Citation: *JL v Canada Employment Insurance Commission*, 2024 SST 715

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts

Decision under appeal:	General Division decision dated October 31, 2023 (GE-23-474)

Tribunal member:	Stephen Bergen
Type of hearing:	In person
Hearing date:	June 14, 2024
Hearing participants:	Respondent's representative
Decision date:	~~**June 21, 2024**~~
CORRIGENDUM DATE:	**July 19, 2024**
File number:	AD-23-1083

Decision

[1] I am dismissing the appeal.

[2] The General Division made an error of ~~fact~~ [**law**] I have substituted my decision for that of the General division to correct the error, but the decision result is the same.

Overview

[3] J. L. is the Appellant. I will call him the Claimant because this application concerns his claim for Employment Insurance (EI) benefits.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim for EI benefits. It said that he had lost his job because of his misconduct. The Claimant disagreed and asked the Commission to reconsider. The Commission refused to change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed his appeal.

[5] The Claimant asked for permission to appeal the General Division decision to the Appeal Division. He did not identify the ground or grounds of appeal on which he intended to rely, but I granted leave to appeal because there was an arguable case that the General Division made an error of law.

[6] On June 14, 2024, I held an in-person hearing as the Claimant had requested. The Claimant was not present for the hearing.

[7] It is my decision that the General Division made an error of law by not explaining how it weighed the evidence to reach its decision. I have made the decision the General Division should have made, but the result is the same. The Claimant's employer dismissed him for misconduct, so he is disqualified from receiving benefits.

Preliminary matters

[8] The Claimant filed an application to the Appeal Division, asking for an in-person oral hearing. As a result, the Tribunal eventually scheduled a hearing at 10:00 a.m. on June 14, 2024, to take place at the Service Canada Centre closest to the address provided in the application.

[9] The Claimant did not appear. I waited until 10:15 a.m. and then proceeded to hear the Commission's arguments from its representative who attended by teleconference. We proceeded on the understanding that I would have the representative repeat the Commission's arguments to the Claimant, if the Claimant joined the hearing before we were finished. The Claimant did not appear before the hearing concluded at 10:40 a.m.

[10] The Tribunal had sent the General Division decision to the Claimant at the email address that he gave the Tribunal. The Claimant filed an application to the Appeal Division on November 28, 2023. In his application, he confirmed that he received the General Division decision on October 31, 2023.

[11] The Appeal Division attempted to call the Claimant on January 22, 2024, but his number was not in service. It then tried to reach him at the same email address at which he had received the General Division decision, which was also the email address he provided in his application to the Appeal Division. The Appeal Division emailed the Claimant on December 1, 2023, February 15, 2024, and March 1, 2024. It finally emailed the Notice of Hearing on April 8, 2024.

[12] In addition, the Tribunal wrote to him at the physical address he gave in his application. It sent a letter by regular mail on January 15, 2024, and other letters by regular mail as well as courier on January 23, 2024, and April 8, 2024. The Tribunal sent him the Notice of Hearing on April 9, 2024, also by regular mail and by courier. Everything the Tribunal couriered to the Claimant was returned to the Tribunal as undeliverable.

[13] The Tribunal made one final attempt to inform the Claimant of the upcoming hearing. It tried to call him on June 7, 2024, but could not reach him.

[14] The Claimant did not call or correspond with the Tribunal between the time that he filed his application and the hearing.

[15] I am not satisfied that the Claimant had notice that the hearing was proceeding at the time and place indicated in the Notice of Hearing.

[16] Even so, I proceeded with the oral hearing in his absence. The Tribunal had made numerous efforts to reach the Claimant using the contact information that he provided. In such a case, Rule 9(2) of the *Social Security Tribunal Rules of Procedure* permits me to continue the process without further notice to him.

Issue

[17] The issue in this appeal is as follows:

Did the General Division make an error of law by not providing reasons that adequately explain how it weighed the evidence or reached its decision?

Analysis

General Principles

[18] 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]

[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).

[19] The Claimant did not characterize any of his reasons for appeal as an error within the grounds of appeal. Much of what he submitted with his application has no obvious relevance to the issues that were before the General Division or the grounds of appeal.

[20] I wrote to the Claimant on January 15, 2024, asking him for a more detailed explanation for why he was appealing, but he did not respond (as he had not responded to any other correspondence from the Tribunal).

[21] However, the Claimant's initial explanation for his appeal alleged that the member may have been biased. Part of the conduct which the employer considered misconduct, had to do with how the Claimant spoke about immigrants, LGBTQ people, and Quebecois people, and about issues related to those people groups. The Claimant suggested that the member was biased because she may not have been a Canadian citizen or may have belonged to the LGBTQ people group.

