Citation: *Canada Employment Insurance Commission v JA*, 2024 SST 382

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Melanie Allen
Respondent:	J. A.

Decision under appeal:	General Division decision dated December 29, 2023 (GE-23-2999)

Tribunal member:	Solange Losier
Type of hearing:	Teleconference
Hearing date:	March 5, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	April 17, 2024
File number:	AD-24-64

Decision

[1] The Canada Employment Insurance Commission's (Commission) appeal is allowed.

[2] The General Division made an error of law and an important error of fact. I am giving the decision it should have given. The Claimant lost his job due to his own misconduct. This means that he isn't entitled to get Employment Insurance (EI) regular benefits.

Overview

[3] J. A. is the Claimant in this case. He was working for a company as a driver until he lost his job. When he stopped working, he applied for EI benefits.

[4] The Commission decided that he wasn't entitled to EI benefits from July 27, 2023 because he lost his job due to his own misconduct.[1]

[5] The Claimant appealed that decision to the General Division of the Tribunal and it allowed his appeal.[2] It found that the Commission failed to prove he lost his job due to misconduct. Because of that, the Claimant was not disqualified from getting EI benefits.[3]

[6] The Commission is now appealing to the Tribunal's Appeal Division.[4] It says that the General Division made an error of law and an important error of fact when it concluded there was no misconduct.

[7] I have found that the General Division made the above errors. Because of this, I am allowing the appeal and giving the decision the General Division should have given. The Claimant lost his job due to his own misconduct.

---

[1] See Commission's initial decision at page GD3-32 and reconsideration decision at page GD3-42.
[2] See General Division decision at pages AD1A-1 to AD1A-8.
[3] See section 30(1) of the *Employment Insurance Act* (EI Act).
[4] See Application to the Appeal Division at pages AD1-1 to AD1-15.

New evidence

[8] New evidence is evidence that the General Division did not have before it when it made its decision.

[9] The Appeal Division generally does not accept new evidence.[5] This is because the Appeal Division isn't the fact finder or rehearing the case. It is a review of the General Division based on the same evidence.[6]

[10] However, there are some exceptions where new evidence is allowed.[7] For example, I can accept new evidence if it provides one of the following:

- general background information only
- if it highlights findings made without supporting evidence
- shows that the Tribunal acted unfairly

[11] Near the conclusion of the Appeal Division hearing, the Claimant explained that if he made a mistake with numbers or dates [at the General Division hearing] it was because he was confused.[8] The Commission noted that if this was new evidence, then the Appeal Division could not consider it.

[12] I find that this is new evidence that was not before the General Division. I understand that the Claimant wants to provide an explanation for some alleged inconsistencies, but I cannot accept the new evidence because it goes to the merits and doesn't fit within one of the exceptions above. Specifically, it does not provide general background information, or highlight findings made without supporting evidence, or show that the Tribunal acted unfairly. As a result, I cannot accept the Claimant's new evidence.

---

[5] See *Tracey v Canada (Attorney General),* 2015 FC 1300 at paragraphs 29 and 34; *Parchment v Canada (Attorney General),* 2017 FC 354, at paragraph 23.
[6] See *Gittens v Canada (Attorney General),* 2019 FCA 256, at paragraph 13.
[7] See *Sharma* v *Canada (Attorney General),* 2018 FCA 48, at paragraph 9 and *Sibbald v Canada (Attorney General),* 2022 FCA 157.
[8] See audio recording of Appeal Division hearing at 41:02 to 43:09.

Issues

[13] The issues in this appeal are:

a) Did the General Division make an error of law or important error of fact when it decided the issue of misconduct?

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

Analysis

[14] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[9]

[15] An error of fact happens when the General Division bases its decision on an "erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[10]

[16] This involves considering some of the following questions:[11]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[17] So, if the General Division made an error of law or an important error of fact, then I can intervene.

---

[9] See section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).
[10] See section 58(1)(c) of the DESD Act.
[11] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47, at paragraph 41.

