Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 252

Tribunal File Number: AD-15-991

BETWEEN:

G. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON February 18, 2016

DATE OF DECISION: May 9, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	G. M.
Representative for the Respondent (Commission)	Susan Prud'homme

INTRODUCTION

[1] On May 9, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant was dismissed from his employment due to misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act) and dismissed his appeal. The Appellant attended the teleconference hearing held before the GD on February 25, 2015. No one attended on behalf of the Respondent, but it had filed written representations.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on September 7, 2015. Leave to appeal was granted on November 15, 2015.

[3] Attached to the Application were the following documents, which were not in the record before the GD or presented as evidence to the GD:

a) A Settlement Agreement relating to an Ontario Labour Relations Board (OLRB) matter, signed by the Appellant only and undated;

b) An unsigned (draft) letter, dated April 27, 2015, on behalf of Dixie Bloor Neighbourhood Centre, the Appellant's former employer; and

c) A signed letter, dated May 20, 2015, on behalf of Dixie Bloor Neighbourhood Centre, the Appellant's former employer.

[4] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal;

b) The information in the file, including the need for additional information; and

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] The Appellant was dismissed by his former employer, in June 2014, due to a conflict of interest involving extra work that had not been done for the employer.

ISSUES

[6] Whether the Appeal Division can consider evidence not adduced before the GD, in the form of a settlement agreement and two letters as described above.

[7] Whether the GD made an error of law, erroneous findings of fact or breached a principle of natural justice in arriving at its decision dismissing the Appellant's appeal before the GD.

[8] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the only grounds of appeal are that:

a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) 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.

[10] Leave to appeal was granted on the following basis (reference to paragraphs of the Leave to Appeal Decision):

[24] The Applicant submits, without citing the grounds enumerated in subsection 58(1) of the DESD Act that the GD based its decision on errors of fact and law by determining that he had been dismissed from his employment due to misconduct. He asks the AD to consider the documents from the OLRB matter, including a Settlement Agreement and letters following the Settlement Agreement.

[25] In *Canada (AG) v. Courchene*, 2007 FCA 183, the FCA decided on an application for judicial review based on the Umpire having ruled that Minutes of Settlement related to a loss of employment were admissible as "new facts" or a material fact that was unknown to the Board of Referees at the time of its decision. The FCA stated that:

> In relation to the to the appropriate approach to be accorded to the admission of new evidence by an Umpire, we would refer to the decision of this Court in *Gilles Dubois v. Canada Employment Insurance Commission and Attorney General of Canada*, [1998] F.C.J. No. 768, 231 N.R. 119 at 129-121, in which Marceau J. states:
>
> > Suffice it to say that the Umpire refused to admit the new evidence based on a strict application of the principles established by the courts holding that on appeal or judicial review, new evidence implies that either the party involved was unaware of the evidence or it was impossible to produce the evidence, at the time of the hearing at first instance.
> > . . .
> > We must express serious reservations about the application by an Umpire of formal rules developed for the smooth functioning of the courts. The Umpire is one level in the process of the administration of the **Unemployment Insurance Act**, an eminently social piece of legislation, where claimants usually represent themselves and where the boards of referees sitting a first instance have no legal training. The principles of justice suggest that submissions by claimants should be accepted very liberally at all levels; in fact this very liberal approach is required by s. 86 [now section 120] of the Act.

On this basis, the FCA concluded that the Umpire's decision in *Courchene* was reasonable.

[26] *Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (FCA) is authority for the proposition that a settlement agreement can constitute evidence that could rebut other evidence of misconduct in some circumstances and may be considered by the Umpire in appropriate cases.

[27] On the ground that there may be errors of mixed fact and law, as set out in paragraph 4, above, and in light of FCA jurisprudence, I am satisfied that the appeal has a reasonable chance of success.

