Citation: *PK v Canada Employment Insurance Commission*, 2024 SST 344

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	P. K.
Representative:	Anthony Luongo
Respondent:	Canada Employment Insurance Commission
Representative:	Lora MacKay

Decision under appeal:	General Division decision dated September 26, 2023 (GE-22-2024)

Tribunal member:	Stephen Bergen
Type of hearing:	In Writing
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	April 5, 2024
File number:	AD-23-985

Decision

[1] I am dismissing the appeal.

[2] The General Division made an error of procedural fairness in how it determined that the employer dismissed the Claimant for misconduct. I have corrected that error to make the decision that the General Division should have made.

[3] Like the General Division, I find that the Claimant should be disqualified from receiving benefits. For the purposes of the *Employment Insurance Act* (EI Act), the employer dismissed the Claimant for misconduct.

Overview

[4] P. K. is the Appellant. I will call her the Claimant because she made a claim for Employment Insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), originally found that the Claimant voluntarily left her job without just cause. She did not return to work when required to do so by her employer.

[5] The Claimant disagreed and asked the Commission to reconsider. It would not change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[6] The General Division member agreed that the Claimant had not voluntarily left her employment. However, it also considered whether she was instead terminated for misconduct. The General Division found that the Claimant's employer terminated her for misconduct, and it decided that she was disqualified from receiving benefits.

[7] The Claimant appealed to the General Division, but the General Division dismissed her appeal. She is now appealing to the Appeal Division.

Issues

[8] Is there an arguable case that the General Division's actions give rise to a reasonable apprehension of bias?

The parties agree that the General Division made an error

[9] A settlement conference was held on March 7, 2024. The parties agreed that the General Division made an error of procedural fairness.

[10] The Claimant wanted me to make the decision the General Division should have made, rather than return the matter to the General Division for reconsideration. The Commission agreed, and I acceded to this request. Both parties understood that I would be reviewing the record and that this included the evidence contained in the audio recording of the General Division hearing.

[11] The parties did not agree on what my substituted decision should be. The Claimant asked me to allow her appeal, and the Commission asked me to dismiss the appeal.

I accept the parties' agreement

[12] Based on the General Division member's manner of questioning, the Claimant might reasonably believe that the General Division member was biased.

[13] In my leave to appeal decision, I noted a particular exchange in which the Claimant appeared to have answered the member's question, but the member urged the Claimant to answer the question differently.[1]

[14] In conceding merit to the Claimant's argument that the General Division had predetermined the appeal outcome, the Commission referenced the same part of the audio record that I identified in the leave decision.

[15] The General Division made an error of procedural fairness.

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[1] Listen to the audio recording of the General Division hearing between timestamp 1:22:45 and 1:14:50.

Remedy

[16] I must decide what I will do to correct the General Division's error. 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.[2]

[17] The Commission's original position was that I should return the matter to the General Division to have it reconsider the decision. This is the usual remedy for an error of procedural fairness since it offers the parties an opportunity to be heard and ensure all their evidence is considered by an impartial decision-maker.

[18] After reflection, the Claimant's counsel asked that I make the decision that the General Division should have made. I reminded him that the Appeal Division could not hear new evidence. If he believed that the General Division had proceeded in a way that hindered the Claimant from presenting her evidence, I suggested he might want to present that evidence at a new hearing of the General Division before a different General Division member.

[19] However, the Claimant's counsel said that he did not expect to present new evidence that was not already included in the General Division record. I asked if he had any concern that the evidence might have been affected by the manner of questioning at the General Division, since this was part of what gave rise to the perception of bias. I made it clear that I would be making my decision based on the entire General Division record, including the audio record of the General Division hearing. He acknowledged some concern, but nonetheless wanted me to proceed and make the decision on the record.

[20] Based on the representations of legal counsel, and the Commission's willingness to accept that the record was complete and that I could make the decision, I agreed to make the decision the General Division should have made.

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[2] See section 59(1) of the *Department of Employment and Social Development Act*.

Jurisdiction to consider misconduct

[21] The Commission originally disqualified the Claimant from receiving EI benefits because she had voluntarily left her employment without just cause.[3] The General Division instead decided that she was terminated for misconduct.[4]

[22] The Claimant noted that the issue of misconduct was raised for the first time in the appeal to the General Division.[5] The parties agreed that I would make the decision on the basis of an error of procedural fairness, but its argument implies that I should consider whether the General Division had jurisdiction to consider the issue of misconduct.[6]

[23] I will address this, since my own jurisdiction to consider misconduct depends on the General Division having properly taken jurisdiction. I have jurisdiction only to review and remedy decisions of the General Division.[7]

[24] I agree that the Commission originally decided that the Claimant was disqualified from receiving benefits because she voluntarily left her employment without just cause. Its reconsideration decision simply maintained the Commission's original decision. I also acknowledge that the General Division derives its jurisdiction from the reconsideration decision.[8]

[25] Nonetheless, I accept that the General Division had jurisdiction to consider whether the Claimant should be disqualified for misconduct. By extension, I also have jurisdiction to evaluate the General Division's decision.