[22] If the member were biased or might reasonably be perceived to be biased, this would be a procedural fairness error.

[23] The Claimant's submissions also asserted that he had a right to speak according to his own beliefs and suggested that there was nothing inherently wrong in whatever he may have said about immigrants, LGBTQ or Quebecois people.

[24] This could be considered an argument that he had no duty to the employer to keep his views to himself on these subjects. He may be arguing that the General Division made some kind of error when it found that his conduct interfered with his duty to his employer.

Error of procedural fairness

[25] The General Division did not act in such a way as to give rise to a reasonable apprehension of bias.

[26] An allegation of bias is serious. It must normally be brought at the earliest opportunity[2] and there must be some evidence on which it is based. The test for bias is what an informed person, viewing the matter realistically and practically—and having thought the matter through—would conclude.[3]

[27] In this case, the Claimant's allegation is purely speculative. He offered no evidence to show that the member was not a Canadian citizen or that she was a member of the LGBTQ. Even if the Claimant were right about either of these claims, this would not automatically disqualify her from hearing the appeal. The Claimant did not identify anything that she said or did that would cause a reasonable person to believe that her membership in, or affinity to, such a group might interfere with her ability to impartially adjudicate the Claimant's appeal.

Error of law

[28] When I granted leave to appeal, I said that there was an argument that the General Division made an error of law by failing to make required findings of fact or provide adequate reasons.

[29] The Commission conceded that the General Division made an error of law. It noted that the General Division decision did not define the conduct that was alleged to be misconduct except to say that the Claimant had made inappropriate and derogatory comments that were contrary to policy. In addition, it did not say why it preferred the employer's version of events over that of the Claimant.

[30] I accept the Commission's concession and I agree that the General Division made an error of law by not adequately explaining its decision.

[31] The General Division summarized the Claimant's conduct in general terms only and did not explain what part of that conduct breached a duty to the employer or how it determined it breached a duty. It said that the conduct was "contrary to the employer's

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[2] See *Vancouver Fraser Port Authority v. GCT Canada Limited Partnership*, 2021 FCA 183 (CanLII)
[3] See *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484

policy" without identifying any such policy. It preferred the evidence of the employer to that of the Claimant without explaining why it did so.

[32] The dearth of specifics within the General Division's analysis intersects with the Claimant's presumed argument that he did not say or do anything that breached his duty to his employer.

Summary

[33] I have found that the General Division's reasons were so inadequate as to be an error of law.

[34] That means that I must decide how to remedy the General Division decision.

Remedy

[35] I must decide what should be done to correct the General Division errors. 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.[4]

[36] The Commission believes that I have evidence I require to decide the question of whether the Claimant was dismissed for misconduct. It recommends that I make the decision the General division should have made. I agree.

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

– **Was the Claimant dismissed or did he quit?**

[37] The Record of Employment stated that the Claimant quit.

[38] However, the Claimant indicated on his application for benefits that he was dismissed and that his last day of work was December 10, 2022. The employer confirmed that it dismissed the Claimant when asked by the Commission.

[4] See section 59(1) of the DESDA.

[39] I find that the Claimant was dismissed.

– **Why was the Claimant dismissed?**

[40] The employer told the Commission that it dismissed the Claimant for using discriminatory language and making derogatory remarks towards co-workers. It claimed that it warned the Claimant about his kind of behaviour on August 25, August 27, September 1, September 3, November 7, and November 24, 2002.

[41] The employer asserted that its workplace policy prohibits inappropriate conduct or comments, and that this kind of conduct is cause for termination. It said that it trained the Claimant on its policies and that he had read them, and that it had given him a copy after the first incident.

[42] The employer's initial discussion with the Commission noted the following:

- The Claimant said, "bad things," and made "homophobic slurs" to a truck driver.
- There were verbal altercations/discriminatory comments with other employees.
- The Claimant said that immigrants have all the full-time jobs.
- People from Quebec should not be allowed to work in Ontario.
- There is a conspiracy, and the Mafia is against him.
- His union representative is from Venezuela, so she doesn't know what she is doing.[5]

[43] The employer also noted that the Claimant had trouble controlling his temper.

[44] The employer provided copies of two of its warnings. The first warning is dated September 3, 2022. The employer reprimanded the Claimant for an "inappropriate conversation" with a colleague, and for "accosting" a new colleague. It spoke of how it had zero tolerance for abuse or name-calling. This warning was witnessed by the Claimant's union representative and others.[6]

[45] The warning was in response to two separate incidents. The first incident occurred on August 27, 2022. The Claimant is reported to have shouted at a Black truck driver (in his role as a shipping receiver)—and to have asked if the driver was Eddie

[5] See GD3-20.
[6] See GD3-51.