– The Commission argues that the General Division made errors

[18] The Commission argues that the General Division made an error of law and an important error of fact.[12] A summary of the Commission's written and oral arguments about the errors follows:[13]

- The General Division incorrectly focused on the severity of the employer's sanction (in this case, dismissal), because case law has said that the focus is whether the Claimant's conduct was wilful (conscious, deliberate or intentional).[14]
- There is also recent case law that says the Tribunal cannot question the reasonableness of an employer's policy and the validity of their dismissal.[15]
- If the General Division had applied the legal test to the facts, the only possible conclusion is that misconduct was proven because the Claimant admitted to speeding while driving his work vehicle and knew a policy prohibiting that particular conduct existed.
- The General Division did not assess all of the evidence because it ignored some evidence that speeding was prohibited (specifically, page GD3-29 referring to the Life Safety Rules). It should have explained why it assigned this evidence little or no weight.

– The Claimant argues that the General Division didn't make any errors

[19] The Claimant argues that the General Division did not make an error of law or an important error of fact. A summary of the Claimant's written and oral arguments follows:[16]

- He agrees that he was speeding in his work vehicle, but it was only for a very brief period and he only did so to pass a truck.

---

[12] See sections 58(1)(b) and 58(1)(c) of the DESD Act.
[13] See pages AD5-1 to AD5-5.
[14] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[15] See *Sullivan v Canada (Attorney General),* 2024 FCA 7, at paragraphs 4, 6 and 14.
[16] See pages AD6-1 to AD6-4.

- The employer says that he sped for a longer period and at a higher speed, but they failed to provide proof of that to the Commission (in the form of GPS logs).

- He is aware that there are laws about speeding and every company has policies about speeding, but he didn't know all of the penalties that might be imposed by his employer.

– What misconduct means in the context of Employment Insurance

[20] The law says that a claimant is disqualified from receiving EI benefits if the claimant lost any employment because of their "misconduct".[17]

[21] Misconduct is not defined in the *Employment Insurance Act* (EI Act) but the Courts have provided some guidance.

[22] The Federal Court of Appeal (Court) defines misconduct to be conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[18] Misconduct also includes conduct that is so reckless that it is almost wilful.[19]

[23] In particular, a claimant doesn't have to have wrongful intent for his behaviour to be misconduct under the law.[20]

[24] The Court has said there is misconduct if the Claimant knew or ought to have known the conduct could get in the way of carrying out their duties to the employer and that dismissal was a real possibility.[21]

[25] I will now review what the General Division decided in this case.

– The General Division decided that the Claimant's conduct was not misconduct

[26] The General Division had to decide whether the Commission had proven that the Claimant was dismissed from his job due to misconduct.

---

[17] See section 30(1) of the EI Act.
[18] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[19] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[20] See *Attorney General of Canada v Secours*, A-352-94.
[21] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.

[27] The General Division correctly outlined the relevant section in law and the Court's definition of misconduct in its decision.[22]

[28] The General Division decided that the Claimant lost his job because he was going above the speed limit in his work vehicle.[23] It accepted the Claimant's testimony that he was travelling around 140 km/hr, which was above the posted speed limit on the highway.[24]

[29] The Claimant didn't dispute the conduct.[25] He agreed that he was speeding in his work vehicle, but he says it was only for a brief period to pass a truck.

[30] The General Division said that the Claimant's conduct went against the employer's safety policy and rules that do not allow speeding. The industry standard rules are called the "Life Safety Rules".[26]

[31] The General Division ultimately decided that the Commission hadn't proven the Claimant lost his job because of misconduct.[27] It said that while the Claimant agreed he was speeding above the speed limit, he had no way of knowing that one instance of speeding with no prior warnings or discipline would lead to his dismissal.[28]

[32] The General Division further explained that without the employer's policies to review that it could not agree with the Commission's assertion that the Claimant was aware of the potential consequences of failing to comply with the employer's safety policies.[29]

[33] It concluded the Claimant's conduct was not misconduct, so his appeal was allowed and he wasn't disqualified from receiving EI benefits.[30]

---

[22] See paragraphs 12-14 of the General Division decision.
[23] See paragraphs 8-10 of the General Division decision.
[24] See paragraphs 21 and 22 of the General Division decision.
[25] See paragraph 4 of the General Division decision.
[26] See paragraphs 8-10 of the General Division decision.
[27] See paragraphs 2, 36 and 37 of the General Division decision.
[28] See paragraphs 20 and 22 of the General Division decision.
[29] See paragraph 26 of the General Division decision.
[30] See paragraphs 1, 2, 36 and 37 of the General Division decision.