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[3] See section 29(c) and section 30 of the EI Act.
[4] See section 30 of the EI Act.
[5] See AD8-6: Claimant Submission, para 36.
[6] When I refer to the "Claimant's arguments" or to what the Claimant argued, I am not distinguishing between the Claimant's representations and those of her counsel.
[7] See section 55 and 59 of the DESDA.
[8] See sections 112 and 113 of the EI Act.

[26] The Federal Court of Appeal has confirmed that the issue (in this type of case) is "disqualification."[9] A claimant's failure to return to work as required by the employer may be characterized or conceptualized as either a termination for misconduct, or a voluntary leaving without just cause, depending on the facts.

[27] As the General Division noted, the fundamental issue before it was whether the Claimant was disqualified under section 30 of the EI Act. It referenced *Desson*, a decision of the Federal Court of Appeal.[10]

[28] *Desson* concerned a claimant who the Commission had found voluntarily left his job because he expected the employer to dismiss him. In the appeal history of the *Desson* decision, the Board of Referees (the first level of appeal at that time) found that the case should have been analyzed as one of misconduct. It allowed the appeal after finding no discernable misconduct. The Umpire (the next level of appeal) saw the issue as one of voluntarily leaving without just cause. It found that the claimant had not left voluntarily.

[29] When the case finally arrived at the Federal Court of Appeal, the Court said that "[i]t does not matter whether the employer or the employee took the initiative in severing the employment relationship where the employment is terminated by necessity and a reprehensible act is the real cause of that termination." It continued, "[t]he legal issue at stake is a disqualification under subsection 30(1) of the Act and a finding to that effect can be based on any of the two grounds for disqualification stated in that subsection as long as it is supported by the evidence."

[30] In the *Borden* decision, the Federal Court of Appeal adopted this approach in nearly identical terms: "… it does not matter whether the employer or the employee took the initiative in severing the employment relationship. The employment is terminated by necessity, and if a reprehensible act is to be identified as the real cause of that sudden

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[9] See *Canada (Attorney General) v. Desson*, 2003 FCA 303; *Canada (Attorney General) v. Borden*, 2004 FCA 176.
[10] *Ibid*.

situation, it is misconduct exclusive of just cause whether you approach it from either of the two branches of subsection 28(1) [now section 30(1) of the current EI Act.]"[11]

[31] Whatever the original justification for the disqualification, the Tribunal has jurisdiction to consider whether they voluntarily left their employment without just cause or were terminated for misconduct.

Was the Claimant dismissed?

[32] The General Division found that the employer dismissed the Claimant because she did not return to work when she was expected to return. The Claimant agrees with the General Division that she did not leave her employment voluntarily but disagrees that she was dismissed.

[33] The Claimant argues that the evidence before the General Division established that she actually "resigned." She refers to the letter she signed on February 23, 2023 (Extension Letter), noting that the letter does not say she will be terminated for misconduct. Rather, it says that "the employer would consider [the Claimant] to have resigned from [her] position and her employment will be terminated," if she did not return to work on the date required.

[34] The Claimant asserts that the General Division ignored evidence that the Claimant left her job voluntarily. At the same time, she states that the General Division finding that the Claimant did not leave her employment voluntarily is "not challenged."[12]

[35] The General Division found that the Claimant should not be disqualified for having left her job without just cause, because of its finding that she did not leave voluntarily. If I accepted that the General Division ignored evidence in reaching that finding, I would have to correct the General Division's error. This would mean that I would also have to revisit the question of whether she had just cause for leaving.

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[11] *Supra,* note 8.
[12] See AD8-9, para 47.

[36] However, the General Division did not make an error when it decided that the Claimant did not leave voluntarily so I am not revisiting the General Division's findings.

[37] The Claimant made much of how the employer's February 23 letter said that it would consider her to have "resigned" if she did not return to work.[13] The Claimant says that she "fiercely attempted to rebut her 'resignation' by voicing her interest and desire to remain in employment with the employer."[14] Perhaps, but she was unsuccessful. The employer did not allow her to return to work.

