Citation: *X v Canada Employment Insurance Commission and CG*, 2024 SST 379

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	X
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen
Added Party:	C. G.
Representative:	Charles Osuji

Decision under appeal:	General Division decision dated October 13, 2023 (GE-23-1043)

Tribunal member:	Stephen Bergen
Type of hearing:	Videoconference
Hearing date:	March 27, 2024
Hearing participants:	Appellant Respondent's representative Added Party Added Party's representative
Decision date:	April 17, 2024
File number:	AD-23-1020

Decision

[1] I am dismissing the appeal.

Overview

[2] C. G. is the Added Party. I will call her the Claimant because this appeal is about her claim for Employment Insurance (EI) benefits. She was an employee of the Appellant, X When I refer to the Employer in this decision, I am referring to the Appellant, which is the company that originally employed the Claimant. When I refer to SC, I am referring to the President and majority shareholder of the Employer.

[3] Acting as the Employer, or on behalf of the Employer, S. C. dismissed the Claimant in August 2022. She told the Respondent, the Canada Employment Insurance Commission (Commission), that she dismissed the Claimant because of her misconduct. The Commission disagreed with S. C. It was not satisfied that the Employer dismissed the Claimant for misconduct, and it maintained this decision even after the Employer asked it to reconsider.

[4] The Employer appealed to the General Division of the Social Security Tribunal, but the General Division dismissed its appeal. It next appealed the General Division decision to the Appeal Division.

[5] I am dismissing the Appeal. The General Division found that the Employer failed to establish that it dismissed the Claimant for the conduct that it alleged to be misconduct. The Employer has not satisfied me that the General Division made an error in so finding.

Issues

[6] The issues raised by the Employer in this appeal are as follows:

a) Did the General Division make an error of law by

i. Failing to recognize that the law requires only that the Claimant's misconduct be an operative cause of her dismissal?

ii. Failing to evaluate whether the Claimant's conduct was misconduct for the purposes of the *Employment Insurance Act* (EI Act)?

iii. Focusing on the complicated legal and interpersonal relationship between the Employer and the Claimant

iv. Disregarding case law standing for the principle that misconduct is made out where an employee deliberately acts in a way that prevents them from performing the duties for which they were hired (and breaches the employee/employer trust)?

b) Did the General Division make an error of fact by

i. Failing to consider evidence that the Claimant engaged in the activities alleged to be misconduct?

ii. Preferring the Claimant's evidence to the Employer's evidence despite contradictions between the Claimant's testimony and her documentary evidence?

iii. Preferring the Claimant's evidence over contrary evidence from the employer without giving reasons for doing so.

iv. Failing to make required findings of fact?

c) Did the General Division exceed its jurisdiction by making findings that the Claimant was a shareholder and a director of the Employer.

d) Did the General Division make an error of procedural fairness by considering documents from the Claimant without giving the Employer an adequate opportunity to respond.

Analysis

[7] 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]

[8] The Employer asserts that the General Division made errors of fairness, jurisdiction, law, and fact.

[9] The General Division found that the various actions included within the misconduct allegation were not the reason the Employer dismissed the Claimant. Because of this, the General Division did not individually consider each of the actions or behaviours alleged to be misconduct in order to make individual findings that they did or did not meet the test for misconduct.

[10] I am going to review the issues in the order in which they logically arise. I will start by considering the General Division's decision whether the General Division could decide that the Claimant was not dismissed for the conduct alleged to be misconduct without considering whether those actions constituted misconduct.

[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).

Could the General Division limit its analysis to whether the Claimant was dismissed for the actions alleged to be misconduct?

[11] The Employer argues that the General Division was required to evaluate whether the Claimant's conduct met the definition of misconduct. It argues that the General Division could not evaluate why the Claimant was dismissed without doing so.

[12] Two conditions must be met before the Commission can disqualify a claimant for misconduct. First, the claimant's employer must dismiss them for the conduct that is alleged to be misconduct. Second, the alleged conduct must meet the definition of misconduct. If either condition is not established, the claimant cannot be disqualified.

[13] To decide whether the Commission (or Employer, in this case) has established the first condition, the General Division must determine whether the Employer dismissed the claimant for the conduct said to be misconduct or for some other reason, or whether the Employer was using that conduct as an excuse for the Claimant's dismissal. This relates to the employer's motivation. It does not depend on whether the conduct ought to be characterized as misconduct.

