[TRANSLATION]

Citation: *NL v Canada Employment Insurance Commission*, 2022 SST 307

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	N. L.
Representative:	J. D.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated October 1, 2021 (GE-21-1390)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	March 3, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	April 20, 2022
File number:	AD-21-369

Decision

[1] The appeal is allowed. The Claimant is not disqualified from receiving benefits.

Overview

[2] N. L. is the Claimant in this case. She worked as an orderly at a private residence for seniors with decreasing independence. Specifically, she worked on the floor for residents with cognitive impairment.

[3] The Claimant was on medical leave from December 2020 to March 2021. During this time, the Canada Employment Insurance Commission (Commission) paid her Employment Insurance (EI) sickness benefits.

[4] When she went back to work, the employer suspended her and then dismissed her for events that had taken place in December 2020. Specifically, the employer says that the Claimant left her post without permission.

[5] The employer argues that the Claimant left her post multiple times and that it warned her that she could lose her job if it happened again. The Claimant, on the other hand, argues that she was overworked and left her post for health reasons.

[6] After being let go, the Claimant applied for EI regular benefits. At first, the Commission approved her application. But, in the end, the Commission concluded that the Claimant had been dismissed for misconduct. As a result, the Commission disqualified her from receiving EI benefits, which created an overpayment on her account.

[7] The Claimant appealed the Commission's decision to this Tribunal's General Division, but it dismissed her appeal.

[8] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. She says that the General Division decision contains errors of law and that she did not commit misconduct under the law.

[9] 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.

[10] In my view, the Commission has failed to prove that the Claimant lost her job because of misconduct. As a result, the Commission has no grounds to disqualify the Claimant from receiving EI benefits.

Issues

[11] I have to decide the following issues:

a) Did the General Division make an error of law by misapplying the legal test for misconduct?

b) If so, how should I fix this error?

c) Did the Claimant lose her job because of misconduct?

Analysis

[12] I can intervene in this case only if the General Division made at least one of the errors set out in the law.[1] Based on the wording of the law, any error of law could trigger my powers to intervene.

[13] In cases where I can intervene, the law also defines the powers that I have to try to fix the General Division's error.[2]

The General Division made an error of law by misapplying the legal test for misconduct

[14] The issue before the General Division was whether the Claimant had lost her job because of misconduct.

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[1] These errors (also known as "grounds of appeal") are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] These powers are established in section 59(1) of the DESD Act.

[15] The law disqualifies you from receiving EI benefits if you lose a job because of misconduct.[3] Misconduct does not require that you have bad intentions, but it does require that the alleged act be wilful.[4]

[16] The Federal Court of Appeal teaches us that, to be considered misconduct, the act complained of "must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."[5]

[17] The Claimant argues that the General Division made an error by focusing its decision on whether the Claimant knew or should have known that her actions could result in her dismissal. The Claimant admits that she has never disputed this finding.

[18] Instead, the Claimant points out that the test for misconduct cannot end there. In her view, the General Division made an error of law by failing in its duty to consider all the relevant circumstances, including the Claimant's mental state and the employer's conduct.

[19] I accept the Claimant's argument.

[20] The Claimant has never disputed that she was not allowed to leave her post. But she did give the following explanation:

- She had felt overwhelmed at work for some time.
- She repeatedly asked for more help, but her employer refused to give it.
- On the relevant day, the Claimant felt exhausted, made sick by her work, and she had had enough, both physically and mentally.

[3] This consequence is set out in section 30 of the *Employment Insurance Act*.
[4] See *Canada (Attorney General) v Lemire*, 2010 FCA 314 at paras 11 to 16; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.
[5] See *Tucker*, A-381-85.

- A few days later, the Claimant's doctor diagnosed her with an adjustment disorder and burnout.

[21] The Commission argues that the General Division considered the Claimant's explanations at paragraph 48 of its decision:

> The Claimant wilfully abandoned her post. She knew the consequences. I give little weight to her explanations. As I said, she had already received a one-day suspension for a similar act. On December 15, 2020, she left her post once more, and again on December 18, 2020.

[22] On the contrary, I find that this paragraph shows how the General Division based its decision on whether the Claimant knew she could be dismissed, not on an assessment of all the relevant circumstances.

[23] On this point, the General Division decision is similar to *Astolfi v Canada (Attorney General)*.[6] Mr. Astolfi knew full well that he would be dismissed if he did not show up for work. But he insisted that it was not safe to do so, since he had been assaulted at work and the employer had not done enough to ensure his safety.

