Citation: *RV v Canada Employment Insurance Commission*, 2024 SST 1230

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. V.
Representative:	B. P.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen

Decision under appeal:	General Division decision dated June 25, 2024 (GE-24-1595)

Tribunal member:	Glenn Betteridge
Type of hearing:	Teleconference
Hearing date:	September 19, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	October 13, 2024
File number:	AD-24-478

Decision

[1] I am dismissing R. V.'s appeal.

[2] I accepted the parties' agreement the General Division made a legal error. I made the decision the General Division should have made.

[3] My decision doesn't change the outcome. R. V. lost his job for a reason that counts as misconduct under the *Employment Insurance Act* (EI Act). This means he is disqualified from getting benefits.

Overview

[4] R. V. is the Claimant. He lost his job as a security guard at a shopping complex, then applied for Employment Insurance (EI) regular benefits. He was 29 years old.

[5] The Canada Employment Insurance Commission (Commission) disqualified him from getting benefits because it said he lost his job for misconduct. His employer dismissed him because he was caught shoplifting while working as a security guard.[1]

[6] The Commission upheld its decision when he asked it to reconsider. He appealed to this Tribunal's General Division. The General Division dismissed his appeal. It decided the Commission showed he lost his job because of misconduct.

[7] I gave him leave to appeal the General Division decision. There was an arguable case the General Division made a legal error. It seems that it didn't make a finding about whether the Claimant knew or should have known there was a possibility his employer would let him go because of his conduct.

[8] The parties agree the General Division made that legal error. I accepted their agreement. And I made the decision the General Division should have made.

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[1] See GD3-26, GD3-33, GD3-50, and GD3-53.

Issues I have to address first

Post-hearing documents

[9] The Claimant sent the Tribunal two emails after the hearing.[2] The Claimant restated evidence and arguments the Claimant had already made. And the Claimant changed his position on the remedy he wanted.

[10] I have not considered these documents.

[11] I didn't ask for or give the parties permission to send in evidence or arguments after the hearing. The Claimant had a full and fair opportunity to make arguments before the hearing in writing, and to make oral arguments at the hearing.

[12] In any event, I have made the decision the General Division should have made. (This was what the Claimant asked me to do at the hearing.) Both parties had a full and fair opportunity to make their case at the General Division. I will analyze the Claimant's arguments about procedural unfairness in more detail, below.

New evidence

[13] The Appeal Division can't consider new evidence, with some exceptions.[3]

[14] The Claimant sent in documents before the Appeal Division hearing. I believed the documents might have contained new evidence. I wrote to the parties and told them I would hear arguments about whether the documents contained new evidence. And if so, whether I should accept that evidence. I referred them to a leading court case for the legal test.

[15] At the hearing, I identified seven potentially new pieces of evidence. The parties made arguments. I made a ruling about each piece of evidence and gave oral reasons. I am not going to repeat every ruling and reason here. I decided I could not consider the following new evidence: pictures of the store exterior[4]; information from the internet on

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[2] See AD9 and AD10.
[3] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 40.
[4] See AD5-4 to AD5-8.

most frequently shoplifted items[5]; a letter that gives a character reference for the Claimant[6]; and, a mirror selfie of the Claimant in a university sweatshirt[7].

Issues

[16] I have to decide five issues.

- Should I accept the parties' agreement that the General Division made a legal error when it didn't use part of the legal test for misconduct?
- Did the General Division use an unfair process, or was the Member biased?
- Did the General Division make an important factual error by ignoring medical evidence or evidence the Attorney General let him keep his security Guard licence?
- Should I correct the General Division error(s) by making the decision it should have made?
- Did the Claimant know, or should he have known his employer might dismiss him for his conduct?

[17] To decide these issues, I reviewed the Claimant's application and other documents he sent to the Appeal Division.[8] I read the General Division decision and listened to the hearing recording. I reviewed the documents from the General Division file. I reviewed the Commission's written arguments.[9] And I considered what the parties said at the Appeal Division hearing.