[14] Whether the alleged conduct constitutes "misconduct" is a question of law. To answer this question, the General Division would have to apply the misconduct "test" developed through case law. The General Division would need to consider what the Claimant knew or ought to have known about her duties to the employer, what she knew or ought to have known about the possibility of dismissal if she breached any of those duties, and whether she willfully breached a duty that she owed. In deciding such an issue, the General Division could not rely on the employer's mere assurance that the conduct in question was misconduct and that it was the reason for termination.[2]

[15] Later in the decision, I will discuss whether the General Division made an error of fact when it found that the Claimant was not dismissed because of the actions alleged to be misconduct. Assuming for the moment that the General Division did not make

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[2] *Fakhari v Canada (Attorney General),* A-732-95.

such an error, the General Division had no obligation to analyze whether the Claimant's conduct met the legal definition of misconduct. This also means that it cannot be faulted for "disregarding" the case law that defines misconduct.

[16] The General Division made no error of law in declining to decide whether the Claimant's actions met the definition of misconduct or by failing to apply case law to make that decision.

Did the General Division mistakenly understand that a claimant may be disqualified for misconduct only where there is no other reason for their dismissal?

[17] The Employer argues that the General Division misinterpreted the law by not recognizing that a claimant's misconduct needs only to be one of the operative causes for dismissal—and not the only cause. This relates to the reason for which I granted leave to appeal. I found an arguable case that the General Division was not sufficiently clear that it understood that misconduct does not need to be the only cause.

[18] The Employer did not develop this argument beyond a simple assent to the terms of the leave to appeal decision. However, the Commission conceded that the General Division decision did not transparently address whether the alleged misconduct may have been one of the operative causes for dismissal. It suggested that the General Division should have provided more extensive reasons to support its finding that none of the conduct alleged to be misconduct played a role in the Claimant's dismissal.

[19] At the same time, the Commission argued that the General Division would have had to reach the same result regardless. According to the Commission, even if the General Division had gone on to analyze whether the Claimant's conduct amounted to misconduct, it would have had to find that the Claimant's conduct was not misconduct.

[20] As I noted in the leave to appeal decision, it is easy to demonstrate an "arguable case" that the General Division may have made an error. To have their argument accepted at the appeal on the merits, a party must establish that the General Division actually made the error they say it did.

[21] The General Division Member instructed the parties that it had to decide whether the Claimant lost her job based on her conduct and not for an unrelated reason.[3] This is fine, as far as it goes. However, the Member stated in his decision that he had to "objectively assess the evidence about 'the reason' the [Claimant] lost her job." It later found that the Employer had not proven that alleged misconduct was "*the* reason" for the Claimant's dismissal. In other words, the argument that the General Division misunderstood the legal test depends entirely on its use of a definite article in place of an indefinite article.[4]

[22] Nonetheless, this grammatical choice allows room for the possibility that the General Division understood that misconduct must be the only reason for a claimant's dismissal and not just an operative cause. Fortunately, the decision does not require more clarity on this particular legal point because of the General Division's findings.

[23] The General Division found as follows:

> "The Appellant hasn't proven it's more likely than not the reason it dismissed the Added Party was her alleged misconduct. I find it's equally likely the Appellant used 'termination for cause' as an excuse to force a resolution of the ownership and control struggle between [the Employer] and [the Claimant]."

[24] The General Division states that the "alleged misconduct" was just as likely "an excuse" for the Claimant's dismissal (as opposed to the reason). In other words, the Employer, who has the burden of proof, has not shown that the alleged conduct was **anything other** than an excuse. The law says that a claimant's misconduct must have been an operative cause for their dismissal, but it also says that it cannot be a mere excuse or pretext.[5]

[25] Read carefully, the General Division decision goes further than just finding that misconduct was not the cause, as in "the only cause," of her dismissal: It effectively

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[3] Listen to the part 1 of the audio recording of the General Division decision at timestamp 6:45.
[4] This is a grammar term to describe the article in front of a noun when it is assumed that the noun is singular. For example, "the king" (definite) rather than "a king" (indefinite).
[5] Brissette v Canada (Attorney General), A-1342-92, cited with approval in *Masic v Canada (Attorney General*), A-462-10. See also CUB 4503.

finds that the Employer did not establish that the alleged misconduct formed **any part** of the cause.

[26] The General Division is not required to say what it would have done if it had found otherwise: It does not need to say that the Claimant could be disqualified even if her conduct was only part of the cause for her dismissal.

[27] The General Division did not make an error of law in this regard. Its reasons are sufficient to explain why it found that the Employer had not proven that the reasons it gave for dismissing the Claimant were not just an excuse.

Was the Claimant dismissed for the actions alleged to be misconduct?

[28] In my view, this is the pivotal issue. Many of the Employer's remaining arguments assert errors that could have affected how the General Division answered this question.

