Citation: *OW v Canada Employment Insurance Commission*, 2024 SST 489

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	O. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Duggan

Decision under appeal:	General Division decision dated October 3, 2023 (GE-23-2119)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	April 23, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	May 8, 2024
File number:	AD-23-973

Decision

[1] The appeal is dismissed.

[2] There is an important error of fact. The General Division didn't consider whether the Claimant's Collective Agreement's progressive discipline clauses impacted whether the Claimant knew, or should have known, that he could be let go.

[3] I have fixed the error by giving the decision the General Division should have given. But the outcome is the same. The Claimant can't get Employment Insurance (EI) benefits as he was dismissed for misconduct.

Overview

[4] O. W. is the Claimant. He lost his job with his employer. The employer says he was dismissed for violating its Business Conduct Policy and its Workplace Harassment and Violence Prevention policy.

[5] The Claimant was denied EI benefits by the Canada Employment Insurance Commission (Commission). The Claimant appealed to the Social Security Tribunal (Tribunal).

[6] The Tribunal's General Division decided that the Claimant lost his job due to misconduct and wasn't entitled to EI benefits. The Claimant appealed this decision.

[7] I agree the General Division made an error. 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.

Preliminary matter: I am not considering the Claimant's new evidence

[8] The Claimant submitted new evidence with his appeal.[1] In AD4, the Claimant gave a new medical note that was written by his psychologist on March 11, 2024. This was after the General Division hearing. In AD7, the Claimant has compiled a document relating to issues that relate to discipline regarding not completing assigned tasks.[2]

[9] Generally, the Appeal Division can't accept new, fresh evidence.[3] That is because the hearing at the Appeal Division isn't a "redo" of the General Division hearing. It isn't a chance to try to perfect any gaps a party may have realized exists after the General Division hearing. The focus of an Appeal Division hearing is on whether or not the General Division made a relevant error.

[10] As explained by the Federal Court of Appeal, it isn't the role of the Appeal Division to be a fact finder.[4] There are exceptions to the general rule. I can consider new evidence if it is only for the purposes of background information, if it highlights a finding the General Division made without supporting evidence, or if it shows the General Division acted unfairly.

[11] I don't find any of those exceptions apply here. The Claimant is attempting to give additional evidence to address what he sees as gaps in his evidence. So, I am not accepting the new evidence.

Issues

[12] The issues in this appeal are:

a) Did the General Division make an important error of fact by finding the Claimant's conduct was wilful despite his explanation that his conduct was as a result of his anxiety being triggered?

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[1] See AD4 and AD7.
[2] See Claimant's argument in AD8-4.
[3] See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at paragraph 13.
[4] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 39.

b) Did the General Division make an important error of fact when it didn't consider whether the Claimant's Collective Agreement's progressive discipline clauses impacted whether the Claimant knew, or should have known, that he could be let go?

c) If so, how should the error(s) be fixed?

Analysis

[13] I can intervene (step in) only if the General Division made an error. I can only consider certain errors.[5] Briefly, the errors I can consider are about whether the General Division:

- acted unfairly in some way
- decided an issue it should not have, or didn't decide an issue it should have
- made an error of law
- based its decision on an important error about the facts of the case

[14] The Claimant alleges the General Division made important factual errors.[6]

The General Division didn't make an error of fact by finding the Claimant's conduct was wilful despite his explanation that his conduct was as a result of his anxiety being triggered

[15] The General Division made a finding that the Claimant's conduct was wilful, or so reckless it became wilful.[7] The Claimant says his anxiety is a defence to whatever reaction he had to his coworkers. He says the General Division needed to consider this. He argues the presence of his anxiety meant his conduct wasn't wilful.

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[5] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[6] In AD1-B the Claimant had a variety of issues that he wrote down including things like a failure to accommodate. The Claimant clarified at the Appeal Division hearing that this document was an early version of his alleged errors. Instead, the Claimant asked me to consider AD8 along with his arguments at the hearing.
[7] See the General Division decision at paragraph 48.

