Citation: *Canada Employment Insurance Commission v SM*, 2023 SST 620

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Respondent:	S. M.
Representative:	M. R.

Decision under appeal:	General Division decision dated February 2, 2023 (GE-22-2944)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	May 8, 2023
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	May 22, 2023
File number:	AD-23-185

Decision

[1] I am allowing the appeal. The General Division made errors of law.

[2] I have made the decision the General Division should have made and found that the Claimant is disentitled to benefits from February 16, 2022.

Overview

[3] The Canada Employment Insurance Commission is the Appellant. I will refer to the Appellant as the Commission. S. M. is the Respondent and also the claimant for Employment Insurance (EI) benefits. I will refer to him as the Claimant.

[4] The Claimant is a professional driver. On or about November 10, 2021, he was convicted for driving under the influence (DUI) in circumstances unrelated to his employment. After his conviction, his licence was suspended, except that he was permitted to drive vehicles fitted with an Interlock device.

[5] The Claimant obtained sickness EI benefits while receiving treatment for his alcohol problem. When those benefits lapsed in early 2022, he sought to return to work at his employer. However, his employer was unwilling to fit its vehicles with the Interlock device and did not have any other work for the Claimant. The Claimant applied for regular EI benefits.

[6] The Commission denied his claim, saying that he had lost his employment due to his misconduct. The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal), and he was successful. The General Division found that there was not enough evidence to prove that the employer dismissed him. The General Division also stated that it would not have found the Claimant's conduct to be misconduct, even if he had been dismissed.

[7] The Commission appealed the General Division decision to the Appeal Division of the Tribunal. Leave to appeal was granted and the appeal was heard on May 8, 2023.

[8] I am allowing the appeal. The General Division made an error of law by focusing only on whether the Claimant was dismissed, without considering the broader definition of "loss of employment" in the *Employment Insurance Act* (EI Act). It also erred by failing to analyze the relevant case law when it said that it would not have found the Claimant's conduct to be misconduct.

[9] I have made the decision the General Division should have made. I found that the Claimant's actions were misconduct and that he was suspended for that misconduct. He is therefore disentitled from receiving EI benefits from February 15, 2022.

Issues

[10] The issues in this appeal are:

a) Did the General Division make an important error of fact when it found that the Claimant was not terminated?

b) Did the General Division make an error of law by failing to consider whether the Claimant was suspended?

c) Did the General Division make an error of fact by not applying the law to evaluate whether the Claimant's actions were misconduct?

Analysis

[11] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.

b) 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 (error of jurisdiction).

c) The General Division made an error of law when making its decision.

d) The General Division based its decision on an important error of fact.[1]

Important error of fact

[12] The General Division found that the employer could not accommodate the Claimant for some period after his medical leave ended. It accepted that the Claimant was lawfully permitted to drive only Interlock-equipped vehicles and that the employer was unable to install Interlock devices in its vehicles.

[13] The General Division also found that the Claimant's employer had not dismissed him. Because of this finding, the General Division concluded that he should not be disqualified for misconduct.

[14] This is the Commission's appeal and the Commission did not argue that the General Division made an error in how it found that the Claimant was not dismissed.

[15] However, the Claimant raised the issue. The Claimant argued extensively that I should not interfere with this finding of fact. Therefore, I will consider whether the General Division made this finding in error.

[16] I agree with the Claimant. I find no basis for interfering in the General Division's finding that the employer did not dismiss the Claimant. The General Division provided intelligible reasons for the manner in which it weighed the evidence to find that the Claimant was not dismissed. I accept that the General Division considered and properly appreciated the evidence related to this finding.

[17] The General Division did not make an important error of fact when it found that the Claimant's employer did not dismiss him.

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[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* (DESDA).

Error of law

– Misinterpretation of "loss of employment"

[18] The General Division made an error of law by misinterpreting "loss of employment."

[19] Much of the General Division decision is about whether the Claimant was dismissed. Its decision that the Claimant should not be disqualified primarily relied on its finding that he had not been dismissed.