[38] For EI purposes, a claimant can only be found to have voluntarily left their employment when they have a choice to stay or to go. The Claimant's employer did not give her a choice to stay, after she failed to return on March 13. It is absolutely clear that the Claimant did not leave her employment voluntarily.

[39] Furthermore, it is not relevant whether the Claimant "resigned" or was dismissed. If it is established that the Claimant lost her employment because of her misconduct, it does not matter whether the Claimant or the employer was the one who took the initiative to sever the employment relationship.[15]

[40] There may be a legal distinction in employment law between an employee who has no choice because they are fired outright, and an employee who has no choice because the employer deemed them to have abandoned their employment. But no such distinction applies in the EI context.

Was the Claimant dismissed because of the conduct alleged to be misconduct?

[41] The burden of proof is on the Commission (or the party alleging misconduct) to show on a balance of probabilities that the Claimant's actions meet the definition for

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[13] See AD8 Claimant's submissions at para 31, 35, 39, 44,45, and 47.
[14] Ibid, para 50.
[15] *Supra* note 8.

misconduct established by the courts (see paragraph 39, above). However, it must also show that the employer dismissed her because of that misconduct.[16]

[42] In this case, the conduct alleged to be misconduct is the Claimant's failure to return to work when instructed. The employer told the Claimant that she had to return to work by a particular date. It told her that she would be terminated if she did not return on that date.

[43] After the Claimant failed to return as required, she spoke to her employer. Her employer refused to take her back because she had not returned as instructed. The Claimant has not suggested that the employer had any other reason for terminating her employment.

[44] I find that the employer dismissed the Claimant for the conduct alleged to be misconduct. She did not resume work on the date she was instructed to return. This was one of the operative causes, if not the only operative cause, for why the employer terminated its employment relationship with her.

Was the Claimant's conduct "misconduct" for the purposes of the *Employment Insurance Act* (EI Act)?

[45] The Claimant disagrees that her failure to return to work when instructed was "misconduct."

[46] The EI Act does not define "misconduct." However, the courts have defined misconduct as follows:

- The claimant must have engaged in the action or inaction that is said to be the basis for their misconduct.
- The claimant's conduct must be willful. Willful conduct may include deliberate, intentional, or even reckless conduct.[17]

[16] See *Minister of Employment and Immigration* v *Bartone*, A-369-88.
[17] See *Canada (Attorney General)* v *Secours*, A-352-94; McKay-*Eden* v *Her Majesty the Queen*, A-402-96.

- The claimant's conduct was such that the claimant knew or should have known that

  their conduct impaired the performance of the duties they owed to the employer;[18] and

  as a result of the conduct, the claimant's dismissal was a real possibility.[19]

[47] The Claimant argues that her conduct cannot be misconduct because neither she nor the employer considered her conduct to be misconduct.[20]

[48] However, **it does not matter** that the Claimant did not consider her actions to be "misconduct." Nor does it matter that the employer did not say that it was terminating her for misconduct. Conduct is "misconduct" if it meets the definition of misconduct. This is a question of legal interpretation, not of personal opinion.

[49] The Federal Court of Appeal has held that conduct can only be found to be misconduct if it is **objectively** misconduct.[21] In one decision, the Court stated that misconduct must be established on the evidence, "irrespective of the opinion of the employer." Misconduct could not be found based on "speculation and suppositions."[22] In another decision, the Court rejected the Umpire's reasoning that the employer needs only to be "satisfied that the misconduct complained of" warranted dismissal [...]"[23.] The Court held that "an employer's mere assurance that it believes the conduct in question is misconduct" does not satisfy the onus of proof.[24]

[50] In other words, an employer cannot turn a claimant's actions or behaviour into "misconduct" just by labelling them misconduct. This implies that a claimant cannot

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[18] See *Mishibinijima* v *Canada (Attorney General)*, 2007 FCA 36.
[19] *Ibid.*
[20] See AD8-8 and 9, para 44–53.
[21] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[22] See *Crichlow* v *Canada (Attorney General)*, A-562-97.
[23] The Umpire was the final level of appeal in the former administrative scheme for Employment Insurance benefits.
[24] See *Fakhari* v *Canada (Attorney General)*, A-732-95.

establish that their actions are not misconduct, by claiming that the employer did not describe them as misconduct.

– **Breach of duty to employer and objective awareness of possibility of dismissal**

[51] I agree with the General Division that the Claimant owed a duty to her employer to return to work at the end of her approved leave. Whether her failure to return to work is considered to be absenteeism or her refusal to return is considered to be insubordination, she breached a duty to her employer when she did not report for work when she knew she was expected.