[16] I find the General Division did consider his anxiety. The General Division mentions the Claimant's anxiety several times.[8] As well, the General Division specifically asked the Claimant how his anxiety would manifest.[9] The Claimant told the General Division that he was having anxiety and that's why he went to see a psychologist.[10]

[17] The General Division weighed the evidence about his anxiety and made findings.[11]

[18] The Appeal Division isn't just a new hearing process. If there isn't an error, I can't just reweigh the evidence that was before the General Division.[12] So, even if I would have decided the case differently, I can't make changes to the decision unless there is an error of fact identified.[13]

[19] The General Division has some freedom in making findings of fact. When I decide if I can intervene, there has to be an **important** error that the General Division **based** its decision on. So, if the finding is "willfully going contrary to the evidence," or if crucial evidence was ignored, then I could intervene.[14]

[20] The General Division doesn't need to mention every piece of evidence.[15] The law is clear that I can intervene only if the General Division "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[16]

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[8] See the General Division decision at paragraphs 32, 34, and 36.
[9] Listen to the General Division hearing recording at 01:19:46.
[10] See the General Division decision at paragraph 32. See also the reports given to the General Division by the Claimant at GD2-12 and GD7-79. Note that GD2-12 were all visits that occurred after the Claimant was let go from his job. While GD7-79 is from 2017 and seems to be dealing with a court proceeding.
[11] See the General Division decision at paragraphs 34, 35, and 36.
[12] See *Uvaliyev v Canada (Attorney General)*, 2021 FCA 222 at paragraph 7; and *Sibbald v Canada (Attorney General)* 2022 FCA 157 at paragraph 27.
[13] The finding of fact must be made in a perverse or capricious manner or without regard to the material. See *Canada (Attorney General) v Bernier*, 2017 FC 120 at paragraph 34.
[14] See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[15] See *Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at paragraph 39.
[16] See section 58(1)(c) of the DESD Act.

[21] The Claimant hasn't convinced me that the General Division didn't consider his anxiety and its impact on the situation. So, I can't find the General Division ignored or misunderstood the evidence before it.

The General Division didn't consider whether the Claimant's Collective Agreement's progressive discipline clause impacted whether he should have known he could be let go

[22] The General Division didn't consider if the Claimant's progressive discipline clause impacted whether he knew, or ought to have known, that he could be let go.

[23] It is outside of the Tribunal's authority to make findings about whether the employer breached a Collective Agreement.[17] That is a matter for another forum. But it is up to the Tribunal to consider a Claimant's argument and how it impacts the test for misconduct.

[24] In this case, the Claimant raised the issue with the General Division. But no analysis was done on this issue. This means relevant evidence was ignored. The question of whether the Claimant knew or ought to have known he could be let go is an essential part of the test for misconduct. This means there is an important error of fact.

[25] Because I have found an error, I don't have to consider the parties' arguments about whether the General Division made other errors.

Remedy

[26] Since I have found an error, there are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair or there isn't enough information to make a decision.[18]

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[17] The Federal Court of Canada in *Cecchetto v Canada (Attorney General)*, 2023 FC 102, has upheld the principle that the Tribunal must look at why an appellant has been dismissed and if it is "misconduct" under the EI Act.
[18] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

[27] The parties agreed that, if I found an error, I should give the decision the General Division should have given. There is no suggestion by either party that they didn't present all of their evidence to the General Division.

[28] I find this means I can give the decision that the General Division should have given. That includes deciding whether the Claimant is disqualified from EI benefits due to misconduct.

There is misconduct under the *Employment Insurance Act*

[29] 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.

– The conduct that led to the Claimant losing his job was from the March 20, 2023 incident

[30] The General Division found the reason the employer let the Claimant go was due to an incident on March 20, 2023.[19] The Claimant says his employer took his conduct out of context.[20] Although the Claimant doesn't agree with his employer's discipline, he didn't dispute that it was as a result of the March 20, 2023 incident.[21]

– The Claimant's conduct was wilful, or so reckless that it can be considered wilful

[31] The Claimant agreed the General Division stated the correct legal test for misconduct.[22] There is no issue with how the General Division stated the law and I adopt those explanations. This includes that conduct that is reckless can be considered wilful.

[32] As noted above, there is no issue with how the General Division considered the Claimant's anxiety.[23] I also adopt the General Division's findings in this respect. This

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[19] See GD3-29 the employer's termination letter.
[20] Listen to the General Division hearing recording at 00:20:34 and through to 00:34:00.
[21] See GD3-37 and listen to the General Division hearing recording at 00:30:11.
[22] See the General Division decision at paragraphs 13 to 17.
[23] See paragraphs 15 to 17 above.

means the Claimant's anxiety doesn't relieve him from responsibility for his actions. The Claimant told the General Division that his anxiety "is not something that is expressed outwards".[24]

[33] I also note the Claimant told the General Division, several times, that he should have taken a "pause" at the time of the incident.[25] The General Division found the Claimant's conduct was so reckless that it was wilful.[26] I don't find the General Division made an error with respect to these findings. That means I adopt their findings and will not intervene on whether the conduct was wilful.