[20] The Commission argued that the General Division did not properly apply the legal test for misconduct. According to the Commission, the General Division had an obligation to look beyond whether the Claimant was "fired," and look at the reasons for the loss of employment. More particularly, the General Division should have considered why the employer was unable to reinstate the employer to work.[2]

[21] According to the EI Act, a claimant is disqualified from their receiving any EI benefits if they lost any employment because of their misconduct.[3] The Claimant argued that the General Division did not need to analyze whether the Claimant's conduct was misconduct because the Claimant had not been terminated.[4]

[22] If there had been no loss of employment, the Claimant would be correct. However, "loss of employment" is not synonymous with "terminated." The EI Act states that "loss of employment" includes a "suspension of employment."[5] The General Division was required to determine whether the Claimant was suspended and not just whether he was terminated or dismissed. Had it found that the Claimant was suspended, it would have to analyze whether the Claimant's conduct was "misconduct"

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[2] See AD1-2
[3] This is found in section 30(1) of the *Employment Insurance Act*. Section 30(1)(a) also says that such a claimant would not be disqualified if the claimant accumulated sufficient hours of insurable employer to requalify, since losing or leaving their employment (but that is not an issue in the facts of this case).
[4] See AD5-8.
[5] This is in "Interpretation" in section 29 of the EI Act.

within the meaning of the EI Act, and whether he was suspended as a result of the misconduct.

[23] The General Division acknowledged that the Claimant was "possibly on an unpaid leave of absence" following his medical leave when his employer could not accommodate him. (This is the period in which the Interlock condition restricted the Claimant's ability to drive.) However, it made no finding about whether the Claimant had been suspended from work within the meaning of the EI Act.

[24] The General Division made an error of law because it misinterpreted the meaning of loss of employment, or failed to determine if the Claimant had suffered a loss of employment.

– **Application of case law: Alternative findings and decision**

[25] The General Division went on to consider what its findings would have been, if it were wrong in finding that the Claimant had not been dismissed.[6] It stated that it would not have found the Claimant's conduct to be misconduct because the Claimant's actions were not willful. It stated that the Claimant could not have known that his employer would dismiss him after his medical leave ended.

[26] However, the General Division made an error of law in how it reached this alternative decision - for two reasons.

[27] First, the General Division's reasons are inadequate. It is not enough to say that the Claimant's actions were not willful and that he could not have known the employer would dismiss him. The General Division failed to analyse or weigh the evidence from which it drew these conclusions.

[28] Second, the reasons fail to reference or apply case law that is relevant to the interpretation of "misconduct" in the circumstances of the case.

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[6] See para 48 of the General Division decision.

[29] In this case, the Claimant pled guilty to driving while under the influence (DUI). This resulted in the imposition of conditions on his licence. The conditions meant that he could not drive a vehicle without an Interlock device. The employer did not have Interlock devices installed in its vehicles and was unwilling to install them. As a result, the Claimant could not return to work in the period between the end of his medical leave and when this condition was lifted from his licence.

[30] The Commission's submissions reference *Cooper*, a Federal Court of Appeal case involving a claimant who required his driver's licence for his job.[7] That case was concerned with whether a claimant had just cause for leaving employment and not with misconduct. However, it was similar to the present case in other ways. The claimant in *Cooper* lost his licence so he asked for modified duties to be able to work without it. He left his employment because the employer refused to offer such duties. The Court found that the Board of Referees[8] made an error when it found that the Claimant had just cause for leaving his employment.

[31] Other decisions have found that a claimant's loss of a driver's licence can be misconduct. In *Brissette*, the Court said:

> The respondent was risking the loss of his driver's licence and thus his job by driving after consuming a quantity of alcohol that exceeded the allowable limit: he knowingly and deliberately caused the risk to occur.[9]

[32] In *Thibault*, the Court found that the claimant lost his employment because of his own misconduct in the following circumstances:

> At issue in this case is a loss of employment because of misconduct, namely, speeding, leading to demerit points and the loss of one's driver's licence, the

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[7] *Canada (Attorney General) v Cooper*, 2003 FCA 21.
[8] The Board of Referees was formerly the first level of appeal for Employment Insurance matters.
[9] *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684 (C.A.).

