, fix) it.

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[28] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] 1 SCR 76.

REMEDY

[55] I have the authority to change the General Division decision or to make the decision that the General Division should have made.[29] I could also send the matter back to the General Division for it to reconsider its decision.

[56] Both parties would prefer that I make the decision that the General Division should have made. However, I can make the decision only if the record is complete. That means that I would have to accept that the parties had an opportunity to give evidence at the General Division on all the issues I need to decide. There also needs to be enough evidence on the appeal record so that I can reach a reasoned conclusion on each of those issues.

[57] In this case, the record is not complete, so I am sending the matter back to the General Division to reconsider its decision.

[58] For a claimant to be disqualified from receiving benefits because of misconduct, the Commission must establish that the claimant's conduct meets the definition of misconduct. However, the Commission must also establish that the conduct was important to the employer's decision to dismiss the claimant.

[59] The Federal Court of Appeal has said that it is up to the Commission to prove that a claimant lost their job "by reason of [their] own misconduct." It also said that the misconduct must be the reason for the dismissal, not the excuse for it.[30]

[60] The General Division found that the Claimant did not lose her job because of her misconduct. However, I do not accept that the General Division turned its mind to the employer's motivation in dismissing the Claimant. The General Division had already determined that the Claimant's conduct was not misconduct within the meaning of the EI Act. The General Division would not have had to consider whether the employer dismissed her for her conduct, if that conduct was not misconduct under the EI Act.

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[29] My authority is set out in sections 59(1) and 64(1) of the DESD Act.
[30] *Davlut v Canada (Attorney General)*, A-241-82.

[61] The General Division commented about the delay between the incident and the Claimant's dismissal. It noted that the employer had not explained the delay, and the Commission had not investigated it. However, the General Division said nothing else about the employer's reasons for dismissing the Claimant. It did not say whether the Commission had established that the Claimant lost her job because of her misconduct.

[62] There is some evidence in the reconsideration file that suggests that the Claimant's conduct was the reason for her dismissal. However, it is not clear to me that the General Division gave the Claimant a fair opportunity to answer that evidence. Therefore, I am returning the matter to the General Division for a reconsideration.

CONCLUSION

[63] I am allowing the appeal and returning the matter to the General Division to reconsider its decision.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 12, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, Representative for the Appellant S. K., Respondent