Citation: *RD v Canada Employment Insurance Commission*, 2024 SST 155

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 19, 2023 (GE-23-431)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	November 29, 2023
Hearing participant:	Appellant
Decision date:	February 19, 2024
File number:	AD-23-659

Decision

[1] The appeal is dismissed.

[2] The General Division made an error of law. I have fixed the error by giving the decision that the General Division should have given. But the outcome is the same. The Claimant can't be paid Employment Insurance (EI) benefits.

Overview

[3] R. D. is the Claimant. He was in senior management at a storage company. He worked there from January 11, 2021, to August 15, 2022.

[4] In August 2022, the company had a conference that employees from all over Canada attended. There was a social mixer one evening. The Claimant was accused of unwanted conduct toward several other employees and the spouse of an employee. The outcome was six formal complaints made against the Claimant.

[5] The employer dismissed the Claimant because it said he was in breach of its anti-harassment and violence policy.

[6] The Claimant applied for EI benefits and was initially granted benefits. His employer asked the Commission to reconsider that decision. The Commission then denied the Claimant benefits.

[7] The Claimant appealed to the Social Security Tribunal (Tribunal). The General Division found the Claimant lost his job due to misconduct and wasn't entitled to EI benefits. The Claimant appealed this decision.

[8] I agree the General Division made errors. But I have reached the same conclusion. The Claimant's actions meet the legal test for misconduct under the *Employment Insurance Act* (EI Act). This means I am dismissing the Claimant's appeal.

Issues

[9] The issues in this appeal are as follows:

a) Did the General Division make an error of law by failing to provide adequate reasons when it concluded the Claimant was disqualified from EI benefits due to his own misconduct?

b) If so, how should the error be fixed?

Analysis

[10] I can intervene (step in) only if the General Division made an error. I can only consider certain errors.[1] Briefly, the errors I can consider are about whether the General Division:

- acted unfairly in some way
- dealt with an issue it didn't have the power to deal with, or didn't deal with an issue it was supposed to deal with
- made an error of law, such as not considering an argument or not giving adequate reasons to support its decision
- based its decision on an important error about the facts of the case

[11] In this case, the Claimant argues the General Division didn't act fairly and that it made an important error of fact. The Claimant checked these boxes on his appeal form. The Claimant didn't argue that the General Division hearing was unfair in any way. Rather, he argued the decision discriminated against him for failing to consider his type 1 diabetes.

[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division made an error of law by failing to provide adequate reasons

[12] The General Division didn't give adequate reasons. First, it failed to make findings about what the Claimant did and how he violated the employer's policy. Second, it failed to consider the Claimant's evidence about his fluctuating blood sugar levels, which was his main explanation, or defence, for his behaviour. Third, it said it preferred signed statements over the Claimant's testimony but didn't explain why.

[13] The Claimant's employer has an anti-harassment and violence policy.[2] The employer received six written complaints about the Claimant's behaviour from August 11, 2022.[3] The employer let the Claimant go.[4]

[14] The General Division decided the Claimant lost his job because he went against his employer's policy.[5] But the General Division doesn't explain specifically what the Claimant did that went against the policy.[6]

– There needed to be findings about what the Claimant did that violated his employer's policy

[15] The General Division decision didn't give an explanation about what the Claimant did that went against the employer's policy.[7] The General Division was required to make findings about the Claimant's conduct. Then, that conduct had to be tied to the employer's policy. Finally, it had to show that this was the reason for the Claimant's dismissal.

– The Claimant's explanation of his fluctuating blood sugar levels needed to be considered

[16] The General Division focussed on the Claimant's drinking, and possible intoxication, as the reason for his conduct.[8] It found there were two separate times the

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[2] See GD3-36.
[3] See GD3-54, GD3-57, GD3-64, GD3-66, GD3-70, and GD3-73.
[4] See GD3-34.
[5] See the General Division decision at paragraphs 13 and 16.
[6] See the General Division decision at paragraphs 22 and 33.
[7] See the General Division decision at paragraph 16.
[8] See the General Division decision at paragraph 38.

Claimant tested his blood sugar levels. Both times, the blood-sugar levels weren't low.[9] The General Division concluded this meant the Claimant didn't have low blood sugar. The General Division found the Claimant was appearing drunk. But found it wasn't due to his blood sugar because it was in a normal range.[10]

[17] Yet, the Claimant testified that blood sugar levels can go up and down.[11] The General Division didn't deal with the Claimant's explanation about his blood sugar levels. During the hearing, the Claimant repeatedly said he felt his employer was discriminating against him because his low blood sugar levels were to blame for his behaviour.[12]

[18] This means the General Division didn't consider the Claimant's argument that his blood sugar was responsible for his behaviour. The General Division decided that, when the Claimant tested his blood sugar, it was at an acceptable level. It didn't consider the Claimant's position that he was still experiencing low blood sugar events throughout the evening. The General Division didn't weigh this evidence.