Consideration of the parties' relationships

[29] According to the General Division, it explored the nature of the relationship between the Claimant and the Employer because it was a more complex relationship than what is usual between an employer and an employee. Furthermore, there were significant tensions and disputes within that relationship.

[30] The General Division spent a significant part of its decision analyzing the nature of this relationship, as noted by the Employer's submissions. The Employer argued that the General Division's focus was misguided and an error of law. It also argued that the General Division exceeded its jurisdiction by making findings related to the ownership and control of the Employer business.

[31] I do not see the merit of these arguments. The *Department of Employment and Social Development Act* (DESD Act) empowers the Tribunal, "to decide any question of

law or fact that is necessary for the disposition of any application made or appeal brought [under the DESD Act]."[6]

[32] The Claimant's alleged misconduct coincided with a period of increasing differences between the Claimant and S. C.as to their roles and interests in the Employer. The General Division needed to determine whether the Claimant's conduct caused her dismissal or was only a pretext for the Employer's interest in disentangling from the Claimant generally. To do this, it needed to evaluate the relationship of the Claimant to S. C. and to the Employer, and review the history of their dealings. This was both appropriate and necessary to the disposition of the appeal.

[33] The General Division's ultimate conclusion was that the Employer dismissed the Claimant in consequence of the fact that S. C. and the Claimant could not resolve profound differences about ownership and control of the Employer. Since the General Division had to ensure that the reasons given by the Employer for terminating the Claimant in her capacity as an employee were not just an excuse, it was entirely appropriate for the General Division to evaluate the evidence that it did. This included the evidence of their respective legal standing and agency within the Employer as officers, directors, or shareholders.

[34] The General Division did not exceed its jurisdiction by finding on the evidence that the Clamant was a shareholder and director.

Excusing misconduct

[35] The Employer seems to be arguing that the General Division made an error of law by justifying the Claimant's misconduct. It argues that the General Division excused the Claimant's misconduct by the deterioration of the business and interpersonal relationship between the Claimant and S. C. It says that the case law does not allow the General Division to justify misconduct.

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[6] See section 64(1) of the *Department of Employment and Social Development Act (DESD Act).*

[36] To illustrate why it believes the General Division fell into error, the Employer refers to what it describes as a clear example of misconduct, which was acknowledged by the General Division. Its example concerns its claim that the Claimant accessed the payroll and changed her own pay without S. C.'s consent.[7]

[37] In answer to the "clear example of an act constituting misconduct [changing payroll]," S. C. testified that she "let that go." This means there would be no basis for the General Division to find that action to be part of why the Claimant was terminated.[8]

[38] But I do not read the General Division decision as "excusing" the Claimant's misconduct. The General Division **did not even consider** whether the Claimant's actions were misconduct, let alone justify her "misconduct" by the breakdown of the relationship between her and S. C.

[39] Instead, the General Division found that the Claimant's and S. C.'s inability to resolve their disputes about the ownership and control of the Employer business forced an end to their relationship, which involved the Claimant's termination. It found that this was the best explanation for the Claimant's dismissal. Because of this finding, there was no need for the General Division to consider whether the Claimant's actions were misconduct.

Ignoring the evidence of misconduct

[40] The Employer has asserted a number of errors of fact. Most flow from its mistaken notion that the General Division found that the Claimant's actions "did not equate to misconduct." This includes its assertion that the General Division failed to consider the evidence in paragraph 38 of its submission.[9] It would also include the evidence submitted to the Commission on March 9, 2024.[10]

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[7] See para 29 to 31 of the Employer's submissions at AD5-8.
[8] Listen to Part 1 of the audio hearing of the August 15, 2023, General Division at timestamp 1:32:40 to 1:34:01.
[9] See para 37–38 of the Employer's submission, AD5-10.
[10] See para 40 of the Employer's submission, AD5-11.

[41] In an appeal to the Appeal Division, an “error of fact” is where the General Division has **based its decision** on a finding that overlooks or misunderstands important evidence, or does not rationally follow from the evidence.[11]

[42] The General Division decided that the Claimant was not disqualified because it found that the Claimant was not dismissed for the conduct alleged to be misconduct. This was based on its review of the personal, business, and legal relationships of the Claimant, S. C., and the Employer, and the nature and progression of disputes that had arisen between the Claimant and S. C. about their respective roles in the Employer.

[43] There was evidence before the General Division that the Claimant’s relationship to the Employer had evolved since she was originally hired as a technician. The Claimant had since invested $100,000.00 in the business, held about 25% of the Employer company shares, was considered (or considered herself) a “partner,” and she was a director. S. C. (who represents the Employer in this appeal) was the President and held the balance of the shares. This evidence came from testimony and documents sourced from both the Claimant and the Employer. There was also evidence that the Claimant was an officer (Vice President), but the General Division did not accept this.