– The General Division made two errors

[34] The basic facts in this case are not disputed between the parties. The Claimant agrees that he was speeding above the posted speed limit while driving a work vehicle. The exact speed he was going and for how long wasn't established because the employer didn't provide the GPS logs to the Commission. The Claimant had an explanation for speeding, but it was not accepted by the employer. The employer dismissed him because his conduct breached their safety policy and Life Safety Rules.

[35] First, the Claimant and Commission agreed that the employer had a policy and Life Safety Rules, which prohibited speeding. The General Division referred to the Life Safety Rules in its decision.[31]

[36] Second, the Claimant agreed that he committed the conduct (speeding in his work vehicle) which led to his dismissal. In doing so, he breached the employer's policy and Life Safety Rules that prohibit speeding.

[37] The Claimant says there was no evidence (i.e., GPS logs from the employer) of his exact speed and for how long. However, it doesn't matter that the Commission didn't have that evidence because the Claimant already admitted to the conduct: he agreed that he was driving his work vehicle and sped over the posted limit.

[38] The General Division followed by deciding that it was not misconduct because the Claimant didn't know he would be dismissed for that conduct. It found that there were no prior warnings and without the employer's policies to review, it could not find that the Claimant was aware of the potential consequences for failing to comply.[32]

[39] However, the absence of the employer's policy and inability to review the potential penalties resulting from non-compliance wasn't critical in this case. The Claimant had already admitted to the conduct and knew that speeding was prohibited by the employer and the Life Saving Rules.

---

[31] See paragraphs 9 and 10 of the General Division decision.
[32] See paragraph 26 of the General Division decision.

[40] In my view, the General Division made two related errors.

[41] The General Division erred because it did not consider some critical evidence that the Claimant knew or ought to have known dismissal was a real possibility.

[42] In particular, there was evidence in the file that the Claimant admitted to the Commission he was in fact **aware that the employer's policy stated it could lead to his termination** or other disciplinary action, but didn't think he would get dismissed for one infraction.[33] This evidence contradicted what he told the General Division at the hearing – that he was not aware of any policy that said he would be fired for speeding.[34]

[43] The General Division did not consider whether he knew or ought to have known that dismissal was a possibility in light of the above evidence where the Claimant told the Commission that he knew it was a possibility.

[44] The Court has already established there is misconduct where a Claimant knows or ought to have known the conduct could get in the way of carrying out their duties to the employer and that dismissal was a real possibility.[35]

[45] In this case, the Claimant worked as a driver, which meant he had to drive a work vehicle in order to carry out his duties for the employer. He was expected to drive safely and follow the employer's policy and Life Saving Rules that prohibit speeding. And there was evidence to support that he knew dismissal was a real possibility.

[46] The General Division also considered that it was the Claimant's first instance of speeding and that he didn't expect to be fired.[36] It agreed with the Claimant that progressive discipline (i.e., suspension) should have resulted for breaking a rule at first instance.[37]

---

[33] See page GD3-37.
[34] See paragraph 29 of the General Division decision.
[35] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[36] See paragraphs 32 and 33 of the General Division decision.
[37] See paragraph 34 of the General Division decision.

[47] This is when the second error occurred. The General Division erred by weighing in on the reasonableness of the employer's policy and actions.

[48] The Court says that the focus is on the employee's conduct and whether it amounted to misconduct within the meaning of the EI Act.[38]

[49] The Court has already decided that the role of the Tribunal is not to decide whether the employer was justified or whether it was the appropriate sanction or penalty.[39]

[50] More recent Court decisions have confirmed that the Tribunal is not the appropriate place to deal with allegations of wrongful dismissals, the employer's conduct or the reasonableness of its work policies.[40] In a decision called *Kuk*, the Court said that the misconduct test focuses on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.[41]

[51] For these reasons, I find that the General Division made an error of law and an important error of fact. It did not consider some critical evidence that the Claimant knew or ought to have known dismissal was a real possibility and by weighing in on the reasonableness of the employer's policy and actions.[42]

[52] Since I have found errors, I do not need to consider any other alleged errors.