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[5] See AD5-9 to AD5-12.
[6] See AD5-13.
[7] See AD5-15.
[8] See AD1, AD6, and AD8.
[9] See AD4.

Analysis

[18] I am dismissing the Claimant's appeal. I have decided he lost his job for misconduct under the EI Act. So, the law says he can't get benefits.

[19] The General Division member explained the law of misconduct to the Claimant and his Representative. At the General Division, the Claimant focused his evidence and arguments on other people's bad conduct and his good character. Unfortunately for the Claimant, the General Division could not base its decision on these factors. They aren't part of the legal test for misconduct under the EI Act.

[20] As a security guard in a shopping complex, the Claimant should have known that his conduct breached a duty he owed his employer and could get him dismissed. Even if his conduct wasn't wilful (conscious, deliberate, or intentional), the Commission has shown it was reckless to the point of being wilful.

[21] The Claimant admits he made a stupid mistake. He argues he has already learned his lesson the hard way.[10] He argued a better approach for the General Division would have been "to help educate Rob [the Claimant] to use a shopping cart or bag in the future, which he had to learn the hard way." [11] Unfortunately for the Claimant, this isn't the Tribunal's role.

The law I have to consider in this appeal

[22] The Claimant has to show there is an arguable case the General Division made an error the law lets me consider.[12] He has argued the General Division made three errors:

- The General Division made a legal error.

[10] See AD1-6.
[11] See AD1-8.
[12] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out grounds of appeal. I use plain language and call these errors.

- The General Division used an unfair process, prejudged the case, or was biased. (This is a procedural fairness or natural justice error.)

- The General Division made an important factual error.

[23] The law gives the Appeal Division powers to remedy (fix) the General Division's errors.[13]

[24] The law disqualifies a person from getting EI benefits if they lose their job because of their misconduct.[14] In misconduct appeals, this Tribunal has a narrow role.[15] The General Division had to decide two things:

- the reason the Claimant lost his job

- whether the Commission had proven that reason counts as misconduct under the EI Act[16]

[25] To be misconduct, the person's conduct has to be wilful (conscious, deliberate, or intentional) or reckless to the point of being wilful.[17] This means the Commission has to show the person knew or should have known their conduct breached a duty they owed to their employer. And the Commission has to show that the person knew or should have known they could lose their job for that conduct.[18]

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[13] See section 59(1) of the DESD Act.
[14] See sections 29 and 30(1) of the *Employment Insurance Act* (EI Act).
[15] See *Brown v Canada (Attorney General)*, 2024 FC 1544 at paragraph 54, citing numerous cases from the Federal courts.
[16] See paragraph 47 of the Federal Court's decision in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[17] See paragraph 9 of the Federal Court of Appeal's decision in *Canada (Attorney General) v Bellavance*, 2005 FCA 87.
[18] See paragraph 21 of the Federal Court of Appeal's decision in *Nelson v Canada (Attorney General)*, 2019 FCA 22.

I accept the parties' agreement the General Division made a legal error when it didn't use part of the test for misconduct

[26] Before the hearing, the Commission conceded that the General Division made the legal error I identified in the leave to appeal decision.[19] At the hearing, the Claimant agreed this was an error.

[27] I accept the parties' agreement. The General Division set out the correct legal test to decide whether the Claimant's conduct was misconduct.[20] Then it used that test to identify two issues it had to decide in the Claimant's circumstances.[21]

[28] But the General Division didn't decide one of those issues. It didn't make a finding about whether the Claimant knew or should have known there was a possibility his employer would let him go.

[29] So, the General Division didn't use a part of the legal test for misconduct. That was a legal error.

[30] I reviewed the Claimant's application to appeal. He checked the procedural unfairness error box on the application form. When I read his explanation and reasons for appeal, he makes arguments about one more error. I will deal with both types of errors, one at a time.