[44] The General Division stated that the Claimant and S. C. paid themselves an equal salary out of the Employer’s revenues following the Claimant’s investment in the Employer. It also noted that both were engaged in the Employer’s day-to-day management and operation. Both had authority to represent the Employer and to contract on behalf of the Employer, and both took on different strategic initiatives to advance the Employer’s interests.

[45] In addition, there was evidence that the parties came to disagree on their respective roles and duties, and how they were to expense costs or be paid. The Claimant insisted on an updated role/job description, but this had not been formalized

[11] This is a paraphrase Section 58(1)(c) of the DESD Act actually says that the General Division has made an error of fact where it “based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.”

by the time she was dismissed. By then, both S. C. and the Claimant were consulting lawyers and seeking to extricate themselves from their various associations.

[46] The Employer's submissions dispute the relevance or importance of these facts, but **not the facts themselves**. The Employer did not point to evidence that the General Division ignored or misunderstood that would challenge its understanding of these facts.

[47] The General Division decision did not make an error by failing to consider evidence relevant to whether the Claimant's actions were or were not misconduct. It did not need to consider whether the evidence showed that the Claimant's conduct was misconduct. It stated this explicitly.[12]

[48] I recognize that the General Division briefly considered case law which suggests that circumstances such as "personality conflicts, uncooperative behaviour, and mutual incompatibility" are not misconduct.

[49] However, this was not meant to be an analysis of whether these circumstances excused the Claimant from misconduct related to the other actions alleged by the Employer. Having found that the Employer actually dismissed the Claimant because of disputes and breakdowns in their relationship, the General Division ruled out the possibility that such things might be misconduct in themselves.

Preferring Claimant's evidence to that of the Employer without adequate explanation.

[50] The Employer also asserts that the General Division made an error of fact (or possibly, law) by accepting the Claimant's evidence in preference to that of the Employer without adequate reasons.[13]

[51] However, the General Division decision does not state a preference for the Claimant's evidence over that of S. C. or the Employer anywhere. Nor does it suggest that the evidence of either the Claimant or S. C.is not credible.

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[12] See General Division decision at para 66.
[13] See para 42 of the Employer's submission, AD5-12.

[52] To the contrary, it notes that S. C. and the Claimant agree on the "preponderance" of those facts (the only exception is that it refused to accept that the Claimant was the Company's vice president.) The General Division states that it found those facts in its "context section" on "credible and reliable evidence."[14]

[53] In its challenge to how the General Division handled the evidence, the Employer gave a particular example of the Claimant's conduct that ought to have led the General Division (in the view of the Employer) to a finding that her conduct was misconduct. It argued that the General Division did not explain why it preferred the Claimant's testimony (that she did not share confidential information) over a document which appeared to indicate the Claimant had shared information.[15]

[54] As an aside, I doubt that this is so "clearly" misconduct as the Employer asserts. The Claimant asserted that she had the capacity and authority to act as she did. This was based on her investment and holdings, her role as an officer - including the ability to legally bind the company, and on informal agreements between her and SC. The scope of her authority was disputed by the Employer, so this question would have had to be resolved to determine whether she breached a duty, and whether she knew she could be dismissed for doing so.

[55] The Employer is correct that the General Division did not grapple with whether the Claimant's testimony about sharing confidential information was in conflict with a document in evidence. However, the General Division had no obligation to evaluate whether the claimant did what she was alleged to have done, or whether it was misconduct. It did not have to resolve what the Employer considers to be a conflict in her evidence about information sharing. Again, the General Division had already found that the actions alleged by the Employer did not cause the Employer to terminate her employment.

[56] The General Division made only one specific finding which was adverse to the Employer. (It was not among those identified by the Employer.) The General Division

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[14] See also the "context" section at para 28–43.
[15] See para 42 of the Employer's submission, AD5-12.

dismissed S. C.'s assertion that she found out about the conduct alleged to be misconduct in mid-August, which led her to investigate and to terminate the Claimant. The General Division said that there were text messages and emails to show that the disputes and the deterioration in the Claimant's and S. C.'s relationship, had begun earlier than S. C.'s investigation.

[57] I note that S. C. testified that she took the decision to terminate the Claimant while the Claimant was on medical leave (that began August 15). She said that the Claimant's continuing conduct was damaging to the Employer, describing it as "a lot of weird stuff" that was "still going on." However, S. C. did not identify what conduct she was talking about. When asked by the Claimant's representative, she refused to disclose what it was that she discovered in mid-August that caused her to terminate the Claimant.[16]

[58] Whatever it was that the Employer discovered after the Claimant went on leave, the General Division could not have found that the Claimant was dismissed for conduct that was not defined or disclosed.