[52] She knew this or should have known this. I also agree that she knew, or ought to have known, that dismissal was a real possibility, for not returning to work on March 13, 2023.

[53] The Claimant knew that her employer expected her back on March 7, 2023, after extending her vacation by one week. She knew that the employer had refused to give her an extension to March 17, 2023, and that her employer would terminate her employment if she did not return to work on March 7, 2023. The employer communicated this explicitly.[25]

[54] When the Claimant's mother passed away, she requested a further extension from March 7 to March 15, 2023, but the employer gave her only until March 13, 2023.[26] The employer responded to three more requests to extend the Claimant's leave by confirming its previous position, emphasizing that it expected the Claimant to return by March 13, 2023.[27] It gave no indication that this was negotiable.

[55] The Claimant did not return to work on March 13, 2023, as required by the employer. The employer responded the same day by terminating her employment, effective immediately.[28]

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[25] See GD2-30.
[26] See GD2-38.
[27] See GD2-42, 43, 46.
[28] See GD2-49.

[56] The Claimant acknowledged that she knew she would be terminated if she did not return by March 7, according to the February 23, 2023, letter (which she signed).

[57] However, the employer had extended the original deadline to March 13, 2023. The Claimant testified that, after the extension, she no longer thought she would be terminated if she did not return when required.

[58] When the employer agreed to extend to March 7, 2023, it stated that the extension was subject to the same conditions, saying that this was subject to "the same conditions as outlined in the [February 23] letter." In each of its subsequent responses to the Claimant, the employer repeated that it expected her back on the "same terms and conditions" of the February 23 letter.

[59] The Claimant testified that she thought the employer meant that she only needed to send an updated flight itinerary. [29]

[60] The February 23 letter asked her to provide her original flight itinerary including her original departure from Toronto (the flight she originally booked when she anticipated returning on February 28). The letter also stated that her employment would be terminated if she did not return on the expected return date of March 7, 2023.

[61] The letter had not asked the Claimant for an updated itinerary of her changed travel plans. It asked for proof of her original flights and when she booked them, which suggests that the employer likely wanted to confirm that the Claimant's request to change her leave was legitimately related to an unforeseen circumstance.

[62] It is not obvious why the Claimant would have understood the employer's insistence on her March 13 return, subject to the same terms and conditions as the extension to March 7, to be a request that she send the employer a revised itinerary, for her return by March 13 or for some later return.

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[29] Listen to the audio record of the General Division hearing at timestamp 1:18:00.

[63] In my view, it is implausible that the Claimant did not know that the "terms and conditions" included the requirement that she return by the specified date or be terminated. Even if the Clamant understood the communications that followed the February 23 letter to be requesting her only to supply an updated itinerary, the employer never gave any indication that it was going to be less strict about its new deadline than its earlier deadline. In its several communications, the employer maintained that it was not granting any further extension.

[64] The Claimant testified that her hiring process had been extensive, and that she did not think the employer would fire her over two days, but this was just wishful thinking.[30] However, a reasonable person in the Claimant's circumstances would not have assumed that the employer's warning about termination in the February 23, 2023, letter would not also apply to the extension to March 13. A reasonable person would have recognized that there was a real possibility they would be dismissed if they did not return as instructed.

– **Willfulness**

[65] I find that the Claimant's failure to return to work was also willful. She was aware of the date the employer required her to return to work. She repeatedly sought to negotiate a later return and the employer repeatedly turned her down. She testified that she could have sent another "ten emails" but she was pretty sure she would get the same response.[31] Then, she did not return as required.

[66] There was no evidence that her failure to return was unconscious or accidental. Instead, she made a deliberate choice to stay in her home country to help her family through a difficult time and to complete her religious obligations. She may have had good reasons for ignoring the employer's direction, but she willfully ignored it, nonetheless.

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[30] Listen to the audio record of the General Division hearing at timestamp 1:05:45 and 1:13:00.
[31] Listen to the audio record of the General Division hearing at timestamp 1:11:15.

[67] The "willful" element requires that the claimant willfully engage in that conduct alleged to be misconduct. The test for misconduct does not require a claimant to believe or understand their actions to be misconduct. Nor does it require them to act with bad intentions or to intend to lose their job as a consequence.

Application of Astolfi

[68] The Claimant also argued that I should apply the Federal Court decision in *Astolfi* and take the employers' conduct into consideration.[32] In *Astolfi*, the Court said that the Appeal Division should have considered the employer's conduct prior to the "misconduct," in order to properly assess, "whether the employee's conduct was intentional or not."[33]

[69] The facts in *Astolfi* were different than the facts in this appeal. In *Astolfi*, the employer harassed the claimant. When the claimant responded to that harassment by working from home, the employer demanded that he return to work in the office. The claimant refused because of how his employer had harassed him.