[11] The powers of the AD include but are not limited to substituting its own opinion for that of the GD. Pursuant to subsection 59(1) of the DESD Act, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

SUBMISSIONS

[12] The Appellant's submissions can be summarized as follows:

a) There was no liability, wrongdoing or misconduct on his part;

b) His employer knew before the extra work started, and he had discussed it with management;

c) An OLRB matter was pending at the time of the appeal to the GD;

d) The OLRB found that there was no wrongdoing and no willful misconduct on his part;

e) He has reference letters from his former employer;

f) The GD Member did not hear him and his points got lost;

g) The two letters attached to the Application were the same; one was a draft and the second had two signatures from the former employer; and

h) The OLRB Settlement Agreement states that the former employer would not block his claim for EI benefits and that there was no liability or wrongdoing.

[13] The Respondent submitted that:

a) The GD did not make an error in its conclusion that the Appellant's loss of employment constituted misconduct within the meaning of the EI Act;

b) The Appellant's grounds of appeal have not been proven;

c) The Settlement Agreement does not show that the facts on the file were erroneous or that they did not accurately reflect the facts as they occurred; and

d) The appeal should be dismissed pursuant to subsection 59(1) of the DESD Act.

[14] The Employer was not an added party in this appeal.

STANDARD OF REVIEW

[15] The Respondent submits that the applicable standard of review for questions of law is correctness, and the applicable standard of review for questions of mixed fact and law is that of reasonableness: *Pathmanathan v. Canada (AG)*, 2015 FCA 50 (paragraph 15).

[16] The Federal Court of Appeal has determined, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[17] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[18] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of EI decisions rendered by the GD.

[19] The Federal Court of Appeal, in *Canada (Attorney General) v. Maunder*, 2015 FCA 274, referred to *Paradis, supra* and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the AD to decisions of the GD.

[20] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act.

[21] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) 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.

[22] Leave to appeal was granted on the basis of the documents from the OLRB matter, specifically a Settlement Agreement and letters following the Settlement Agreement, and the *Courchene* and *Boulton* cases.

[23] These documents were not before the GD and, therefore, would be new evidence before the AD.

ANALYSIS

New Evidence

[24] The Tribunal must first determine whether the new evidence that the Appellant wishes to adduce can be received by the AD. There is no dispute that the new evidence was not adduced before the GD.

[25] Federal Court of Appeal decisions have held that:

a) Umpires should never receive new evidence: *Canada (AG) v. Taylor*, [1991] F.C.J. No. 508, *Canada (AG) v. Hamilton*, [1995] F.C.J. No. 1230, *Brien v. Canada (EIC)*, [1997] F.C.J. No. 492, *Canada (AG) v. Merrigan*, 2004 FCA 253, and *Karelia v. Canada (MHRSD)*, 2012 FCA 140;

b) Umpires were allowed to receive new evidence as long as it was "new facts" under (former) section 120 of the EI Act: *Canada (MEI) v. Bartone*, [1989] F.C.J. No. 21, *Canada (AG) v. Wile*, [1994] F.C.J. No. 1852, *Canada (AG) v. Chan*, [1994] F.C.J. No. 1916;

c) Umpires could consider new evidence that was not "new facts" in relation to a breach of natural justice: *Velez v. Canada (AG)*, 2002 FCA 343; and

d) Umpires could, in an exceptional case, consider new evidence that was not "new facts", on the basis of former section 120 of the EI Act or otherwise: *Dubois v. Canada (EIC)*, [1988] F.C.J. No. 768, and *Canada v. Courchene*, 2007 FCA 183.

[26] In *Rodger v. Canada (AG)*, 2013 FCA 222, the Federal Court of Appeal was faced with an appellant who tried to adduce new evidence before the Umpire, tried to adduce the same new evidence as new facts on the basis of a rescind or amend application of the original Umpire's decision and later tried to adduce new evidence before the Federal Court of Appeal. The Federal Court of Appeal decision held:

> 26 Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. R.*, 2003 FCA 317, [2003] 4 C.T.C. 206 (F.C.A.) at paragraph 5). This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.
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> 27 As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.
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> 43 As noted in *Canada (Attorney General) v. Chan* (1994), 178 N.R. 372 (Fed. C.A.) at paragraph 10 (*Chan*), reconsideration under this section of the *Act* should remain a "rare commodity", and an Umpire should be careful not to let the process be abused "by careless or ill-advised claimants". As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[27] Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, ss. 266-267, the Office of the Umpire was been replaced by the AD of the Tribunal.