– **There wasn't an explanation about why signed statements were preferred over the Claimant's testimony**

[19] The General Division preferred signed statements over the Claimant's testimony.[13] Yet, it didn't explain why it gave weight to certain parts of the statements.

[20] When there is a material finding that goes to the root of the decision, the General Division must explain why it prefers that evidence.[14] It didn't do that here. This created an error in the decision.

[21] This is an error because the General Division didn't explain how it weighed the evidence. The General Division decision says that, without the witness statements, the

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[9] See the General Division decision at paragraphs 35 and 36.
[10] See the General Division decision at paragraph 38.
[11] See the General Division hearing recording at 00:46:06.
[12] See, for example, the General Division hearing recording at 00:28:43, 00:42:14, and 1:11:00.
[13] See the General Division decision at paragraph 34.
[14] See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

employer would not have had any grounds to let him go.[15] This suggests the witness statements were crucial to the decision.

It isn't necessary to consider other errors

[22] I have found there is an error of law in the General Division decision. That means I don't need to consider other potential errors. It must be noted that the Claimant didn't suggest that there had been an unfair hearing. Rather, he felt the General Division wasn't "fair" because it didn't consider that he was a type 1 diabetic.[16]

Fixing the General Division's error

[23] There is no suggestion by either party that they didn't present all of their evidence to the General Division. The Commission didn't attend the hearing. The Claimant said the file is complete and he has nothing further to add.

[24] This means I can give the decision that the General Division should have given. That includes deciding whether the Claimant is disqualified from receiving EI benefits.[17]

There is misconduct under the *Employment Insurance Act*

[25] I find the Commission has proven there was misconduct for the reasons that follow. This means the Claimant is disqualified from receiving EI benefits. I will go through each element of the misconduct test below.

[26] The EI Act doesn't define the word "misconduct." But the courts have said that the conduct in question has to be wilful. This means the conduct was conscious, deliberate, or intentional.[18] But the courts have said that reckless conduct can be considered wilful too.[19]

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[15] See the General Division decision at paragraph 16.
[16] See AD1-5.
[17] Section 59(1) of the *Department of Employment and Social Development Act* allows me to fix the General Division's errors in this way.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[27] The Claimant doesn't need to have had wrongful intent. This means that he didn't have to mean to be doing something wrong for his behaviour to be misconduct under the EI Act.[20]

[28] The focus is on what the Claimant did. This means I don't have to consider how the employer behaved.[21]

[29] There is misconduct if the Claimant knew, or should have known, that his conduct would get in the way of carrying out his duties toward his employer and that there was a possibility of being let go because of that.[22]

– The test for misconduct under the EI Act doesn't include considering whether the employer wrongfully let the Claimant go

[30] The Claimant says he should not have been let go. He says his employer is discriminating against him.[23]

[31] I can't decide whether the Claimant's employer wrongfully let him go. My focus is on what the Claimant did or didn't do and whether it is misconduct under the EI Act.[24] The Claimant says his low blood sugar was an emergency situation and he should not have been let go because of that. There is no suggestion the employer let the Claimant go because he had low blood sugar. The Claimant hasn't proven that his low blood sugar caused him to act the way he did.[25]

– The Claimant's conduct was wilful

[32] The Claimant wilfully touched his colleagues in an unwanted way. This behaviour goes against his employer's policy. The Claimant argued his blood sugar levels were

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[20] See *Attorney General of Canada v Secours*, A-352-94.
[21] See section 30 of the EI Act. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[22] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[23] See the General Division hearing recording at 00:28:43 and 00:43:47.
[24] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraphs 22 and 23. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[25] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, where the claimant argued that his alcohol addiction was a disability that relieved him from culpability. The Federal Court of Appeal said the focus is on what the employee did and not whether the employer should have accommodated the employee.

partially to blame for his behaviour. I don't accept that his fluctuating blood sugar levels make his conduct unintentional. This means the Claimant's actions were conscious, deliberate, and intentional.

– **The Claimant's conduct interfered with his ability to carry out his duties toward his employer**

[33] The employer decided the Claimant breached its policy. It told the Claimant he wasn't allowed to be at work because of this. This meant that the Claimant wasn't able to carry out his duties toward his employer.

– **The employer's policy**

[34] There is no dispute the employer had an anti-harassment and violence policy.[26] There is also no dispute the Claimant was aware of this policy and signed an acknowledgement about the policy.[27]

[35] The employer's policy says the following: "Generally, harassment is considered to have taken place if the person knows, or should know, that the behaviour is unwelcome. Usually, harassment can be distinguished from normal, mutually acceptable socializing. Harassment is offensive, insulting, intimidating, and hurtful. It creates an uncomfortable work environment and has no place in employee relationships."[28]

[36] The employer's policy also gives the following examples of personal harassment:

> **Personal harassment** is any unsolicited, unwelcome, disrespectful or offensive behaviour that [has] an underlying sexual, bigoted, ethnic or racial connotation and can be typified as:
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> […]
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> - unwelcome remarks, jokes, innuendoes, propositions, or taunting about a person's body, attire, sex or sexual orientation and/or based on religion;

[26] See GD3-36.
[27] See GD3-10 and GD3-24.
[28] See GD3-36.