possession of which is an indispensable condition of employment for truck driver.[10]

[33] These decisions apply the test for misconduct in circumstances that are similar to those of the Claimant. The General Division did not refer to these decisions or any of the misconduct case law involving non-employment conduct by which claimants lost licences or credentials that were required to perform their job. It referenced *Mishibinijima,* and *McKay-Eden*, two Federal Court of Appeal decisions that talks about the test for misconduct.[11] However, the General Division failed to apply the case law to the circumstances, except to help define "wilfulness". There are other elements to the test for misconduct.[12]

[34] The General Division made an error of law by failing to consider or apply relevant case law.

Remedy

[35] I have found errors in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[13]

[36] Both the Claimant and the Commission say that I should go ahead and make the decision.

[37] I accept that the Claimant had a fair opportunity to present his evidence to the General Division and that I have all the evidence I need to make the decision. I will make the decision that the General Division should have made.

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[10] *Canada (Attorney General) v. Thibault,* 2005 FCA 369.

[11] See para 48 of the General Division decision. *Mishibinijima v Canada (Attorney General),* 2007 FCA 36; *McKay-Eden v Her Majesty the Queen* A-402-96.

[12] See case citations in paragraphs 58 to 62 below.

[13] See section 59(1) of the DESDA.

Did the Claimant have a "loss of employment"?

[38] I find that the Claimant had a loss of employment because he was suspended.

[39] I find that the Claimant wanted to return to work at his regular employer after his medical leave. He wanted the employer to install Interlock devices so that he could return to driving, or to offer him some other kind of work.

- When the Commission asked him why he was not returning to work, he said that "the employer [was] not willing to put a blowbox in multiple vehicles for [him] to work."[14]

- On June 8, 2022, the employer told the Commission that "they would hire him back but can't right now as he cannot drive and that is his job." The employer also said "[the Claimant] can't come back until he has an unrestricted driver's license as he cannot fulfil the job duties."[15]

- The Claimant told the General Division that he asked the employer if he could do other non-driving duties, but that the employer was unwilling to offer other duties.[16]

[40] I am not interfering with the General Division's finding that the Claimant was not dismissed. However, I accept that the employer would not permit the Claimant to return to work so long as the Interlock condition remained on his licence. This is not in dispute.

[41] At the General Division, the Claimant argued that he was not working because of an illness. I do not accept that the Claimant was not working from February 16, 2022, onward because of illness.

[42] After his DUI conviction, the Claimant took a medical leave and collected sickness EI benefits. On March 11, 2022, he spoke to the Commission about converting

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[14] See GD19.
[15] See GD 21, GD-34.
[16] See para 24 of the General Division decision.

his sickness EI to regular benefits. He said that he was available for and capable of working as of February 16, 2022, which is the day after his sickness benefits ended.

[43] The Claimant also told the Commission that he had finished treatment for his alcohol problem before he sought to return to work.[17] In his submissions to the Appeal Division, he appears to have adopted the General Division's characterization of his condition status as "recovered," at the time that he met with his employer to discuss a return to work.[18]

[44] The Claimant made the alternative argument that he "stopped working because of an involuntary leave of absence."[19] I agree that the Claimant was on some kind of leave, since I accept the General Division's findings that he was not terminated. I cannot characterize the Claimant's circumstances as an involuntary leave of absence.

– **Leave of absence or suspension?**

[45] Under the EI Act, a claimant is disentitled to receive benefits whether they voluntarily take a leave of absence without just cause,[20] or whether the claimant is suspended for misconduct.[21] In the case of a leave of absence, it must be voluntary, authorized by the employer, and have an agreed endpoint when the claimant will resume employment.