[28] To determine whether the AD can receive the new evidence requires a four part analysis, as follows:

a) Is the AD able to rescind or amend a decision of the GD?
b) Is the new evidence "new facts"?

c) If the new evidence is not "new facts", is the new evidence in relation to a breach of natural justice?

d) If the new evidence is not “new facts”, are there other exceptional circumstances such as in the *Dubois* or *Courchene* cases?

(a) *Is the AD able to rescind or amend a decision of the GD?*

[29] Paragraph 66(1)(a) of the DESD Act states that a decision may be rescinded or amended “if new facts are presented” or if the Tribunal is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[30] The AD may rescind or amend a decision made by it but may not rescind or amend a decision of the General Division. An application to rescind or amend a decision of the General Division would need to be brought to the General Division of the Tribunal.

[31] Given that there is a one year time limit within which an application to rescind or amend must be made, it may be too late for the Appellant to bring an application before the General Division. In the circumstances, I will discuss the remaining questions.

(b) *Is the new evidence “new facts”?*

[32] In the *Chan* case, the Federal Court of Appeal stated that reconsidering a decision on the basis of new facts should be a rare occurrence:

> ¶ 11 Reconsideration of a decision by an umpire on the basis of "new facts" having been submitted is and should remain a rare commodity. Unemployment insurance claimants are given an exceptionally large number of opportunities to challenge the decisions affecting them and umpires should be careful not to let the reconsideration process be abused by careless or ill-advised claimants. (…)

[33] The new evidence that the Appellant seeks to adduce is in the form of documents from the OLRB matter between him and his former employer. The Appellant relies on these documents to show that there was no wrongdoing or misconduct on his part.

[34] There is a difference between new facts and new evidence supporting facts already known. As stated in *Chan, supra*: “A different version of facts already known to the claimant, mere afterthoughts or the sudden realization of the consequences of acts done in the past are not new facts.”

[35] Evidence available at the time of the hearing before the GD, but not produced, cannot be considered as a new fact: *Velez, supra*.

[36] "New facts" must have occurred after the decision was rendered or occurred prior to the decision but could not have been ascertained by diligence: *Chan, supra*.

[37] The question is not whether the Appellant was aware that the new evidence had to be produced at the GD hearing but whether the Appellant acting diligently could have produced this evidence: *Canada (AG) v. Hines* 2011 FCA 252.

[38] Here, the new evidence which the Appellant seeks to adduce is in the form of documents which did not exist at the time of the GD hearing. The documents were dated in April and May 2015 and the GD hearing was in February 2015. Therefore, they could meet the legal test of "new facts", if they would have a major impact on the outcome of the case.

[39] Although the AD cannot rescind or amend a decision of the GD, it may be able to receive the documents in another manner.

(c) *Is the new evidence in relation to a breach of natural justice?*

[40] The Appellant did not rely on a breach of natural justice in his application for leave to appeal.

[41] At the AD hearing, the Appellant stated that "the GD Member did not hear me" and "no one was listening to me".

[42] The Respondent submitted that the GD was the trier of fact and its role was to weigh the evidence and make findings based on its consideration of the evidence. In this process, the GD can decide what evidence it prefers. The Respondent also argued that there is nothing in the GD decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor is there any evidence to show there was a breach of natural justice present in this case.

[43] A breach of natural justice must be brought up at the earliest practicable opportunity and if no objection is made at the hearing, the party alleging the breach is taken to have provided an

implied waiver of any perceived breach of unfairness: *Benitez et al* v. *Minister of Citizenship and Immigration*, 2006 FC 461, at paras. 204-220. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection: *Ibid.* at para 221. However, the doctrine of waiver does not preclude an applicant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of, for example, badgering in cross-examination: *Ibid.* at para 222.

[44] The Appellant did not allege that there was a breach of natural justice during the GD hearing, at any point. His application for leave to appeal includes a repetition of arguments he made before the GD but did not allege a breach of natural justice. The Appellant first raised allegations of breach of natural justice at the appeal hearing.