> […]
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> - Offensive jokes or comments of a sexual nature about an employee
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> […]
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> - physical contact such as touching, patting, or pinching, with an underlying sexual connotation.

[37] There is no question the Claimant did some of the acts he is accused of. In fact, he admitted to the following:

- kissing the heads of three colleagues[29]
- pulling on the back pants pocket of a colleague[30]
- making a joke that he later apologized for[31]

[38] The incident reports (complaints) against the Claimant detail things differently. One colleague says the Claimant pinched his buttocks twice.[32] The Claimant disputes this and says he only pulled on his colleague's pants pocket. Even if he did just pull on his colleague's pants pocket, it is an example of unwanted touching by the Claimant. These actions go against the employer's policy.

[39] The recipients of the unwanted behaviour complained to the employer's human resources department. The acts the Claimant agreed he did are enough to fall within the employer's policy under unwanted touching. There is no question some of the acts happened; there is no question these acts fall under the employer's policy. So, the next question is whether the Claimant has established he wasn't responsible for his actions.

[40] During the General Division hearing, the Claimant said that "he's old school. He's a touchy-feely guy."[33] At the Appeal Division hearing, I asked the Claimant to give me

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[29] See the General Division hearing recording at 00:53:17 and 01:04:00.
[30] See the General Division hearing recording at 01:11:00.
[31] See GD3-76 and the General Division hearing recording at 00:54:45.
[32] See GD3-58.
[33] See the General Division hearing recording at 00:48:47, 1:28:00, and 1:32:00. The Claimant confirmed this during the Appeal Division hearing at 1:22:00.

an argument as he has maintained from the beginning that the reason for his actions was his low blood sugar. I asked the Claimant whether his behaviour was because he had low blood sugar or because he was a "touchy-feely guy." The Claimant said "both." I take this to mean that the Claimant's low blood sugar wasn't the only reason he acted the way he did.

– The Claimant's low blood sugar doesn't make his actions unintentional

[41] The Claimant argues he has a disability. He is a type 1 diabetic and says he was experiencing low blood sugars on the night in question. He also says that he had more than one low blood sugar event throughout the night. The Claimant argues his disability explains his behaviour and means he didn't act wilfully. He argues this means he didn't commit misconduct.

[42] The Claimant's doctor confirmed the Claimant has type 1 diabetes.[34] The doctor provided general information about what can happen when a person has hypoglycemia (low blood sugar).

[43] Essentially, the Claimant argues that his hypoglycemia excuses his conduct. There isn't case law that deals with this situation specifically. But there are cases where a person said that their actions were due to intoxication and that their drinking was a disability. Those cases provide guidance here.[35] The Claimant is essentially making the same argument. He has type 1 diabetes and had low blood sugar events, which he says is a disability. He argues these low blood sugar events make him not responsible for his actions.

[44] Respectfully, I find the Claimant's actions were wilful, even if he was having low blood sugar events.

[45] First, the Claimant admitted that the low blood sugar was only a factor. He clearly said he is a "touchy-feely" guy. The Claimant also admitted that both reasons were

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[34] See GD8-3.
[35] See, for example, *Casey v Canada (Employment Insurance Commission)*, 2001 FCA 375 at paragraph 3; and *Canada (Attorney General) v Bigler*, 2009 FCA 91.

factors in his conduct. This means the low blood sugar wasn't the only reason for his behaviour.

[46] Second, the Claimant hasn't established that low blood sugar would cause these sorts of inappropriate behaviour. The Claimant's doctor provided general information. There is no information about how low blood sugar affects the Claimant specifically.

[47] In cases dealing with alcoholism, the courts have found two things need to be established. First, the person claiming the defence needs to establish the disability (in those cases, alcoholism; in this case, type 1 diabetes). Second, the person must establish they didn't have the ability to make a conscious or deliberate decision. So, it must be shown that the conduct was involuntary.[36]

[48] In this case, it isn't in dispute that the Claimant has type 1 diabetes. I accept the Claimant's evidence that he was having hypoglycemic "events" throughout the night. Yet, he hasn't presented persuasive evidence about the effects of a hypoglycemic event on him specifically.[37] The general list of symptoms provided isn't enough to show what symptoms the Claimant actually experienced.