[46] If the Claimant was on a leave, that leave was involuntary. The Claimant himself described his leave as involuntary.[22] He would have gone back to work with the employer as of February 16, 2022, if he could have, but the employer could not use him so long as he had the Interlock condition on his driver's licence. From the perspective of the employer, the Claimant was not on leave. The Claimant does not believe his

[17] See GD3-26.
[18] See AD5-4 and paragraph 41 of the General Division decision.
[19] See para 8 of the General Division decision.
[20] See section 32 of the EI Act.
[21] See section 31 of the EI Act.
[22] See GD3-27.

employer ever terminated him, but the employer considered the Claimant to be terminated as of November 2, 2021.[23]

[47] Furthermore, I find that the leave did not have a clear endpoint. If the Claimant knew when the condition would be lifted from his licence so that it would be possible for him to drive his employer's vehicles, the employer was not aware of that date. At the time of the January 2023 General Division hearing, the employer had "recently" called him to determined if he was able to drive without the Interlock device.[24]

[48] The employer said it would be willing to "hire" the Claimant when the condition was removed from his licence, but there is no evidence that this was agreed or certain. The Claimant acknowledged in his request for reconsideration that he had returned to Prince Edward Island where he has diligently sought other employment.[25]

[49] The Claimant does not meet the criteria to be disentitled for taking a leave of absence. Therefore, there is no need to consider whether he took leave "without just cause."

[50] The only question is whether his involuntary and ill-defined "leave" was a suspension within the meaning of the EI Act.

– **The Claimant was suspended**

[51] I find that the Claimant was effectively suspended from work.

[52] A suspension is a "loss of employment" as defined by the EI Act. Since the Claimant was suspended, the Claimant had a loss of employment.

[53] I have considered that the employer did not expressly say that it suspended the Claimant. Instead, the employer characterized the loss of employment as a termination (which it confirmed with the worker in February 2022 when he completed his rehabilitation program[26]). It justified terminating the Claimant because he could no

[23] See GD 21.
[24] See para 46 of the General Division decision.
[25] See GD3-27.
[26] See GD3-34.

longer drive its vehicles. However, as I have deferred to the General Division's finding of fact that the Claimant was not terminated, I accept the employer's statement for this purpose: It is evidence that the employer imposed an absence from employment on the Claimant's. It also shows that the employer communicated this to the Claimant in February 2022.

[54] The Claimant wanted to return to work but the employer could not offer the Claimant work. This was not because there was a shortage of work. It was because the Claimant did not have a licence that would allow him to drive the employer's vehicles. Until the Claimant's licence conditions could be lifted, the employer could not put him to work.

[55] In addition, the Claimant's leave was likely unpaid. The Claimant applied for regular EI benefits as of February 16, 2022. This does not mean that he could not have been receiving any pay from his employer, but additional income would have been relevant to his application for regular benefits. There is no record that the Claimant ever said he received or expected any other kind of pay for the time that he was seeking regular benefits.[27]

[56] For these reasons, I find that the Claimant was effectively suspended from employment as of February 16, 2022. I am agreeing with other Appeal Division decisions that have characterized involuntary leave of absences as suspensions.[28]

Misconduct

[57] I find that the Claimant was suspended for misconduct.

[58] I appreciate that the Claimant likely sees his DUI conviction as a consequence of his alcohol problem, and that the Interlock condition (that resulted in the suspension) was therefore also a consequence of the alcohol problem.

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[27] See GD3-19.
[28] See for example *TH* v *Canada Employment Insurance Commission*, 2023 SST 63.

[59] However, I am following the cases which I discussed earlier in this decision. The Courts have consistently found that intentional actions – that lead to the loss of a driver's licence – are misconduct if a claimant has a loss of employment because a valid driver's licence is a job requirement.

[60] The Courts do not accept that a person is relieved of criminal responsibility for impaired driving for the reason that they may be too impaired to form the intent to drive. The intention is found in the voluntary consumption of alcohol. In terms of misconduct, the Courts accept that driving while impaired may be misconduct,[29] even though an impaired claimant may not be thinking straight about how their actions might affect their employment.

[61] A claimant must willfully engage in conduct that they can reasonably foresee will result in their termination[30] or, in the Claimant's case, suspension. I accept that it is reasonably foreseeable that the Claimant would be dismissed or suspended. It is reasonably foreseeable that

- A person may be pulled over and charged after drinking too much and driving.
- Charges will lead to a conviction.
- A conviction will result in the cancellation or suspension of a driver's licence or the imposition of conditions.
- Any one of those licencing consequences may mean that a professional driver can no longer perform their essential work duties.
- Their employer will dismiss or suspend them as a result.