The General Division was impartial and used a fair process

– A reasonable person would think it's more likely than not the Member was impartial

[31] In his application, the Claimant argues the General Division Member:

- was biased against the Claimant from the get-go
- interrogated the Claimant like a police officer, acted like a first run insurance claims agent denying the Claimant benefits, treated the Claimant as a

[19] See AD4-1 and AD4-5.
[20] See the General Division decision at paragraphs 10 and 11.
[21] See the General Division decision at paragraph 24.

criminal, and acted like an arrogant investigator who thinks she knows more than the BC Attorney General

    - she did this because the huge Canadian government deficit made the Member a “hired gun” to avoid paying EI benefits

- didn’t do her homework and wasn’t a competent investigator
- had no empathy as a uninformed bureaucrat
- handled the Claimant and his parents in a discriminatory fashion
- was perhaps anti-military because she was apparently unimpressed with the Claimant’s five years with the Royal Canadian Air Cadets
- was anti-citizen and treated the Claimant like a second class citizen, and her decision doesn’t bring out the best in Canada and makes people want to leave for the USA

[32] The Claimant seems to rely on the Member’s conduct during the hearing and her written decision to deny him benefits to support these arguments.

[33] At a case conference, I explained the legal test for bias.[22] I explained the Claimant had to prove it was more likely than not the Member wasn’t impartial based on evidence. I also explained that I could accept new evidence to show bias or other procedural unfairness.

[34] At the hearing, the Claimant argued the General Division member wasn’t impartial. His representative’s research showed that as a lawyer she had represented unions and worked on cases involving government bodies. The Member is currently

[22] See *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at page 394. The Court said the test is, “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

paid by the federal government, and this could also show bias. The Representative said this is how she feels.

[35] This evidence doesn't show bias or impartiality. It shows the General Division Member practised law before she was appointed to the Tribunal. Before she was given the statutory independence to hear and make decisions in EI appeals as a member of the General Division. And before she was presumed to be impartial.

[36] I listened to the General Division hearing. The Claimant's Representative chose to have the Member take the lead asking the Claimant questions.[23]

[37] Yet, the Claimant's Representative and his father repeatedly and sometimes aggressively interrupted the Member when she was explaining the law or asking the Claimant questions.[24] They gave a mix of evidence and argument. Most of what they said when they interrupted was irrelevant to the Member's questions and the legal issues the General Division had to decide. Or it was hearsay or speculation and personal opinion about issues that weren't relevant. And they continued to interrupt despite the Member's attempts to get them to stop.

[38] The Member focused her questions on the Claimant's conduct during the incident that led his employer to dismiss him. Sometimes the Member asked the Claimant the same question more than once, and in different ways. This was because the Claimant was either unable or unwilling to give a direct answer. He often responded with an argument, not evidence. Or because the Representative or the Claimant's father interrupted before the Claimant could answer her question.

[39] The legal test to show a tribunal member was biased or prejudged the case is difficult to meet.[25] A Tribunal member is presumed to be impartial.

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[23] Listen to the recording of the General Division hearing at 46:55.
[24] Listen to the recording of the General Division hearing at 39:30, 43:00, 44:50, 54:37, 1:06:11, 1:13:38, 1:17:42, 1:19:55, 1:23:16, 1:27:43, and 1:43:19.
[25] See *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69; *and Kuk v Canada (Attorney General)*, 2024 FCA 74.

[40] The Claimant hasn't presented any credible and reliable evidence that support his allegations of bias, prejudice, or discrimination. So, no reasonably informed person viewing the matter realistically and practically would conclude the Member wasn't impartial or would not decide his appeal fairly.

– The General Division process was fair

[41] The Claimant made two arguments that the General Division process was unfair.

[42] First, he says his lawyer resigned on June 4, 2024.[26] (The hearing was scheduled for and went ahead on June 11, 2024.) This wasn't a reasonable amount of time. He didn't have a representative. He says his Representative was "totally unprepared."

