



Citation: *WS v Canada Employment Insurance Commission*, 2023 SST 32

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: W. S.

Respondent: Canada Employment Insurance Commission
Representative: Melanie Allen

Decision under appeal: General Division decision dated October 6, 2022
(GE-22-1919)

Tribunal member: Charlotte McQuade

Type of hearing: In person
Hearing date: January 6, 2023
Hearing participants: Appellant
Decision date: January 12, 2023
File number: AD-22-729

Decision

[1] The appeal is allowed. The General Division made an error of law.

[2] I am returning the matter to the General Division for reconsideration.

Overview

[3] W. S. is the Claimant. He worked for an energy authority. The Claimant's employer placed him on an unpaid leave and then terminated him for failing to comply with its Covid-19 vaccination policy.

[4] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) disentitled the Claimant from EI benefits from November 28, 2021, to December 31, 2021, and disqualified him from benefits from January 2, 2022.

[5] The Claimant appealed to the Tribunal's General Division who dismissed his appeal. The General Division decided the Claimant was suspended and then lost his job due to misconduct.

[6] There was evidence before the General Division that the Claimant had reached a settlement with his employer involving severance and a revision to his Record of Employment (ROE) to reflect a termination without cause.¹ Both the Claimant and the Commission agree that the General Division made an error of law by not considering case law from the Federal Court of Appeal that says evidence of a settlement with an employer is relevant to the issue of whether a claimant has been suspended or terminated due to misconduct.

[7] I accept that the General Division made an error of law. I am returning this matter to the General Division for reconsideration.

¹ See paragraph 20 of the General Division decision.

The parties agree the General Division made an error of law

[8] The parties agree that the General Division erred in law.

[9] The Claimant argued in his Application to the Appeal Division that the General Division had made an error of law by not considering the reasonableness of the employer's policy and by misapplying case law about the General Division's jurisdiction to consider that issue. The Claimant also questions whether the General Division had prejudged the case.

[10] I granted the Claimant permission to appeal for another reason. I said it was possible the General Division may have erred in law by not considering case law from the Federal Court of Appeal that says evidence of a settlement with an employer is relevant to the issue of whether a claimant has been suspended or terminated due to misconduct.

[11] The Commission provided submissions agreeing that the General Division had made this error of law. The Commission pointed out that the General Division acknowledged the evidence of a settlement between the employer and the Claimant. However, the General Division did not consider this evidence in light of case law from the Federal Court of Appeal that says evidence of a settlement is relevant to the question of misconduct.

[12] The Commission maintains that the settlement may have had an impact on the General Division's conclusion about misconduct and if it did not, then the General Division had to explain why it did not have an impact.²

[13] The Claimant agreed at the hearing with the Commission's submissions that the General Division had made this error of law.

I accept the General Division made an error of law

[14] I accept that the General Division made an error of law.

² AD8-3.

[15] The *Employment Insurance Act* (EI Act) provides for disentitlement from benefits where a claimant has been suspended for reasons of misconduct and disqualification from benefits where a claimant has been dismissed for misconduct.³

[16] Misconduct is not defined in the EI Act. However, the courts have come to a settled definition about what this term means.

[17] Misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵

[18] The Federal Court of Appeal has said another way to look at this, is that there is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and there was a real possibility of being let go because of that.⁶

[19] The Claimant's employer instituted a mandatory vaccination policy that required all employees to be vaccinated, subject to medical reasons or substantiated grounds under the employer's human rights policy.

[20] The policy provided that employees who did not comply with the policy would be subject to discipline up to and including termination.

[21] There was no dispute before the General Division that the Claimant refused to comply with the vaccination requirements in the policy and this was the reason for his unpaid leave and termination.⁷

³ See section 30(1) and section 31 of the *Employment Insurance Act*.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See paragraph 11 of the General Division decision.

[22] The Claimant's reason for refusing to comply with the policy was that the employer had changed the terms of his employment contract and he did not think the policy was reasonable.⁸

[23] The General Division found that the Claimant was fully aware of the employer's vaccination policy and the consequences for failing to comply with this policy.⁹

[24] The General Division decided that the Commission had proven the Claimant's conduct in failing to comply with the policy amounted to misconduct because the Claimant was fully aware of the employer's vaccination policy and the consequences for failing to comply with this policy.

[25] The General Division acknowledged the Claimant's evidence that he had taken legal action against his employer and was awarded severance monies and that the employer amended his ROE to show the Claimant was dismissed without cause.

[26] However, the General Division said the only issue before it whether the Claimant was suspended and dismissed for misconduct, and it must apply the EI Act and the legal test for misconduct. The General Division concluded that the law could not be ignored, even for sympathetic reasons.¹⁰

[27] There is case law from the Federal Court of Appeal that suggests where a settlement contradicts an employer's earlier assertion of misconduct, while not determinative, the settlement can be relevant to the question of whether the employee's conduct is misconduct under the EI Act.¹¹

[28] The case law says that the General Division is not bound by how the employer and employee might characterize the way employment has ended. It is the General

⁸ See paragraph 19 of the General Division decision.

⁹ See paragraph 19 of the General Division decision.

¹⁰ See paragraph 20 of the General Division decision.

¹¹ See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).

Division's role to assess the evidence and decide whether the Claimant's conduct amounted to "misconduct" under the EI Act.

[29] The case law also says that before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct, which would contradict the earlier position taken by the employer. Some weight may also be given to situations where there is reinstatement, or the employee is given meaningful compensation.¹²

[30] The General Division acknowledged the Claimant's evidence of a settlement with his employer and the revision to the ROE. However, the General Division did not consider the case law noted above or analyze the evidence of the settlement to determine whether it had any impact on its conclusion that the Claimant's conduct amounted to misconduct. Respectfully, this was an error of law.

[31] The Claimant submits that the General Division also made other reviewable errors. However, I don't need to consider whether the General Division made other errors. It is enough to show one reviewable error has been made.

[32] Since the General Division has made an error of law, I can intervene in the decision.¹³

Remedy

[33] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.¹⁴

¹² See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).

¹³ See section 58(1) of the DESD Act.

¹⁴ See section 59(1) of the DESD Act.

[34] The Commission submits that appeal should be returned to the General Division for a new hearing, so the Claimant can provide the settlement agreement documentation and so all pertinent evidence can be considered.

[35] The Claimant says he is indifferent as to whether I substitute my decision for that of the General Division or return the matter to the General Division for reconsideration. He is concerned about the lengthy process involved in his appeal.

[36] I understand the Claimant doesn't want to go through another hearing and prolong this matter further. However, I am not satisfied that the record is complete enough to allow me to substitute my decision.

[37] There are no details in the documentary record about the settlement or the reasons for the settlement. Since this issue was not considered by the General Division, no details were canvassed at the hearing about the settlement or the reasons for the settlement.

[38] I am not satisfied the record is complete enough to allow me to substitute my decision for that of the General Division. So, I need to send the appeal back to the General Division so it can reconsider the matter. At the General Division, the Claimant will have the opportunity to provide more detailed information about his settlement.

Conclusion

[39] The appeal is allowed. The matter is returned to the General Division for reconsideration.

Charlotte McQuade
Member, Appeal Division