– **The Claimant knew, or should have known, there was a real possibility that he could be let go**

[34] It is not the Tribunal's role to interpret the Collective Agreement. It is not the Tribunal's role to decide whether or not the employer breached a clause of the Collective Agreement. There are other forums for that.[27] But I must look at whether or not the Claimant knew, or should have known, that he could be let go. I find the Claimant knew, or should have known, he could be let go for the reasons that follow.

[35] The Claimant argues his Collective Agreement provides for progressive discipline.[28] This includes oral warnings, written warnings, suspensions and then dismissal.

[36] But the same provision of the Collective Agreement also says, "(t)he level of discipline may vary depending on the circumstances. All discipline imposed is subject to the grievance procedure."[29]

[37] The Collective Agreement must also be considered in light of the employer's Workplace Harassment and Violence Prevention Policy.[30] The Claimant acknowledged

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[24] Listen to the General Division hearing recording at 01:21:00.
[25] Listen to the General Division hearing recording at 00:30:11, 00:54:17, 01:09:00 and 01:13:01.
[26] See the General Division decision at paragraph 48.
[27] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[28] See GD7-36 at paragraph 11.08 of the collective agreement.
[29] See GD7-37.
[30] See GD7-68.

he was aware of this policy and that his employer has a “zero tolerance” for any disrespectful behaviour in the workplace.[31]

[38] The policy says, “The Company will take such disciplinary measures as it deems appropriate, up to and including termination of employment, at its discretion, against any employee who subjects any other employee, visitor, volunteer, customer, vendor or contractor to Workplace Harassment and Violence.”[32]

[39] The Claimant also said he was aware this policy includes discipline up to and including and termination of employment.[33] The Claimant confirmed there were “HR meetings” about this topic so he was aware.

[40] I find the Collective Agreement says there is progressive discipline, but that the level of discipline can vary. The employer wrote to the Claimant and said they made a decision to terminate the employment because they have a duty to prevent harassment and violence in the workplace.[34] Given that the Claimant acknowledges he was familiar with this policy, I find that he also knew, or should have known, that a breach of that policy could lead to termination of his employment.

[41] I find this means the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a policy, and did not follow the policy. The Appellant knew, or ought to have known, that by not following the policy that he might face disciplinary action including termination of employment. This means that he did not carry out his duties to his employer.

[42] This means the Commission has proven all four elements of misconduct as considered under the EI Act and related case law.

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[31] Listen to the General Division hearing recording at 00:51:09.
[32] See GD7-71 at point 5 under Workplace Harassment and Violence Prevention.
[33] Listen to the General Division hearing recording at 00:52:04.
[34] See GD3-30.

– The Claimant's allegations of his being harassed and being discriminated against won't be considered in this forum

[43] The Claimant alleges he was the one that was being harassed and that his employer didn't investigate his complaints. The Claimant also says he has a disability and his employer had a duty to accommodate him.

[44] The law doesn't say I have to consider how the employer behaved.[35] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[36]

[45] I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.[37]

[46] So, I can't consider these issues. The Federal Court of Appeal has said that, when interpreting and applying the EI Act, the focus is clearly on the employee's behaviour, not the employer's.[38] This means the Claimant would have to address his issues in another forum.

[47] The Federal Court has also made it clear that a claimant may not be satisfied with the Employment Insurance scheme, but "there are ways in which his claims can properly be advanced under the legal system".[39]

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[35] See section 30 of the Act.
[36] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[37] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[38] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[39] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 49.

Conclusion

[48] The appeal is dismissed.

[49] The General Division made an important error of fact because it didn't consider whether the Claimant's Collective Agreement's progressive discipline clauses impacted whether the Claimant knew, or should have known, that he could be let go.

[50] I have fixed the error by giving the decision the General Division should have given. But the outcome is the same. The Claimant can't get EI benefits because he was dismissed for misconduct as defined by the EI Act.

Elizabeth Usprich
Member, Appeal Division