[70] The Court found that the employer's harassment leading up to the claimant's refusal was potentially relevant to whether it was **willful** for the claimant to refuse to return to the office. It did not say that the employer was acting unreasonably by requiring the claimant to work in the office.

[71] Harassing employees is not an employer prerogative. The Court in *Astolfi* may have believed that the earlier harassment by the employer impaired the claimant's ability to intentionally disregard the direction to return to the office. After all, the employer was effectively asking the claimant to put himself in harm's way.

[72] There is nothing inherently unreasonable in the employer's demand that the Claimant return to work by a certain day, particularly after it had granted the employee

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[32] See *Canada (Attorney General) v Astolfi*, 2020 FC 30.
[33] *Ibid*. para 33.

additional vacation time and then a further extension. It is the employer's prerogative to grant leave or schedule its employees to manage its business as it sees fit.

[73] More importantly, there is nothing in this case to suggest that the employer's conduct affected, or could have affected, the **willfulness** of the Claimant's refusal. Therefore, *Astolfi* is distinguishable.

[74] I recognize that the Claimant was asking for the further extension to her leave period because of the funerary requirements of her faith. She argued that the employer's conduct was unreasonable because it had a statutory obligation to accommodate the Claimant's request to the point of undue hardship.

[75] However, the employer's failure to abide by other legal obligations does not make the Claimant's refusal any less willful. It does not mean that the employer conduct was a cause of the Claimant's refusal to return to work when required.

[76] If the employer failed to comply with its statutory obligations, it may have to answer to the Claimant in some other forum. Indeed, it appears to have settled its other issues with the Claimant.[34] But this does not mean the Claimant is not disqualified from receiving benefits under the EI scheme.[35]

[77] In the 2024 *Sullivan* decision, the Court upheld an Appeal Division decision that said, "the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies."[36]

– **Benefit of the doubt**

[78] The Claimant argued that the General Division member did not turn her mind to section 49(2) of the EI Act, which requires the Commission to give the benefit of the doubt to a claimant.

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[34] See GD2-79.
[35] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102, Kuk v. Canada (Attorney General),2023 FC 1134; *Paradis v Canada (Attorney General*), 2016 FC 1282; Mishibinijima v Canada (Attorney General), 2007 FCA 36.
[36] *Sullivan v Canada (Attorney General),* 2024 FCA 7.

[79] This is an appeal of a General Division decision in which I am substituting my decision as a remedy for the agreed error, which was a breach of procedural fairness. I am not considering whether the General Division made some other error.

[80] I presume that the Claimant is arguing that I should also be giving the benefit of the doubt to the Claimant.

[81] Section 49(2) requires the **Commission** to give the benefit of the doubt. It does not apply to the General Division, or to the Appeal Division.[37] The General Division is a "de novo" process in which it conducts an independent review of the evidence. When so engaged, it reviews the evidence on a balance of probabilities standard. When I evaluate the evidence to substitute my decision for that of the General Division, I apply the same standard.

[82] In any event, section 49(2) is only engaged where the evidence is evenly balanced. There is no suggestion that either the Commission or the General Division viewed the evidence as evenly balanced. Nor do I find the evidence to be evenly balanced.

– **Burden of Proof**

[83] The Claimant noted that the Commission had the "onus" to prove misconduct, yet it provided only limited submissions to the General Division on this issue.

[84] I am not sure of the Claimant`s point. It is true that the Commission must prove misconduct, but this refers to the burden of proof, which is an evidentiary burden. The Commission has no "onus" to make sufficient or persuasive arguments to the General Division. The record may speak for itself even if there were no submissions at all.

[85] The General Division must make its decision by weighing the evidence and applying the law, not by grading the quality or sufficiency of submissions. I am likewise

[37] See *Chaoui* v *Canada (Attorney General)*, 2005 FCA 66.

weighing the evidence and applying the law, since I am substituting my decision for that of the General Division.

Conclusion

[86] I am dismissing the appeal.

[87] The General Division made a procedural fairness error in how it reached its decision. It acted in a way that gave rise to a reasonable apprehension of bias. The Claimant and the Commission agreed on this.

[88] However, I have reached the same decision as the General Division. I am satisfied that the employer dismissed the Claimant for misconduct, as misconduct is defined for the purposes of the EI Act. Because of this, the Claimant is disqualified from receiving EI benefits.

Stephen Bergen
Member, Appeal Division