[43] Two days after the Tribunal received the lawyer's letter, it sent the Claimant a complete copy of his appeal file. On June 11, 2024 (before the hearing), the Claimant emailed the Tribunal to say Dr. Barbra Popil would be his representative and a character witness.[27]

[44] At the hearing the Claimant's Representative said she was representing the Claimant and prepared to go ahead.[28] She said she had studied law for 10 years at UBC and had three degrees. She had gone through the documents (GD3 and GD4) and made points that she thought were relevant.[29] She agreed her role was to make representations. She also said that she understood that she would not be a witness because she didn't have first-hand knowledge of the relevant events.

[45] So, the Claimant hasn't shown an arguable case the General Division acted unfairly by going ahead with the hearing. Or by clarifying with the Representative that she understood she would not be a witness.

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[26] See GD9.
[27] See GD10.
[28] Listen to the recording of the General Division hearing at 14:00 to 22:00.
[29] Listen to the recording of the General Division hearing at 25:06.

[46] Second, the Claimant argues the hearing was unfair. He argues the Member handled the Claimant and his parents in a discriminatory fashion, scolding and lecturing.[30] And she treated the Claimant like a second-class citizen, and interrogated him. (There is some overlap between the Claimant's bias argument and his unfair hearing argument.)

[47] The hearing lasted almost 2.5 hours. The recording shows me the General Division Member actively adjudicated the hearing. This is what the Tribunal's procedural rules tell her to do.[31]

[48] The Member explained the correct law and the hearing process. She asked the Claimant relevant questions because he could give the best evidence about his conduct at the grocery store. She respectfully and professionally used her power to run the hearing in a way that was fair while responding appropriately to the repeated interruptions by the Claimant's Representative and father. Finally, she heard arguments from the Claimant's Representative.

[49] In other words, the Claimant hasn't shown the General Division deprived him of the opportunity to know the case he had to meet or to fully and fairly respond to it.

– **Summary about fairness**

[50] The Claimant hasn't shown that the General Division used an unfair process, or that the Member was biased or prejudged his case. In other words, he hasn't shown the General Division made a procedural fairness of natural justice error.

The General Division didn't ignore or misunderstand relevant evidence

[51] The Claimant says the General Division ignored his medical note.[32] He argues the General Division, "cherry-picked her report to simply side with the security-guard company."[33] He also argues the General Division should have followed the BC Attorney

[30] See AD1-6.
[31] See sections 8(2) and 17 of the *Social Security Tribunal Rules of Procedure* (Tribunal Rules).
[32] See GD10-6.
[33] See AD1-7.

General's letter about the Claimant's conduct and security guard licence.[34] At the Appeal Division hearing, the Claimant argued the General Division got the evidence wrong—he never left the grocery store, he was in the outdoor area which was part of the store.

[52] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding relevant evidence.[35] It is the General Division's job to review and weigh the evidence.[36] I can't re-weigh the evidence or substitute my view of the facts. The law also says I can presume the General Division reviewed all the evidence—it doesn't have to refer to every piece of evidence.[37]

[53] The General Division considered the medical note.[38] It is one sentence, written by a medical doctor. It says he reported anxiety and fatigue for several reasons. The General Division weighed the evidence and made a finding. "But nothing in the Appellant's evidence or in the report connects his actions on October 28, 2023, with his medical situation. The Appellant knew it was against the rules for him to take something from the store without paying."[39]

[54] The General Division didn't cherry-pick. The evidence about the reason the Claimant's employer dismissed him was clear. That evidence was what the employer told the Commission and the documents it sent to the Commission. There was no credible and reliable evidence that contradicted that evidence.

[55] The General Division considered and weighed evidence from the employer, the Commission, and the Claimant when it decided whether the reason he lost his job was misconduct. It considered the Claimant's evidence and argument he never left the

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[34] See GD6-10.
[35] 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 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, based on the words in the Act and the cases that have interpreted the Act.
[36] See *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paragraph 33.
[37] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.
[38] See paragraph 68 of the General Division decision.
[39] See paragraph 68 of the General Division decision.

store.[40] It assessed the credibility of his evidence. It didn't ignore or misunderstand evidence about this.

