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Canada Employment Insurance Commission v KH, 2025 SST 507

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[TRANSLATION]

Citation: *Canada Employment Insurance Commission v KH*, 2025 SST 507

Social Security Tribunal of Canada
Appeal Division

Decision

2025 SST 507 (CanLII)

Appellant:	Canada Employment Insurance Commission
Representative:	Louis Gravel
Respondent:	K. H.

Decision under appeal:	General Division decision dated February 4, 2025 (GE-25-109)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	May 1, 2025
Hearing participants:	Appellant's representative Respondent
Decision date:	May 12, 2025
File number:	AD-25-132

Decision

[1] The Commission's appeal is allowed. The Claimant lost his job because of misconduct.

Overview

[2] The Claimant lost his job on June 5, 2024. His employer said that he was let go because of an event that took place on June 4, 2024, during the night shift. The night shift manager filed a complaint against the Claimant, saying that he had put his hand on her shoulder three times against her will and had tried to grab her by the neck.

[3] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.

[4] The Commission reconsidered and maintained its initial decision. The Claimant appealed to the Tribunal's General Division.

[5] The General Division decided that the Commission hadn't proven that the Claimant lost his job because of misconduct. It allowed his appeal.

[6] The Commission was given permission to appeal the General Division's decision. It says that the General Division made errors of fact and errors of law.

[7] I have to decide whether the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner and made an error in its interpretation of misconduct.

[8] I am allowing the Commission's appeal.

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Issue

[9] Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner and make an error in its interpretation of misconduct?

Analysis

Preliminary remarks

[10] It is well established that I have to consider only the evidence that was before the General Division. A hearing before the Appeal Division isn't a new opportunity to present evidence. The Appeal Division's powers are limited by law.[1]

[11] So, I listened to the recording of the hearing before the General Division on February 3, 2025.

Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner and make an error in its interpretation of misconduct?

[12] The General Division determined that the Claimant lost his job after the events of June 4, 2024.

[13] The General Division determined that the multiple relevant facts on file, including the Claimant's cognitive abilities, the results of the investigation into the events of June 4, 2024, and the agreement reached in mediation by the CNESST [Quebec's labour standards commission], showed that the Claimant's actions weren't wilful and that he could not have known that he would be let go. It allowed the Claimant's appeal.

[1] *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

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[14] In my opinion, the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without considering the evidence presented.

[15] The evidence before the General Division about the Claimant's mental health is clearly insufficient to cast doubt on his cognitive abilities and the deliberate nature of his actions. Yes, the Claimant had chronic behavioural problems, but the evidence before the General Division simply doesn't support the conclusion that his conduct on June 4, 2024, wasn't deliberate because of his mental state.

[16] There is also no evidence on file to support the General Division's finding that the agreement between the Claimant and his employer was intended to compensate for unjust damage to the Claimant. The agreement was reached without admission or acknowledgement of liability on either side.

[17] Lastly, I am of the opinion that the General Division made an error of law in its interpretation of misconduct within the meaning of EI, specifically in determining that mitigating factors should be considered in deciding whether the Claimant lost his job because of misconduct.

[18] The General Division's errors mean that I am justified in intervening.

Remedy

[19] Considering that the parties had the opportunity to present their case to the General Division, I will give the decision that the General Division should have given.

The agreement reached with the employer

[20] The Claimant relied heavily on the out-of-court settlement with his employer to argue that he didn't commit misconduct. It must be reiterated that the mere existence of a settlement agreement signed between the parties doesn't in itself resolve the question of whether the employee lost his job because of misconduct. It is the Tribunal's job to examine the evidence and give a decision.

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[21] I also note that the agreement doesn't expressly or implicitly include any admission by the employer that the facts in the Claimant's file were incorrect or didn't accurately reflect the events as they occurred.

[22] It is important to note that the agreement was made without any admission and doesn't contain any retraction by the employer of the events that led to the Claimant's dismissal in the first place.

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No criminal charges

[23] The Claimant says the lack of criminal charges shows that his actions were harmless and that the team leader's complaint was unfounded. I have to reiterate that it is the Tribunal's job to examine the evidence and give a decision. Also, the burden of proof in criminal proceedings is quite different from the one the Commission or the employer must meet in this case.

The issue of misconduct

[24] I have to decide whether the Claimant lost his job because of misconduct.

[25] It is well established that the burden of proof to establish misconduct within the meaning of EI rests with the employer and the Commission, which must demonstrate, on a balance of probabilities and not beyond a reasonable doubt, that the Claimant committed the act complained of and lost his job because of his misconduct.

[26] The notion of misconduct doesn't imply that the breach of conduct needs to be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful, or at least of such a careless or negligent nature that you could say the person willfully disregarded the effects their actions would have on their performance.

[27] The General Division's role isn't to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant

in such a way that the dismissal was unjustified, but rather to decide whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.

[28] According to the employer, the Claimant placed his hand on his team leader's shoulder without her consent. She asked him to remove his hand, but he didn't move at all. So she moved a little further away, and the Claimant moved closer to her and tried to touch her again three more times. The shift manager then got angry and as she tried to get away from him, he tried to grab her by the neck with his hand.[2]

[29] According to the Claimant, he put his hand on the team leader's shoulder to talk to her. She started screaming and hunched down. He withdrew his hand and apologized. He didn't try to touch her after that. He compared his gesture to the pats on the back and hugs employees give each other.[3]

[30] After reviewing the evidence, I give more weight to the employer's version.

[31] The Claimant admitted to touching his shift manager without her consent, and that she screamed loud enough for others to hear. It is unlikely that the team leader would shout so intensely at a friendly gesture, as he claims.

[32] The team leader promptly filed a complaint against the Claimant. After the employer viewed the video of the event, the Claimant was fired.

[33] When confronted about the video of the event, the Claimant said the recording had probably been altered by his employer, since it had done that in the past. This version of the Claimant's story is simply not credible, given the employer's commendable efforts to allow him to keep his job despite the 25 disciplinary notices he has received since he was hired.

[34] I also note from the evidence that this wasn't the first incident involving the Claimant and a team leader. He was suspended on July 4, 2023, for disrespecting his team leader. He had received another disciplinary notice on May 29, 2024, a week

[2] GD3-20.
[3] GD3-23.

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before the last event, for disrespecting his shift manager. The notices make it clear that further breaches of the code of conduct would result in action up to and including dismissal.[4]

[35] I am of the opinion that the act complained of was intentional or so reckless that was almost wilful. The Claimant knew or should have known that not following the employer's policy could cause him to lose his job, especially given his previous participation in a corrective action plan and the numerous disciplinary notices he had received. He was clearly dismissed because of the event of June 4, 2024.

[36] It is well established that wilful non-compliance with an employer's policy is considered misconduct under the *Employment Insurance Act*.

Conclusion

[37] The Commission's appeal is allowed. The Claimant lost his job because of misconduct.

Pierre Lafontaine
Member, Appeal Division

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[4] GD3-28, GD3-41.