[59] The General Division was not convinced by S. C.'s assertion that she terminated the Claimant for any of those other actions alleged by the Employer. Instead, the General Division attributed the termination to the profound disputes about ownership and control of the Employer company, which began before the Claimant went on medical leave. It relied on evidence sourced from both the Claimant and SC, and from inferences which it drew from the totality of that evidence.[17] Its decision was not based on a preference for the Claimant's evidence over that of the Employer.

[60] Clearly, the parties disagree on the reason for the Claimant's dismissal. But that was not the principal tension between the evidence of the Claimant and that of the Employer. Most of the disagreement between the Claimant's and the Employer's evidence concerned whether the Claimant engaged in certain conduct, and how that

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[16] Listen to Part 1 of the audio hearing of the August 15, 2023, General Division at timestamp 1:57:00.
[17] This evidence is found in the context section. But also see paras 61–64 of the General Division decision.

conduct should be characterized. In other words, their evidence differed over whether her actions had the defining characteristics of misconduct.

[61] With the exception of the single adverse finding discussed above, the General Division's finding (that the Employer had not shown that the alleged conduct caused it to dismiss the Claimant) did not rely on any evidence in which the parties presented a significantly different picture of the circumstances.

Selective use of evidence

[62] Finally, the Employer argued that the General Division made an error of fact by citing and relying on evidence selectively. It referred to how the General Division used only an excerpt of a text message (at para 37 of the General Division decision) and noted that the General Division referred to "the text message and emails" in two places in its decision.

[63] However, the Employer has not said why this is an error of fact. When the General Division found that the Employer was using the Claimant's conduct as an excuse for terminating her, it relied on the excerpt but also on "many of the text message and email strings", the termination letter, and the "sequence of events over the summer of 2002."[18]

[64] While it is true that the General Division did not cite the entire text string, this does not mean that the General Division failed to consider it.[19] The General Division is presumed to have considered all the evidence. It does not have to refer to each and every piece.[20]

[65] Furthermore, it is not obvious to me that the un-cited portion of the text string would have changed the General Division's understanding of the excerpt, or its conclusion. If the Employer believes that the General Division misunderstood or ignored evidence because it **excerpted the text string**, then it should explain why. The

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[18] See paras 63 and 64 of the General Division decision.
[19] I note that the excerpted portion is from DG3-84 to GD3-85, but the General Division referred to the exchange running from GD3-84 to GD3-88 in its footnote. It also referred to other email stings.
[20] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

Employer has the burden to show that the Claimant was dismissed for misconduct. As the Appellant, it also has the burden to show that the General Division made an error.

[66] The General Division is the primary finder of facts. It is required to weigh the evidence and reach a conclusion. The Employer may disagree with how the General Division weighed the evidence, but it is not the job of the Appeal Division to reweigh or re-evaluate the evidence.[21]

Did the General Division interfere with the Employer's ability to know the case and be heard?

[67] The Employer asserted that the General Division made an error of procedural fairness because it proceeded with the hearing despite the fact that the Claimant filed a fairly large volume of materials shortly before the hearing.

[68] At the outset of the hearing, the General Division acknowledged that the Claimant filed documents late, and asked the Employer if it was prepared to proceed. The Employer indicated it was willing to do so.[22]

[69] Furthermore, the hearing proceeded in two parts separated by almost two months. The Claimant filed documents just before the first of the two hearings. If the Employer had not had time to digest them before the first hearing, it had time to do so before the second hearing on September 29, 2023, when it had the opportunity to rebut the Claimant's evidence. It did not ask for extra time to cross-examine the Claimant on those documents or to make more extensive submissions.

[70] The Claimant sent additional documents before the second hearing, but the General Division did not agree to consider those documents.

[71] The General Division did not make a procedural fairness error.

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[21] See, for example: *Hideq v Canada (Attorney General)*, 2017 FC 439, *Parchment v Canada (Attorney General)*, 2017 FC 354, *Johnson v Canada (Attorney General)*, 2016 FC 1254, *Marcia v Canada (Attorney General)*, 2016 FC 1367.

[22] Listen to part 1 of the audio recording of the August 15, 2023, General Division hearing at timestamp 6:40.

Conclusion

[72] I am dismissing the appeal. The Employer has not satisfied me that the General Division made an error of law, of fact, of jurisdiction, or of procedural fairness.

Stephen Bergen
Member, Appeal Division