[TRANSLATION]

Citation: *Canada Employment Insurance Commission v JT*, 2024 SST 558

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Jessica Earles
Respondent:	J. T.

Decision under appeal:	General Division decision dated November 28, 2023 (GE-23-2466)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	April 18, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	May 17, 2024
File number:	AD-23-1113

Decision

[1] The Commission's appeal is allowed. The Claimant lost his job because of misconduct.

Overview

[2] The Respondent (Claimant) lost his job. His employer said that he was let go because he was often late, made a serious mistake in destroying a document, and violated the safety policy by altering an N-95 mask to make it easier for him to breathe.

[3] The Appellant (Commission) found that the Claimant lost his job because of misconduct. It decided that he was disqualified from receiving Employment Insurance (EI) benefits.

[4] The Claimant argued that his employer let him go mainly because of a personality conflict with his immediate supervisor. The Commission upheld its initial decision on reconsideration. The Claimant appealed to the General Division.

[5] The General Division found that the Claimant did not lose his job because of misconduct, but instead was harassed by his supervisor. It found that the Commission had not proven the Claimant's misconduct.

[6] The Commission was given permission to appeal the General Division decision. It says that the General Division failed to consider the material before it and made an error of law.

[7] I have to decide whether the General Division made its decision without regard for the material before it and made an error in its interpretation of misconduct.

[8] I am allowing the Commission's appeal.

Issue

[9] Did the General Division make its decision without regard for the material before it and make an error in its interpretation of misconduct?

Analysis

Appeal Division's mandate

[10] The Federal Court of Appeal has determined that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[11] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, the Tribunal has to dismiss the appeal.

Preliminary remarks

[13] It is well established that I have to consider only the evidence that was before the General Division. A hearing before the Appeal Division is not a new opportunity to present evidence. The Appeal Division's powers are limited by the law.[2]

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[1] See *Canada (Attorney General) v Jean*, 2015 FCA 242; and *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

Did the General Division make its decision without regard for the material before it and make an error in its interpretation of misconduct?

[14] The Commission says that the General Division failed to consider all of the evidence and made an error of law in its interpretation of misconduct.

[15] The Commission says that the Claimant wilfully chose to go against the company's safety policies and protocols by modifying his safety equipment, and that he knew he could be let go for that.

[16] The Commission says that the General Division found that the Claimant had wilfully destroyed a document in violation of the company's clear policy. But it found that it was not misconduct because he had checked with an employee in quality control, who told him that he could destroy it. The Commission says that the General Division substituted its opinion for the employer's policy when it found that the Claimant was justified in throwing away an important document. The Commission says that, by using this reasoning, the General Division made an error in its interpretation of the legal notion of misconduct.

[17] The Commission says that the General Division's finding that it failed to prove the Claimant's misconduct is incompatible with the facts of the case.

[18] The Claimant says that the General Division did not make any errors of fact or law that would justify my intervention.

[19] The General Division had to decide whether the Claimant lost his job because of misconduct.

[20] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent. It is enough that the misconduct is conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their employer.

[21] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that his dismissal was unjustified, but rather to determine whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.

[22] The General Division found that the Claimant lost his job mainly because of a personality conflict with his immediate supervisor, and not because of a serious violation of the industry's internal policies based on a principle of progressive offensives.

[23] The General Division found that the Claimant was not late for work. It found that the employer instead blamed him for not dressing before the start of his shift. It noted that the supervisor gave him unnecessary warnings for tardiness because it accused him of taking too long to get ready when he arrived at work, hence the use of the name "J. R."

[24] The General Division found that the Claimant did not act wilfully in destroying an important document because he had checked with a manager in quality control.

[25] The General Division found that the Claimant did modify his N-95 mask in violation of the safety guidelines and policy but that this breach alone would not have led to the Claimant's dismissal, given the principle of progressive discipline.

[26] First, it is well established that an employer's disciplinary process is not relevant to determining misconduct under the *Employment Insurance Act* (EI Act).[3]

[27] The General Division had to assess the Claimant's actions to determine the following:

- whether he was aware of his employer's policy
- whether he wilfully ignored his employer's policy

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[3] See *Houle v Canada (Attorney General)*, 2020 FC 1157; and *Dubeau v Canada (Attorney General)*, 2019 FC 725.

- whether he knew or should have known the consequences of ignoring his employer's policy

[28] The employer's policy SOP-007, [translation] "*Guidelines for good documentation practices for handwritten entries*," says, among other things:

> [translation]
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> Section 4.1.5; Discarding GMP documents for any reason is not acceptable except when the retention period has ended.

[29] The evidence shows that the Claimant destroyed a document on April 14, 2023. He had received comprehensive training on GMP guidelines in December and February 2023. He was aware of the employer's clear policy that prohibits discarding documents **for any reason**.

[30] The Claimant was careless or so negligent as to approach wilfulness when he relied on another employee's advice to justify destroying a document when the employer's policy is clear.

[31] The conflict with the supervisor may explain that the Claimant was not actually late for work, but it does not change the fact that he violated the employer's policy on the destruction of documents.

[32] The employer's written warning of April 19, 2023, says that, if the Claimant is given an additional warning, there will be other disciplinary measures, **including the possibility of dismissal**.

[33] On June 1, 2023, only six weeks after the last warning, the Claimant modified his N-95 mask in violation of the employer's safety guidelines and policy. Again, the conflict with the supervisor does not change this fact. As a result of this violation, the Claimant lost his job.

[34] The evidence shows that the Claimant was aware of the employer's safety policy. He decided to modify his N-95 mask, rather than use other available remedies. The act complained of was wilful or resulted from such carelessness or negligence that it approached wilfulness. The Claimant knew or should have known that non-compliance

with the safety policy could lead to his dismissal following the April 19, 2023, warning, and he did lose his job because of this non-compliance with the employer's policy.

[35] It is well established that wilful non-compliance with an employer's policy is considered misconduct under the EI Act.[4]

[36] For these reasons, I am of the view that the General Division did not consider all the evidence before it and that it made an error in its interpretation of misconduct. So, I am justified in intervening.

Remedy

[37] Considering that the parties had the opportunity to present their case before the General Division, I will give the decision that the General Division should have given.

[38] The evidence shows that the Claimant was aware of the employer's safety policy. On June 1, 2023, he decided to modify his N-95 mask, rather than use other available remedies. The act complained of was wilful or resulted from such carelessness or negligence that it approached wilfulness.

[39] The Claimant knew or should have known that non-compliance with the employer's safety policy could lead to his dismissal following the April 19, 2023, warning. He did lose his job because of this breach of the employer's safety policy.

[40] It is well established that wilful non-compliance with an employer's policy is considered misconduct under the EI Act.

[41] For these reasons, I find that the Claimant lost his job because of misconduct.

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[4] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

Conclusion

[42] The Commission's appeal is allowed. The Claimant lost his job because of misconduct.

Pierre Lafontaine
Member, Appeal Division