[49] As well, the Claimant has to show that the low blood sugar made his actions involuntary. He hasn't done that. The Claimant made it clear he is a "touchy-feely guy." He has never said his conduct was involuntary. The Claimant had a clear recollection of the actions he admitted to.[38] He never denied the wilfulness of those specific actions.

[50] The actions the Claimant admitted to are enough to show that there was wilful misconduct. These admitted actions are part of what resulted in six written incident reports to his employer. Those incident reports all have one thing in common: that the

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[36] See *Canada (Attorney General) v Bigler*, 2009 FCA 91.
[37] See *Casey v Canada (Employment Insurance Commission)*, 2001 FCA 375 at paragraph 3. The Federal Court of Appeal considers an expert report that didn't specifically deal with that particular applicant. The Court found it wasn't enough to have a general expert report. Rather, it was necessary to have a "firm opinion" about that particular applicant.
[38] The actions he admitted to were kissing three colleagues, pulling the pants pocket of a colleague, and making a joke that he realized could be taken the wrong way and apologizing for it.

Claimant's conduct was unwanted by the recipients. This means the Claimant's actions were unwelcome and went against his employer's policy.

[51] The Claimant admitted he kissed colleagues' heads, pulled on a colleague's pocket, and made a joke that he later apologized for. That resulted in several co-workers making formal complaints. These behaviours fall within the employer's broad workplace policy. This means the Claimant wasn't in compliance with his employer's policy. As a result of not being in compliance with the policy, the Claimant could not carry out his duties toward his employer. This is misconduct.

– **Intoxication versus hypoglycemic events**

[52] Those that made complaints against the Claimant seemed to all believe that the Claimant was intoxicated on the night of the events.

[53] The Claimant admitted to drinking but says there were two reasons for his behaviour. He said both are to blame. He said he had low blood sugar and he is a "touchy-feely" person.

[54] I accept the Claimant's argument that drinking alcohol wasn't the issue and isn't a relevant factor here.

[55] At the General Division hearing, the Claimant testified that the alcohol receipt, while not signed by him, was representative of how many drinks he had.[39] His position was that the number of drinks over the course of a night for a person his size would not have made him intoxicated.

[56] At the Appeal Division hearing, he changed his position and argued that several of those drinks were purchased for his team. I don't find this matters. Again, I don't find the drinking of alcohol was a relevant factor here.

[57] I have focussed on the Claimant's position that his low blood sugar caused his behaviour.

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[39] See the General Division hearing recording at 00:48:09 and GD3-72.

– The Claimant knew that breaching the employer's policy could result in his dismissal

[58] The employer's policy makes it clear that inappropriate conduct could result in dismissal.[40] The Claimant testified that he agreed with the employer's policy.[41] The Claimant knew about the policy and knew someone could be let go for breaching the policy. But he felt the policy was being used against him in an improper way. I find the Claimant knew or should have known that there was a real possibility of being let go.

[59] The employer told the Claimant he was being investigated for his conduct. The employer decided the Claimant's conduct went against its policy and it let him go.[42]

– The Claimant hasn't demonstrated there was a conspiracy against him

[60] The Claimant suggested there was a conspiracy to let him go. I have found no evidence that there was a conspiracy.

[61] The Claimant denies many of the other complaints against him. He believes his co-workers conspired to make the complaints. The Claimant says his new boss just wanted to get rid of him.

[62] There isn't any evidence his co-workers were conspiring against him. The Federal Court has been clear that the role of this Tribunal is limited when considering misconduct under the EI Act. The Court found that the Tribunal has a "narrow and specific role to play in the legal system."[43] In that case, it was to decide why the appellant had been dismissed and whether it was "misconduct" under the EI Act. So, my focus isn't on what the employer chose to do or whether this was a wrongful dismissal case. That is for a different forum.

[63] As a result of the formal complaints it received, the employer investigated and decided to let the Claimant go. Again, what the employer did isn't what is being looked at. The policy says that a breach of the policy can result in disciplinary action. That can

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[40] See GD3-40.
[41] See the General Division hearing recording at 00:31:36.
[42] See GD3-34 termination letter.
[43] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraphs 46 and 47.

include “counselling, a formal warning and could result in immediate dismissal without further notice.”[44]

The Claimant lost his job because of misconduct under the EI Act

[64] Based on my findings above, the Claimant lost his job because of misconduct. The Claimant admitted to certain actions. These actions were part of what led to his dismissal. He also agreed those actions can’t be explained by low blood sugar only. This means the Claimant had responsibility for his actions. Those actions went against his employer’s policy, and the Claimant was dismissed as a result.

Conclusion

[65] The appeal is dismissed. I have found the General Division made errors in its decision. Those errors allow me to intervene.

[66] The outcome remains the same. The Claimant’s appeal is dismissed. He can’t receive EI benefits because he was dismissed due to his own misconduct.

Elizabeth Usprich
Member, Appeal Division

[44] See GD3-40.