



Citation: *TV v Canada Employment Insurance Commission*, 2023 SST 1658

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:

T. V.

Respondent:

Canada Employment Insurance Commission

Representative:

Gilles-Luc Bélanger

Decision under appeal:

General Division decision dated May 9, 2023
(GE-22-3550)

Tribunal member:

Janet Lew

Type of hearing:

In Writing

Decision date:

November 21, 2023

File number:

AD-23-740

Decision

[1] The appeal is allowed.

[2] The Appellant, T. V. (Claimant), is not disqualified from receiving Employment Insurance benefits.

Overview

[3] The Claimant is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Commission (Commission), had proven that the Claimant lost his job because of misconduct. In other words, he did something or failed to do something that caused him to lose his job.

[4] The General Division found that the Claimant regularly took longer breaks from his work without his employer's permission and that he reasonably should have known that he could lose his job by doing this. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made important procedural, legal, and factual errors in dismissing his appeal. He says that the General Division made a mistake in finding that he should have known that he could lose his job. He claims that none of the evidence showed that his employer had any policies about taking breaks or, for that matter, any guidelines for those who took long breaks. Without any policies or guidelines, he denies that he knew that he would face any consequences for taking long breaks.

The parties agree on the outcome of the appeal

[6] The Commission concedes the appeal. The Commission asks the Appeal Division to allow the Claimant's appeal.

I accept the proposed outcome

[7] Given the evidence before the General Division and for the reasons set out below, allowing the appeal is the appropriate disposition of this matter.

Issues

[8] The issues in this appeal are as follows:

- a) Did the General Division base its decision on any important factual errors?
- b) Did the General Division make any legal errors?
- c) Did the General Division make any procedural errors?
- d) If the answer is “yes” to any of the above questions, how should the error be fixed?

Analysis

[9] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.¹

[10] For factual errors, the General Division had to have based its decision on that error, and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.² In effect, this means that the evidence had to be able to support the General Division’s decision.

The evidence did not support the General Division’s decision

[11] The Claimant argues that the General Division based its decision on an important factual error that it made in a perverse or capricious manner. He says the evidence simply did not support the General Division’s decision.

¹ See section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

² See section 58(1)(c) of the DESDA.

[12] In particular, the Claimant argues that none of the evidence showed that he knew or should have known that he faced dismissal from his job if he took long breaks without his employer's permission.

[13] He argues that his employer did not have any clear policies on taking breaks. He says that, even if there had been any policies about how long he could take for a break, his employer did not have any guidelines or procedures for dealing with any violations of those policies. He argues that his employer should have warned or given him a chance to correct his behaviour, if he was in fact taking longer breaks than he was allowed to take.

[14] The Commission notes that the Claimant's employer confirmed that it never warned the Claimant about taking long breaks.³ The employer also confirmed that its policies and procedure manual did not contain any specific information about the length of breaks.⁴ The policy dealt with other issues, including absences from work, dress codes, grievances, amongst other things, but it did not say anything about breaks.

[15] So, the Commission acknowledges that it would be difficult to conclude that the Claimant was necessarily aware that taking long breaks meant risking his employment. As the Commission states, "The employer's failure to intervene gives the impression that it endorses or accepts the undesirable conduct."⁵

[16] As serious as the Claimant's conduct may have been, without any prior warnings from his employer, he could not reasonably have known that his employer would dismiss him.

[17] For misconduct to occur, a claimant has to or should be aware that certain conduct is prohibited. They also have to or should be aware of what the consequences might be if they willingly choose to engage in that conduct. These facts were not present in this case. So, the Claimant did not commit misconduct.

³ See Supplementary Record of Claim, dated September 20, 2022, at GD 3-30.

⁴ See employer's Policy and Procedure Manual, dated December 2017, at GD 3-33 to GD 3-39.

⁵ See Representations of the Commission to the Social Security Tribunal – Appeal Division, at AD 3-4.

[18] As I have determined that the General Division made a factual error, it is unnecessary to address the balance of the Claimant's arguments.

Fixing the error

[19] The Commission asks the Appeal Division to allow the appeal by giving the decision it says the General Division should have given.

[20] I agree that this is appropriate. Returning the matter to the General Division would accomplish little as all of the relevant evidence has already been produced. The Claimant argues that the General Division relied on video evidence that had not been disclosed to him, but the employer did not have any records or video footage of the Claimant taking long breaks.

[21] The evidence shows that the Claimant's employer did not have any policy against taking long breaks or that an employee could face dismissal if they habitually took long breaks without the employer's permission. The Claimant was unaware that he could face dismissal for frequently taking long breaks.

[22] The Commission has not established that the Claimant committed misconduct.

Conclusion

[23] The General Division's findings were not supported by the evidence. For that reason, I am allowing the appeal. The Claimant did not commit misconduct and he is not disqualified from receiving Employment Insurance benefits.

Janet Lew
Member, Appeal Division