



Citation: *BG v Canada Employment Insurance Commission*, 2023 SST 1773

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:**

B. G.

**Respondent:**

Canada Employment Insurance Commission

**Representative:**

Gilles-Luc Bélanger

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**Decision under appeal:**

General Division decision dated July 3, 2023  
(GE-23-297)

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**Tribunal member:**

Glenn Betteridge

**Type of hearing:**

Teleconference

**Hearing date:**

November 22, 2023

**Hearing participants:**

Appellant  
Respondent's representative

**Decision date:**

December 11, 2023

**File number:**

AD-23-714

## Decision

[1] I am allowing B. G.'s appeal.

[2] She and the Canada Employment Insurance Commission (Commission) agree the General Division made an error. They say I should make the decision it should have made. And they agree she didn't lose her job for misconduct.

[3] I accept their agreement. This means she isn't disqualified from getting Employment Insurance (EI) benefits.

## Overview

[4] B. G. is the Claimant in this appeal. I call her the Claimant because she made a claim for EI benefits.

[5] The Claimant worked as a superintendent in an apartment complex. Her employer says it let her go because she didn't give a contractor access to the building to do repairs. Her employer also said it gave her a final warning after receiving tenant complaints about the way she did her job.

[6] The Claimant says the contractor already had a key to the building. She didn't want to deal with the contractor in person because they had sexually harassed her in the past.

[7] The Commission decided the Claimant lost her job for misconduct under the *Employment Insurance Act* (EI Act).<sup>1</sup> So it didn't pay her benefits.

[8] This Tribunal's General Division agreed with the Commission and dismissed the Claimant's appeal.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (EI Act) says a person who loses their job because of misconduct is disqualified from getting benefits. In other words, they can't get EI regular benefits.

[9] Now the Claimant and the Commission (parties) agree the General Division made an error in its decision.<sup>2</sup> They also agree she didn't lose her job for misconduct. I have accepted the parties' agreement.

## The parties agree on the outcome of the appeal

[10] The parties reached an agreement at the Appeal Division hearing. This is a summary of what they agreed to:

- The General Division made a **serious factual error**.<sup>3</sup>
- I should allow the Claimant's appeal and give the decision the General Division should have given.
- The Claimant didn't lose her job for a reason the EI Act counts as misconduct.

## I accept the proposed outcome

[11] In misconduct appeals, the General Division has to decide two things:

- the reason the person lost their job
- whether that reason counts as misconduct under the EI Act<sup>4</sup>

[12] To be misconduct the person's conduct has to be **wilful** (conscious, deliberate, or intentional) or reckless to the point of being wilful.<sup>5</sup> To show a person's conduct was wilful the Commission has to show they knew or should have known their conduct

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<sup>2</sup> This is a ground of appeal under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act). That section describes the ground of appeal using these words—it's an error where 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." I call this a **serious factual error**.

<sup>3</sup> The Commission sets out its position at pages AD4-4 and AD4-5 of its representations.

<sup>4</sup> See paragraph 47 of the Federal Court's decision in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>5</sup> See paragraph 9 of the Federal Court of Appeal's decision in *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

breached a duty they owed to their employer, and they knew or should have known they could lose their job for that conduct.<sup>6</sup>

[13] The General Division set out the correct test for misconduct. But it made a serious factual error in its decision.

– **The General Division made a serious factual error when it ignored the Claimant’s evidence about the contractor**

[14] The General Division decided the reason the Claimant lost her job was because she didn’t give the contractor access to the building.<sup>7</sup>

[15] Then it decided the Claimant **knew or should have known her actions could lead to the termination of her employment**.<sup>8</sup> The General Division based that finding of fact on the evidence of tenant complaints, plus the employer’s letters and final warning in response to those complaints.<sup>9</sup> But the General Division **ignored the Claimant’s evidence** explaining why she didn’t give the contractor access to the building.

[16] One of the ways the General Division makes **a serious factual error** is to base its decision on a finding of fact it made by ignoring evidence. I am using the word “ignored” to mean the General Division based its finding of misconduct on a mistake about the facts it made in a “capricious manner or without regard for the material before it.”<sup>10</sup> The Federal Court of Appeal has said this includes the situation where a decision maker **fails to reasonably account for critical evidence that ran counter to its findings**.<sup>11</sup>

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<sup>6</sup> See paragraph 21 of the Federal Court of Appeal’s decision in *Nelson v Canada (Attorney General)*, 2019 FCA 22.

<sup>7</sup> See paragraph 14 of the General Division decision.

<sup>8</sup> See paragraph 45 of the General Division decision.

<sup>9</sup> See at paragraphs 22 and 43 to 45 of the General Division decision.

<sup>10</sup> See section 58(1)(c) of the DESD Act, and footnote 2, above.

<sup>11</sup> See paragraph 41 of *Canada (Attorney General) v Walls*, 2022 FCA 47, where the court cites three Federal Court of Appeal cases that say this.

[17] The Claimant's evidence about the contractor was critical to deciding the misconduct issue. It was directly relevant to whether she knew or should have known she might lose her job for not letting the contractor into the building.

[18] The Claimant testified the contractor already had keys to the building—so she didn't need to let them in. She explained she didn't want to deal with the contractor in person. The contractor had sexually harassed her before. When she had told her employer, it didn't take her seriously.<sup>12</sup>

[19] It wasn't enough for the General Division to summarize the Claimant's evidence about the contractor in the part of its decision where it considered the reason she lost her job.<sup>13</sup> It had to grapple with her evidence when it considered whether that reason was misconduct. If the General Division thought her evidence about the contractor wasn't relevant, or wasn't credible, it had to state that and explain why. But it didn't do that. Instead, it accepted the Commission's evidence about tenant complaints, ignored her evidence about the contractor, and decided she lost her job because of misconduct.<sup>14</sup> This was a serious factual error.

#### – **Fixing the error**

[20] Because I have found the General Division made a serious factual error, I have the power to fix the error.<sup>15</sup> The parties agreed I should give the decision the General Division should have given.

[21] I have reviewed the documents from the General Division and listened to the recording of the hearing. I am satisfied the evidence supports the parties' agreement that she didn't lose her job for misconduct. Her evidence explaining why she didn't give the contractor access to the building shows she didn't know and should not have known she could lose her job for that reason.

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<sup>12</sup> This was part of her testimony at the General Division hearing.

<sup>13</sup> See paragraphs 13 and 16 of the General Division decision.

<sup>14</sup> See paragraph 52 of the General Division decision.

<sup>15</sup> Section 59(1) of the DESD Act gives this power to the Tribunal's Appeal Division.

## **Conclusion**

[22] I am allowing the Claimant's appeal and making the decision the General Division should have made.

[23] I have accepted the parties' agreement that the Claimant didn't lose her job for misconduct. This means she isn't disqualified from getting EI benefits.

Glenn Betteridge  
Member, Appeal Division