



Citation: *DS v Canada Employment Insurance Commission*, 2024 SST 634

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: D. S.

Respondent: Canada Employment Insurance Commission
Representative: Jessica Murdoch

Decision under appeal: General Division decision dated
February 26, 2024 (GE-24-236)

Tribunal member: Glenn Betteridge

Decision date: June 5, 2024

File number: AD-24-230

Decision

[1] I am allowing D. S.'s appeal.

[2] He and the Canada Employment Insurance Commission (Commission) agree the General Division made an important factual error. They say I should decide that he didn't lose his job for misconduct.

[3] I accept the parties' agreement about the error and the outcome. This means D. S. isn't disqualified from getting Employment Insurance (EI) benefits for that reason.

Overview

[4] D. S. is the Claimant in this case. After he lost his job, he made a claim for EI regular benefits.

[5] The Commission decided he lost his job for a reason that counts as misconduct under the *Employment Insurance Act* (EI Act).¹ So, the Commission didn't pay him benefits.

[6] He asked the Commission to reconsider its decision. The Commission maintained its decision. So, he appealed to this Tribunal's General Division. The General Division dismissed his appeal. Then I gave him permission to appeal the General Division decision.

[7] At a settlement conference, the Claimant and the Commission (parties) agreed the General Division made an error and agreed about how I should fix that error.

The parties agree on the outcome of the appeal

[8] I invited the parties to a settlement conference. At the settlement conference on June 5, 2024, the parties agreed:

¹ Section 30(1) of the *Employment Insurance Act* says, in part, that a person is disqualified from receiving benefits if they lost their job because of their misconduct.

- The General Division made an important factual error when it based its decision on a factual finding it made by ignoring or misunderstanding a letter from the Claimant's psychiatrist.
- I should make the decision the General Division should have made. The Claimant didn't lose his job for a reason that counts as misconduct under the EI Act.

I accept the proposed error and outcome

[9] 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 Act²

[10] To be misconduct the person's conduct has to be **wilful** (conscious, deliberate, or intentional) or reckless to the point of being wilful.³ To show a person's conduct was wilful, the Commission has to show they **knew or should have known** their conduct breached a duty they owed to their employer, and they **knew or should have known** they could lose their job for that conduct.⁴

[11] The General Division used the correct test for misconduct. But it made an important factual error when it applied that test.

– The General Division ignored or misunderstood the psychiatrist's letter

[12] The General Division makes an important factual error when it bases its decision on a factual finding it made by ignoring or misunderstanding evidence.⁵ In other words,

² See paragraph 47 of the Federal Court's decision in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

³ See paragraph 9 of the Federal Court of Appeal's decision in *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

⁴ See paragraph 21 of the Federal Court of Appeal's decision in *Nelson v Canada (Attorney General)*, 2019 FCA 22.

⁵ Section 58(1)(c) of the DESD Act says it is a ground of appeal 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 have described this ground of appeal using plain language.

the evidence goes squarely against or doesn't support a factual finding the General Division made.⁶

[13] The Claimant sent the General Division a letter from his psychiatrist.⁷ Part of that letter says (I have added the underlining):

His [the Claimant's] manic symptoms described at the time included: irritability, agitation, swearing, hypertalkative, interrupting others, bizarre behaviours, impulsivity (such as spending sprees and giving away property), increased energy, decreased need for sleep, cognitive impairments/memory issues.

The link between his illness and the incident are clear. He acted out of character and due to his illness. His symptoms of irritability, impulsivity and cognitive impairment led directly to him impulsively and irritably confronting the protester and he was unable to reflect at the time and use better judgment.

[14] The General Division acknowledged that the psychiatrist's letter supports the Claimant's testimony about his bipolar manic episode (paragraphs 29 and 35).

[15] Then the General Division weighed the evidence and decided that:

- The Claimant's conduct was intentional (paragraph 31).
- He hadn't persuaded the General Division his actions were involuntary at the time, even though it accepted he was bipolar and was in the middle of a manic episode (paragraph 40).
- The evidence shows the Claimant was aware of his actions during the incident (paragraphs 41 and 47).

[16] Based on these findings of fact, the General Division found the Claimant should have known he could be dismissed for his conduct. In other words, his conduct was wilful. And the General Division went on to decide he lost his job for misconduct.

[17] I agree with the parties that the General Division based its decision on an important factual error. The General Division's factual findings ignore or misunderstand

⁶ See *Garvey v Canada (Attorney General)*, 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

⁷ See GD2-11.

the psychiatrist's letter. In other words, the General Division's factual finding that the Claimant's conduct was wilful goes squarely against the psychiatrist's letter. And it based its decision on this factual finding that went against the evidence.

– **The outcome and what the Commission has agreed to do now**

[18] Because I have found the General Division made an important factual error, I have the power to fix (remedy) the error.⁸

[19] The parties agreed I should give the decision the General Division should have given. Based on the psychiatrist's letter, the Commission conceded that the Claimant's conduct wasn't wilful. So, it said he didn't lose his job for misconduct. This is also what the Claimant argued.

[20] I agree with the parties about how I should fix the General Division's error. I also agree that the evidence—including the underlined parts of the psychiatrist's letter, above—shows the Commission hasn't proven the Claimant lost his job for misconduct. This means the Claimant isn't disqualified from getting EI benefits for that reason.

[21] The Commission said that after it receives this decision, one of its agents will call the Claimant. The Claimant and the agent can fill out the biweekly reports the Commission needs to process and pay his claim for EI benefits.

Conclusion

[22] I am allowing the Claimant's appeal.

[23] I have made the decision the General Division should have made. The Commission hasn't proven the Claimant lost his job due to misconduct. So, he isn't disqualified from getting benefits for this reason.

⁸ Section 59(1) of the DESD Act gives the Appeal Division power to fix (in other words, remedy) the General Division's error.

Glenn Betteridge
Member, Appeal Division