Murphy (a well-known Black actor and comedian). Shortly after the incident, “SSP,” an Assistant Store Manager, talked to the Claimant about treating everyone with respect because of how he had been aggressively shouting at the driver.[7]

[46] In relation to the second incident from the September 3 warning, witness “L” stated that the Claimant had acted unhelpful and rude to a new LGBTQ employee, and to have called him “creepy” and “weird.” The new employee was upset and quit soon after that incident.[8]

[47] Later on, the employer obtained another statement from witness L about this. L said that she witnessed how the claimant was rude and unhelpful to the new hire. She also said that he told her she should not have her job because she was from Quebec and half-Aboriginal.[9]

[48] In a November 7 statement, “RR” a Manager on Duty, characterized the Claimant’s interaction with a truck driver as inappropriate and aggressive, and noted that the driver was not responding in kind. RR said the truck driver appeared to feel threatened and had mentioned calling the police.[10] RR was on the phone with the AD while this was happening, and A could hear the Claimant’s yelling over the phone.[11]

[49] The second warning was dated December 2, 2022, and followed a November 21 altercation between the Claimant and a truck driver. [12]. The warning included a 5-day suspension, which the employer applied retroactively because it had suspended the Claimant on November 24, 2024, pending an investigation into what happened “on Monday night” (November 21). The Claimant had already missed five shifts.[13]

[50] The warning/suspension stated that the employer had spoken to the Claimant about respect in the workplace, about using derogatory language towards drivers, and

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[7] See GD31.
[8] Ibid.
[9] See GD3-54.
[10] See GD3-53.
[11] See GD3-32.
[12] See GD3-52
[13] See GD3-33 and GD3-33.

about angry outbursts in the backroom.[14] It informed the Claimant that any future offence may result in his discharge.

[51] "RG," the Manager on Duty on November 21, also observed the Claimant screaming and pointing at a driver.[15] Witness "C" confirmed that the Claimant called the driver a faggot and other slurs.[16] There is a further statement from the truck driver "G," who was involved in the November 21 incident in the receiving area. G did not identify the receiver by name, but noted that the receiver yelled at him because G had touched him, and said that the receiver called him "serious names."[17] RR also provided a witness statement which seems to be related to the November 21 incident. She talked about how the Claimant was upset and disoriented. She recalled that he wanted to call the police because the driver had assaulted hm by touching his arm.[18]

[52] AD and JG (union supervisor) met with the Claimant on November 29 to discuss the November 21 incident. The employer reports that the Claimant acted aggressively in the meeting but insisted he did nothing wrong. Asked about whether he called the driver a faggot, the Claimant did not deny it. Instead, he said he wanted to "plead the fifth."[19]

[53] Where the December 2 suspension refers to "angry outbursts in the backroom," this seems to be a reference to a September 21 incident. Witness L provided a statement on December 8, in which she describes the Claimant's response to her brushing up against the Claimant's shoulder in the lunchroom. The Claimant reportedly screamed at her for ten minutes until she left the room. She felt his behaviour was abusive and reported feeling frightened.[20] Another witness, "C" provided a statement in transcript form of what the Claimant, L, and C said to each other in the lunchroom.[21]

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[14] See GD3-52.
[15] See GD3-32.
[16] See GD3-42.
[17] See GD3-65.
[18] See GD3-60.
[19] See GD3-33.
[20] See GD3-55, 59.
[21] See GD3-62.

[54] Shortly before the Claimant's dismissal (on December 2), "K" documented that she spoke to the Claimant about his schedule, saying that she was instructed to make sure that he doesn't "receive" (shipments) anymore.[22]

[55] The employer asked the Claimant to come into his office on December 5. He told the Claimant to go home for the day and wait for a meeting with him and the union rep on his next scheduled shift. The Claimant asked why he was being dismissed. The employer told him he was making people uncomfortable and was talking about inappropriate things, including his comments about the sexual orientation of colleagues.

[56] During the conversation, the Claimant reportedly persisted in the same behaviour. He stated that the manager and union rep were lesbians and having sex, that he disliked the ASM (assistant store manager) because she is French, and that he would be calling immigration because he believed the store's third-party cleaning employees were all illegal immigrants.

