Citation: *LW v Canada Employment Insurance Commission*, 2023 SST 1400

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated February 13, 2023 (GE-22-3774)

Tribunal member:	Melanie Petrunia
Type of hearing:	In Writing
Decision date:	October 24, 2023
File number:	AD-23-258

Decision

[1] The appeal is dismissed. The General Division did not make any reviewable errors. The Claimant is disqualified from receiving EI benefits.

Overview

[2] The Appellant, L. W. (Claimant), was dismissed from her job as a decision support consultant with a hospital because she did not comply with her employer's COVID-19 vaccination policy (policy). The Claimant then applied for EI regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) determined that the Claimant was dismissed from her job because of her misconduct so it was not able to pay her benefits. The Claimant requested a reconsideration but the Commission maintained its decision.

[4] The Claimant appealed to the Tribunal's General Division and her appeal was dismissed. The General Division found that the Claimant was terminated from her job because she did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct and she is disqualified from receiving EI benefits.

[5] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. She argues that the General Division based its decision on an important factual error by failing to consider an amended ROE, relied on irrelevant case law and was biased.

[6] I am dismissing the Claimant's appeal. The General Division did not make any reviewable errors in its decision. The Claimant was dismissed due to misconduct and cannot be paid EI benefits.

Issues

[7] The issues in this appeal are:

a) Did the General Division base its decision on an important factual error by failing to consider the amended Record of Employment (ROE) issued by her employer?

b) Did the General Division make an error of law by relying on irrelevant case law?

c) Was the General Division biased?

Analysis

[8] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[1]

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

The General Division did not make any reviewable errors

– The Claimant previously appealed another General Division decision

[9] The Claimant initially appealed the Commission's decision to the General Division. At that time, the Claimant requested an adjournment of her General Division hearing because she had grieved her termination and a mediation was scheduled. The General Division refused the adjournment request and the appeal was dismissed.[2]

[10] The Claimant appealed that decision to the Appeal Division. The Appeal Division allowed the appeal, finding that the General Division should have granted the

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[1] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] AD1A

adjournment because the outcome of the mediation could have an impact on the appeal. The matter was returned to the General Division for redetermination.[3]

– The General Division decision

[11] The General Division had to decide why the Claimant stopped working and whether this reason amounted to misconduct under the law.

[12] The General Division decided that the reason that the Claimant was let go was because she didn't comply with her employer's vaccination policy.[4] It found that the Commission had proven that this reason amounted to misconduct under the EI Act. It based its decision on the following:

- The employer had a mandatory vaccination policy;
- The Claimant was aware of the policy;
- The policy made it clear that employees who did not comply could not continue working; and
- The Claimant knew, or ought to have known, that she could be dismissed if she did not comply with the policy.[5]

[13] The General Division acknowledged that the Claimant made arguments concerning the following:

- Her employer's policy violated her human rights;
- The policy was not reasonable because she worked from home;
- Her disability prevented her from returning to work without accommodations so her vaccination status did not affect her ability to do her job, and

[3] Appeal Division decision in AD-22-410
[4] General Division decision at para 12.
[5] General Division decision at paras 36 and 37.

- The policy says that non-compliance will result in unpaid leave, not termination, so she didn't know that she could lose her job.[6]

[14] The General Division found that the Claimant was warned by the employer that she would be dismissed for non-compliance with the policy.[7] It also found that the policy clearly applied to all employees, whether or not they worked from home. Exemptions were available but there was no guarantee that the Claimant would be exempted or accommodated due to her disability.[8]

[15] The General Division also found that it was not within its jurisdiction to decide whether the employer's policy was fair or reasonable and there are other avenues for the Claimant to address concerns about a violation of human rights or allegations of discrimination.[9]

– **The General Division did not ignore relevant facts**

[16] The Claimant argues that the General Division based its decision on an important factual error. She says that the General Division should have considered that her employer issued a revised ROE following a mediation. She says that this ROE indicates that the reason for issuing was "termination for non-cause" which shows that she was not dismissed for misconduct. [10]

[17] The Claimant also argues that the ROE shows that she received severance pay, which is only provided when an employee loses their job through no fault of their own. She says that the Commission was not at the hearing and its not clear if it considered the new ROE or just relied on their submissions from the previous General Division matter.[11]

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[6] General Division decision at para 29.
[7] General Division decision at para 36.
[8] General Division decision at para 37.
[9] General Division decision at para 44.
[10] ADN3-2
[11] ADN3-3

[18] The Claimant argues that the General Division based its decision on important factual errors by failing to take this evidence into consideration.

[19] The General Division did not refer directly to the Amended ROE that the Claimant submitted. It acknowledged that it formed part of the record during remarks at the hearing.[12] The Claimant did not make any further arguments at the General Division about the amended ROE or provide minutes of settlement or other documents that would show what the agreement was between her and the employer.

[20] 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.[13]

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

[22] The case law also says, however, 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.[14]

[23] The General Division did not rely on the coding on the original ROE when it decided that the Claimant was dismissed due to misconduct. The amended ROE was not binding on the General Division and, without any further evidence from the Claimant such as minutes of settlement, it is not relevant to the issue that the General Division had to decide.

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[12] Recording of General Division hearing at 8:10 to 09:10 and 13:05 to 13:26.
[13] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene,* 2007 FCA 183.
[14] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene,* 2007 FCA 183.

[24] I find that the General Division did not base its decision on any factual errors by not directly referring to the amended ROE issued by the employer.

– **The General Division did not err in law**

[25] The Claimant argues that, by ignoring that the employer issued an amended record of employment, it relied on irrelevant case law in its analysis.

[26] The General Division accurately set out and applied the key principles established in case law from the Federal Court and the Federal Court of Appeal.[15] The courts have said that misconduct is conduct that is willful, which means that the conduct was conscious, deliberate or intentional.[16] It also includes conduct that is so reckless that it is almost willful. It is not necessary that a claimant have a wrongful intent.[17]

[27] The Courts have also said that there is misconduct when a claimant knew or should have known that the conduct could get in the way of carrying out their duty to their employer and dismissal was a real possibility.[18] The question is not whether the suspension or dismissal was justified in a labour law context, but whether the claimant could foresee that they would be suspended or dismissed.[19]

[28] The General Division explained why it found that the Claimant's conduct was wilful and why it amounted to misconduct. The General Division cited the definition of misconduct from several Federal Court of Appeal cases. It applied the law to the facts. Its findings were consistent with the law and based on the evidence before it. The case law it relied on was relevant to the matter.

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[15] General Division decision at paras 14-26.
[16] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[17] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[18] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[19] See *Lemire* at para 15 and *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at paragraph 2.

– The General Division was not biased

[29] The Claimant argues that the General Division was biased. She says that she was given until the day after the hearing to provide any additional documents, which is the same as the date on the decision.[20]

[30] I find that there is no evidence of bias. The Claimant was given until the day following the hearing to provide additional documents, which was a Friday. The decision was not issued until the following Monday and the Claimant had not provided anything further for the General Division to consider.

[31] I find that the General Division did not err by failing to refer to the amended ROE. It did not rely on irrelevant case law and was not biased against the Claimant by issuing its decision so soon after the hearing.

Conclusion

[32] The General Division properly cited and applied the law concerning misconduct. It supported its findings with evidence and explained the reasons for its decision. It did not make any reviewable errors when it determined that the Claimant was dismissed because of misconduct.

[33] The appeal is dismissed.

Melanie Petrunia
Member, Appeal Division

[20] ADN3-4