[24] In its decision in *Astolfi*, the Federal Court reminds us that it is not enough to summarize the claimant's explanations. Mr. Astolfi had said that his refusal to come in was a direct result of his employer's actions before his misconduct. So, it was essential to consider these explanations "to properly assess whether the employee's conduct was intentional or not."[7]

[25] Here, the Claimant says that her leaving her post early was a direct result of her health and her employer's earlier actions. Although the General Division summarized the Claimant's explanations, I find that it made an error of law by failing to consider them among all the factors relevant to analyzing the wilfulness of the misconduct.

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[6] See *Astolfi v Canada (Attorney General)*, 2020 FC 30.
[7] See *Astolfi v Canada (Attorney General)*, 2020 FC 30 at para 33.

I will give the decision that the General Division should have given

[26] At the hearing before me, there were no objections to my giving the decision it should have given.[8] The Claimant is not arguing that the General Division prevented her from presenting her case in any way.

[27] I agree. This means that I can decide whether the Claimant lost her job because of misconduct.

The Claimant did not lose her job because of misconduct

– To be misconduct, the alleged act must be wilful

[28] In this case, it is up to the Commission to show that the Claimant's alleged act amounts to misconduct under the law.

[29] The word "misconduct" is not defined in the *Employment Insurance Act*. So, the Tribunal has to refer to the case law to understand its meaning.

[30] According to this case law, the wilfulness of the alleged act is essential to determining whether there is misconduct. The Federal Court of Appeal summarized this principle as follows:[9]

> Thus, there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[31] The law recognizes that certain acts, even those considered reprehensible, do not automatically amount to misconduct.[10]

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[8] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.
[10] See *Tucker*, A-381-85; and *Locke v Canada (Attorney General)*, 2003 FCA 262.

– The Claimant's alleged act was not wilful

[32] In this case, the Commission has failed to show that the Claimant's alleged act was wilful.

[33] It is important to remember that the Claimant was an orderly in a seniors' residence. She usually worked alone on a floor for residents with cognitive impairment, during a global pandemic that increased her workload.

[34] On December 18, 2020, the Claimant was experiencing difficulties at work. She asked the head nurse for help. But the one who came was the general manager, who the Claimant did not get along with. The head of human resources was with her.

[35] The general manager refused to give the Claimant the help she wanted. Instead, she said that the Claimant should be capable of performing her duties on her own.

[36] I understand why the employer insisted that the Claimant not leave her post without permission. She supervised vulnerable people who needed her around to ensure their safety.

[37] But I reject the Commission's argument that the Claimant's actions amount to misconduct just because she knew she could be dismissed if she left her post again.

[38] The Claimant gave another explanation for her actions: She was sick and exhausted, and she could not carry out her duties anymore because of her health. I place significant weight on this explanation for the following reasons:

- The Claimant provided compelling testimony about how she felt, physically and mentally, in response to the general manager's refusal.[11] So, she announced that she had to leave her post.

[11] See the audio recording of the General Division hearing at 0:25:44.

- The Claimant reacted similarly a few days earlier. Also, the stress she felt when leaving work that day caused her to be sick next to her car.[12]

- The Claimant then saw doctors and was put off work for several months for an adjustment disorder and burnout.[13]

[39] So, I find that the Claimant was unable to continue working that day. She did not act in a careless or negligent way toward her responsibilities. She did not wilfully disregard the effects her actions would have on her job performance.

[40] Viewed from a different angle, the Claimant could not have foreseen that she would be dismissed for leaving her post because of a serious health problem. Even though she did not collapse, the Claimant could not go on because of her health.

[41] On this point, I note that the employer's procedures provide for the possibility of needing to leave work unexpectedly for medical reasons.[14] In addition, the Claimant notified the general manager and the head of human resources before she left.

[42] So, I find that the Commission has not proven that the Claimant's alleged act was wilful. This means that the Claimant did not lose her job because of misconduct, and she should not be disqualified from receiving EI benefits.

[12] See the audio recording of the General Division hearing at 0:30:20.
[13] See, for example, the medical certificate at GD2-15, and the notes at GD3-29.
[14] See GD3-51.

Conclusion

[43] The General Division made an error of law by misapplying the legal test for misconduct. Specifically, it failed to weigh the Claimant's explanations against all the factors relevant to analyzing the wilfulness of the misconduct. This error allows me to intervene in this case and to give the decision the General Division should have given.

[44] I am allowing the appeal because the Commission has not proven that the Claimant's alleged act amounts to the necessary wilful misconduct. This means that the Claimant did not lose her job because of misconduct, and she should not be disqualified from receiving EI benefits.

Jude Samson
Member, Appeal Division