[29] Supra, notes 7, 9, 10 and see para 64 below.
[30] *Canada (Attorney General) v Lemire,* 2010 FCA 314.

[62] I also accept that the conduct that resulted in the Claimant's DUI was willful. "Willful" conduct is defined as conduct that is "conscious, deliberate, or intentional."[31] The decision to get into a vehicle and drive while impaired, is still willful.[32]

[63] On October 28, 2021, the Claimant drove impaired. He was convicted. I understand that the Claimant has an alcohol problem. This may mean that he is more likely to drink and/or more likely to drink too much. However, it does not make his choice to drink and drive on a particular occasion any less willful than anyone else who drives impaired.

[64] Finally, I accept that the Claimant's conduct "breached an express or implied duty,"[33] The Claimant knew that he required appropriate licencing for his job. Because of the Claimant's DUI, he was restricted to driving only vehicles with an Interlock device. It was impractical for his employer to install Interlock devices in its fleet of vehicles, so the Claimant could not drive his employer's vehicles. The conduct that resulted in the Claimant's DUI, put him in the position where he could not perform his job.

[65] Much of the case law deals with claimants who were terminated as a result of their misconduct, rather than suspended as in this case. However, if a claimant's actions could have resulted in job loss and would otherwise be misconduct, those actions may also be misconduct where they result in a suspension only. There is still a "loss of employment."

[66] Furthermore, I see no important distinction based on the particular pathway from the misconduct to the loss of employment. It was predictable that the Claimant's conviction would negatively affect his licence, whether that was the loss of his licence, the suspension of his licence, or conditions on his licence. If the Claimant could reasonably foresee that he would not be able perform his job duties because of his conduct, it does not matter that he might not have precisely foreseen what happened;

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[31] *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 (F.C.A.).
[32] Supra, note 9.
[33] *Canada (Attorney General) v Cartier*, 2001 FCA 274.

that the employer would refuse to equip its vehicles with Interlock devices to accommodate the Claimant's licence restrictions.

Jurisdiction to consider disentitlement

[67] The Courts have found that it does not matter whether it is the employer or the claimant that terminated an employment relationship, where the employment relationship is terminated by necessity, and a reprehensible act is the real cause for the termination.[34] The Tribunal has jurisdiction to find that a claimant was dismissed for their misconduct even where the Commission decision was that the claimant voluntarily left their employment for just cause.

[68] In my view, the present situation is analogous: It does not matter that the Commission found that the Claimant should be disqualified for his misconduct. The real issue is whether the Claimant's misconduct led to a loss of employment. I have found that the Claimant was suspended for misconduct and not dismissed. I have jurisdiction to consider whether the Claimant should be disentitled and not disqualified.

[69] Section 30 of the EI Act states that a claimant is disqualified if they lost any employment because of their misconduct unless they are disentitled under section 31.

[70] I have found that the Claimant was suspended from employment because of misconduct. Section 31 states that such a claimant is disentitled to benefits until the period of suspension expires, the claimant loses or voluntarily leaves the employment, or the Claimant has accrued a sufficient number of hours since the disqualification to requalify for benefits.

[71] I find that the Claimant is disentitled to benefits from and including February 16, 2022.

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[34] *Canada (Attorney General) v Desson*, 2004 FCA 303; *Canada (Attorney General) v Borden,* 2004 FCA 176

Conclusion

[72] I am allowing the appeal. The General Division made an error of law by not considering whether the Claimant had a “loss of employment.” It also failed to apply the relevant case law when it found that his conduct would not have been misconduct.

[73] I have made the decision the General Division should have made. The Claimant is disentitled to regular benefits from and including February 16, 2022.

[74] I leave it to the Commission to determine when the Claimant’s disentitlement should end, and whether he qualifies for regular benefits at that point.

Stephen Bergen
Member, Appeal Division