[56] It was open to the General Division to find the Claimant left the store—meaning the building. The evidence shows the garden centre was outdoors, not fenced in, he had to pass the cashiers to get to the garden centre, and there was no cashier outside.[41] So, the General Division didn't base its finding of fact (or its decision) on a misunderstanding of or ignoring the evidence.[42]

[57] The General Division considered and weighed the evidence about the Attorney General's decision.[43] The General Division explained why it wasn't going to follow it. And the General Division didn't have to follow it when it decided whether the Claimant conduct counted as misconduct under the EI Act.

[58] To summarize, the Claimant hasn't shown the General Division ignored or misunderstood relevant evidence. And my review of the record shows me the General Division's decision is supported by the evidence. This means the General Division didn't make an important factual error.

The Claimant should have known his employer might dismiss him—his conduct was misconduct under the EI Act

[59] I am going to use my power to fix the General Division's error by making the Decision the General Division should have made. This is the appropriate remedy. Both parties had a full and fair opportunity to present their case at the General Division. As I decided above, the General Division didn't make any procedural fairness or natural justice errors. The hearing lasted over 2.5 hours. And the evidentiary record is strong—with documents and testimony.

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[40] See paragraphs 36 to 46 of the General Division decision.
[41] See the photo of the garden centre/area at GD2-2.
[42]. See paragraphs 70 to 72 of the General Division decision.
[43] See paragraphs 62 and 63 of the General Division decision.

[60] It makes no legal or practical sense for me to send the case back to the General Division. The Tribunal has to decide appeals as simply and quickly as fairness allows.[44]

[61] I have to decide one issue: Did the Claimant know (or should he have known) his employer might dismiss him for his conduct? This is the second part of the test for misconduct under the EI Act, as decided by the courts.

[62] The Claimant hasn't shown the General Division made any important factual errors, and only one legal error. So, I am adopting the General Division's findings of fact. I am also adopting the General Division's mixed findings of fact and law—where it applied the correct law to its factual findings to decide an issue it had to decide.

[63] The uncontradicted evidence shows the Claimant was a licenced security guard who worked at a shopping complex where shoplifting was a serious problem. That was his evidence. I am adopting the General Division's finding that the Claimant's conduct was reckless:

> [T]he things he did were so reckless that they were almost wilful. He put the air fresheners in the waistband of his pants, and they fell down into his pants. And then he left the store. He should have known that by not properly securing the air fresheners in his waistband there was a risk that they would fall down. And he should have known that if they fell down, and he left the store without paying for them – even if he was going outside to look at flowers - he could be accused of trying to steal them.[45]

[64] In these circumstances, the Claimant should have known that if he were stopped by a security guard (loss prevention officer) and accused of stealing, there was a possibility his employer would dismiss him.

[65] The courts have said that workers who transform a risk of unemployment into a certainty should not get EI benefits.[46] EI benefits are for people who are involuntarily unemployed.[47]

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[44] See section 8(1) of the Tribunal Rules.
[45] See paragraph 72 of the General Division decision.
[46] See *Canada (Attorney General) v Langlois*, 2008 FCA 18; and *Canada (Attorney General) v Marier*, 2013 FCA 39.
[47] See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] SCR 29.

[66] The Claimant doesn't think his employer acted properly when it dismissed him. But the law says the General Division could not consider his employer's conduct or whether the dismissal was justified. That is for another tribunal or court to decide. And the General Division could not consider the evidence of his good character and work ethic—it wasn't legally relevant.

[67] The Claimant acknowledged he made a mistake.[48] He acted recklessly and put his job at risk. That risk came to be. So, unfortunately for the Claimant, the law says he can't get EI benefits.

Conclusion

[68] The appeal is dismissed. The Claimant is disqualified from getting EI benefits because he lost his job for a reason that counts as misconduct under the EI Act.

Glenn Betteridge
Member, Appeal Division

[48] See AD1-8, where the Claimant argues: "Although she is correct that Rob's method of carrying the grocery-store items in his belt wasn't smart, her punitive actions to deny him federal help for stupidity is overkill."