[57] After the December 5 meeting, L emailed AD to say that she was fearful of working with the Claimant. She had been present in the December 5 meeting and confirmed many of the details reported by the employer. [23] She emailed AD again on December 8 to say that she and her colleagues are stressed and worried about their personal safety because of the Claimant.[24]

[58] I accept that the employer considered the Claimant's repeated angry outbursts, intolerance, and inappropriate remarks (some of which I have detailed earlier in this decision) to be unacceptable in the workplace.

[59] Regardless of whether the incidents occurred in precisely the manner in which they were related by the employer, its employees, the one driver delivering to the employer's receiving area, they are evidence of both the employer's concern with the

[22] See GD3-64.
[23] See GD3-59.
[24] See GD3-56.

kind of conduct described in those notes and statements, and with its response to that conduct.

[60] I also find that the Claimant was dismissed for what the employer considered to be angry outbursts, and intolerant and inappropriate remarks, which caused other employees to feel anxious and fearful. This is also the behaviour that is alleged as misconduct.

[61] The employer held meetings with the Claimant, in which others were present, to discuss how these behaviours were unacceptable. Its warnings and suspension were both directed towards these behaviours. The employer highlighted some of these behaviours in its December 5 meeting with the Claimant, just before the Claimant's dismissal.

Does the conduct meet the legal test to be considered misconduct?

[62] To establish misconduct, the Commission had to prove all of the following:

1. The Claimant's conduct was willful, meaning intentional or deliberate, or that it was so reckless as to approach willfulness.

2. The Claimant knew, or ought to have known:
   - His conduct was such as to impair the performance of a duty that he owed to his employer.
   - His dismissal was a real possibility as a result of the breach.[25]

– Willfulness

[63] The Claimant's conduct was willful.

[64] According to the witness statements which I referenced, it is likely that some of the Claimant's outbursts and remarks either offended, hurt, intimidated, or humiliated his co-workers and third-party drivers. However, even if these other people were not

[25] See *Mishinibinjima v Canada (Attorney General),* 2007 FCA 36.

affected in this way, the conduct was such that a reasonable person could expect it to negatively impact on their targets or even bystanders.

[65] It is possible that the Claimant intended his remarks, and the manner in which he delivered them, to hurt or offend others. If that were not his intention, he was heedless of the effect he was having, and therefore reckless. He could have moderated or censured his comments, but he chose not to.

– **Duty to employer**

[66] The Claimant also knew, or he ought to have known, that his conduct was interfering with his duty to his employer.

[67] It is in the employer's interests to be able to retain the employees it recruits, and to have those employees work productively. In addition, the Claimant's behaviour towards the truck drivers could have been damaging to the employer's reputation. The Claimant's comments reportedly created anxiety and discord in the workplace, in which it would presumptively be more difficult for employees to focus and be productive.

[68] The employer did not give the Commission a copy of the policy document that it said prohibited conduct such as that of the Claimant. But, regardless of the policy, the Claimant's remarks might reasonably be interpreted to be variously racist, homophobic, xenophobic, and salacious gossip and/or slander. Such conduct is inherently damaging to relationships with both colleagues, clients, and to the interests of the employer.

[69] The Claimant can hold whatever opinions, beliefs, or values that he wishes, but he has no absolute right to express those beliefs however he wants in the workplace. Nor is he entitled to verbally assault others because he has a problem with being touched. The Claimant had a duty to consider the effects of his conduct on his co-workers, the work environment, and the business of his employer.

– **Knew or ought to have known he could be dismissed**

[70] Even if the Claimant was originally ignorant that his comments or tantrums were inappropriate in the workplace, the employer made its expectations clear. The Claimant

was warned, and suspended, and yet he persisted with little apparent effort to modify his behaviour.

[71] When the employer confirmed the Claimant's suspension, it also warned him that a further violation could result in his dismissal. The Claimant suspected that the employer was going to dismiss him in the course of their December 5 meeting, but the employer did not say he had decided to dismiss him at that point. Yet the Claimant accused his manager and union rep of being lesbians and having sex with one another, in the same meeting.

[72] The Claimant either knew that his dismissal was a real possibility as a result of his conduct, or he ought to have known.

How I weighed the evidence

[73] The Claimant does not dispute each and every fact as I have found them, but he recalls many events differently, and largely takes a different view of their significance than the version of events described in the employer and witness statements.