Fixing the errors

[53] There are two options for fixing an error by the General Division.[43] The first option is to send the file back to the General Division for reconsideration. The second option is to give the decision that the General Division should have given.

---

[38] See *Canada (Attorney General) v Marion*, 2002 FCA 185, at paragraph 3.
[39] See *Canada (Attorney General) v Caul*, 2006 FCA 251, at paragraph 6.
[40] See *Sullivan v Canada (Attorney General),* 2024 FCA 7, at paragraph 4.
[41] See *Kuk v Canada (Attorney General),* 2023 FC 1134, at paragraph 37.
[42] See sections 58(1)(b) and 58(1)(c) of the DESD Act.
[43] See section 59(1) of the DESD Act.

[54] The Commission says that the record is complete, so I should render the decision the General Division should have given. It says that I should allow the appeal because there were errors and I should decide that the Claimant lost his job due to his own misconduct.

[55] However, the Commission noted that it would not be opposed to returning the file to the General Division for reconsideration.

[56] The Claimant prefers the first option because he says that it might be better for him because it would allow for more evidence and fact finding. But, he isn't opposed to the second option because the process has already taken up a lot of time so far.

– I will make the decision

[57] I will make the decision the General Division should have given. The parties have had a full and fair opportunity to present their cases and the record is complete. In doing so, I can make necessary findings of fact.[44]

[58] The Claimant was aware of the employer's policy and the industry standard Life Safety Rules that do not allow speeding.

[59] The Claimant admits to the conduct. He agrees that that he was driving a work vehicle above the posted speed limit to pass another vehicle.

[60] Even if the Claimant was only speeding for a brief period, his conduct breached the employer's policy and Life Safety Rules that prohibit speeding.

[61] I don't have to decide how fast he was going, or for how long because he has already admitted to the conduct.

[62] The Claimant argues that he didn't know the consequences and that he would be dismissed for speeding. He thinks that the employer should have imposed a different penalty.

---

[44] See section 64(1) of the DESD Act.

[63] As noted above, it is not the Tribunal's role to determine whether a dismissal by the employer was justified or was appropriate.[45]

[64] The relevant question is whether the Claimant willfully committed the conduct and whether it amounted to misconduct within the meaning of the EI Act.

[65] I find that the Claimant's conduct was wilful. He deliberately, intentionally and consciously chose to speed in his work vehicle in order to pass another vehicle.

[66] I accept that he may not have had wrongful intent, but his conduct still amounts to misconduct because he made a choice to speed even though he knew it was prohibited by the employer's policy and Life Saving Rules.[46]

[67] There was no evidence that the employer permitted speeding in specific circumstances, including speeding briefly while passing another vehicle. Indeed, the evidence supports that there was zero tolerance for safety issues as the employer was described as safety conscious.[47] The Life Saving Rules clearly state that one must follow safe driving rules, including "I do not exceed the speed limit, and reduce my speed for road conditions".[48]

[68] There is evidence that the Claimant knew there was a possibility of dismissal. He told the Commission that the policy stated it could lead to termination or other disciplinary action, but he didn't think he would necessarily get dismissed for one instance.[49]

[69] I find that the Claimant knew or ought to have known that dismissal was a real possibility.[50] He ought to have known that breaching the employer's policy and Life Saving Rules by speeding in his work vehicle could result in his dismissal.

---

[45] See *Canada (Attorney General) v Caul*, 2006 FCA 251, at paragraph 6.
[46] See *Canada (Attorney General) v Secours*, A-352-94.
[47] See summary of employer's discussion with the Commission at page GD3-42.
[48] See page GD3-29.
[49] See page GD3-37.
[50] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.

[70] For these reasons, I find that the Claimant's conduct amounts to misconduct, within the meaning of the EI Act. This means that he is disqualified from receiving EI benefits.[51]

Conclusion

[71] The Commission's appeal is allowed. The General Division made an error of law and important of fact. I have substituted with my decision. The Claimant is not entitled to get EI benefits because he lost his job due to his own misconduct.

Solange Losier
Member, Appeal Division

[51] See section 30(1) of the EI Act.