[74] Some of the Claimant's evidence is as follows:

a) The Claimant states that he and the driver got into a yelling match on August 27 because the driver would not stop talking. He believed that the driver was trying to cause him to drop a heavy box. He noted that truck drivers are the kind of people who swear. He neither confirmed nor denied calling the driver Eddie Murphy.

b) He denies any incident on September 1, 2022, involving the new hire. He says he did not call the new hire a "creepy little weirdo." He says he has no problem with LGBTQ people, and that he has no idea why the new hire quit.

c) The Claimant does not deny that he "flew off the handle" on September 21 because L touched him in the lunchroom. However, he says she had touched him once before and he does not like to be touched.

d) Regarding the November 7 incident, the Claimant says that the truck driver was yelling because he would not sign a form. He allows that it is possible that he was also yelling, but he says it was an industrial work area, so he had to yell. He does not believe the manager would have heard him from her office, though.

e) The Claimant claims that he remained calm on November 21, and not in a rage. He denies that he called the driver a faggot several times. However, he believes that the driver was taking his photo and that this was so that the driver could "dox" him. He says that this is a "violation" and "ridiculous." He believes that management was trying to cover for the driver and that there is a coordinated bullying campaign against him.

f) He also said the driver did not just brush against him, but that the driver punched him. He said the driver was out of control.[26]

[75] After considering both the evidence from the employer, as well as the Claimant's evidence, I have given the employer's evidence more weight. Where the employer's evidence differs from that of the Claimant, I have largely preferred it to the Claimant's evidence. I will tell you why.

[76] I find that the employer's evidence is more reliable because it was documented in detail, and much of that documentation was completed on December 10, around the same time as the actual events. Also, the suspensions and records of meetings discussing the claimant's conduct seem to be internally consistent, and consistent over time, which supports both their reliability and their credibility. More than one witness was present for many of the reported incidents, and their witness statements largely corroborate incidents of angry outbursts and inappropriate remarks. There was also more than one witness in all or most of the meetings in which the employer (or a representative of the employer) confronted the Claimant with his conduct. This provides some confidence that the notes accurately report what was said to the Claimant and his responses.

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[26] See GD3-39.

[77] On the other hand, the Claimant has not produced notes from the time of these events or any witnesses that can support his explanations. Many of his denials are implausible or not credible. I will give some examples:

[78] The Claimant says that RR, the Manager on Duty, could not have heard him yelling from her office on November 7. However, RR was on the phone with AD at the time, and AD corroborates RR's evidence. AD recalls that she could hear the Claimant yelling in the background. This shows that the Claimant either had not noticed that it was possible for someone in the office to hear what was going on in the receiving area, did not recall how loud they had been, or that he is intentionally minimizing how heated his conversation with the driver had become.

[79] The Claimant has implicitly denied that he called anyone a faggot or used homophobic slurs. However, when he was asked about this in a meeting with the employer and the notes record that he wanted to "plead the fifth," rather than respond to the question.[27] This is not the kind of response you would expect from a person who had never said such a thing.

[80] The Claimant protests that he meant only to suggest that his manager ("AD") and union supervisor (JG) were "in bed together" in the sense of that they were coordinating.[28] However, the meeting notes seem to rule out this interpretation. He apparently said that AD and JG were lesbians and having sex together.[29] He also told MC after the meeting that AD and JG were having sex together. When MC told him that this was crazy, he did not explain how he only meant it as a metaphor but instead, repeated the claim.[30] The same day, he repeated his claim to L and to JR, in roughly the same words.[31]

[81] The Claimant lost his temper when he was touched by L in the lunchroom, and he has acknowledged that he can lose his temper when anyone touches him. However,

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[27] See GD3-69.
[28] See GD3-47.
[29] See GD3-34.
[30] GD3-61.
[31] See GD3-59; GD3-34.

he claims that he remained calm on November 24 when, according to his account, a driver punched him in the head.[32]

[82] The Claimant said that one driver deliberately distracted him to cause him to drop a heavy box, that another wanted to dox him, and that another driver punched him in the head. He said that his management was conspiring to bully him or cause him to lose control. However, he did not explain why any of these people would do those things. Without some explanation (other than pure caprice) why all of these people were targeting him, his history of events seems to be coloured by efforts to shift the blame to others for the various incidents.

Summary

[83] I have found that the employer dismissed the Claimant for his angry outbursts and inappropriate comments.

[84] I have also found that those outbursts and comments are misconduct within the meaning of the EI Act. The Claimant owed a duty to obey his employer. That included a duty to control his temper and to desist from making racist, xenophobic, homophobic, or otherwise inappropriate comments to other employees, clients, or third-party suppliers to the employer of goods or services. The Claimant willfully disregarded that duty, and he knew or should have known that the employer could dismiss him as a consequence.

Conclusion

[85] I am dismissing the appeal. The General Division made an error of law, but I must reach the same result even after correcting that error.

Stephen Bergen
Member, Appeal Division

[32] See GD3-42.