[45] I find that the Appellant did not bring up a breach of natural justice at the earliest practical opportunity. However, the doctrine of waiver does not preclude the Appellant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of badgering in cross-examination or other similar circumstance. By the Appellant's description of the GD hearing and on review of the audio recording of the hearing, there was no evidence of badgering of the Appellant during the hearing.

[46] While the Appellant did not raise any fairness issues at the GD hearing and, therefore, can be taken to have waived any perceived breach of unfairness, the Tribunal will discuss the alleged breach of natural justice.

[47] The Appellant alleges that he was not heard. Specifically, he asserts that no one listened to him.

[48] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22.

[49] I have reviewed in detail the appeal file before the GD including the audio recording of the GD hearing, and it is clear that the GD had the documentary file (which included the Appellant's application, questionnaires and other statements, his request for reconsideration, and documents related to interviews of the Employer). The GD also summarized, in its written

decision, the Appellant's testimony about his employment history with the employer and the circumstances of the "extra work" which caused problems with the employer. The opportunity for the Appellant to present his case did not depend solely on oral testimony at the GD hearing, and there is no evidence that the GD Member prevented the Appellant from giving evidence.

[50] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[51] Even taking the Appellant's statements about the GD – that he was not heard - as described in paragraph [41] above as proved, the evidence falls short of showing that the GD did not give the Appellant a sufficient opportunity to be heard or that the GD was prejudiced or biased. While the Appellant may have had the impression that he was not being heard, the evidence does not demonstrate that the conduct of the GD derogated from the standards of the right to be heard and the right to an impartial hearing.

[52] For the reasons given above, I conclude that the GD did not fail to observe a principle of natural justice by not according the Appellant a fair hearing.

[53] Also, the new evidence that the Appellant seeks to adduce is not in relation to a breach of natural justice. It cannot be received by the AD under the *Velez* exception.

(d) *Are there other exceptional circumstances such as in the Dubois or Courchene cases?*

[54] *Courchene*, *supra*, and *Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (FCA) formed the basis upon which leave to appeal was granted. *Dubois*, *supra*, was affirmed in the *Courchene* case.

[55] In *Courchene*, the Umpire allowed in evidence of minutes of settlement that were not before the Board, by way of an application to rescind and amend. In *Boulton*, the agreement was in evidence before the Board. In *Dubois*, the Federal Court of Appeal noted that new evidence, in the form of a medical certificate, should have been allowed to be introduced before the Umpire where no rescind or amend application had been brought.

[56] Before me, the Respondent agreed that the AD could receive the new documents under this line of cases. However, it argued that: (1) the present case is different from *Courchene* because the Federal Court of Appeal had found that the agreement in that case was entirely contrary to a finding of misconduct and (2) that the facts in *Courchene* were different from those in *Boulton*.

[57] I note that the *Dubois*, *Courchene* and *Boulton* line of cases were decided within a regime that permitted an Umpire to rescind or amend a decision of the Board. As stated above, the AD cannot rescind or amend a decision of the GD. However, the AD has been considering a decision of the GD a reviewable decision using the same principles as that of a decision of the Board (appealed to the Umpire).

[58] Given the recent decisions in *Paradis*, *supra*, and *Maunder*, *supra*, and the differences between section 66 of the DESD Act and former section 120 EI Act (rescind and amend provision), I am uncertain whether this line of cases is binding on the AD considering a decision of the GD.

[59] The Respondent would limit the application of this line of cases to misconduct matters in which a settlement agreement between the claimant and the employer contradicted a finding of misconduct on the part of the claimant. However, some decisions of the AD have held that these cases are not limited in this manner: for example AD-14-99 (2016 SSTADEI 40).

[60] In the circumstances and until the Federal Court of Appeal rules to the contrary, I will seek guidance from the existing EI jurisprudence. On this specific issue, I will receive and review the new evidence of the Appellant.

New Documents and Misconduct

[61] The Appellant submits that the new documents state that his former employer would not block his claim for EI benefits and that there was no liability or wrongdoing on his part.

[62] While the version of the Settlement Agreement produced by the Appellant was only signed by him, he stated that it was the final version. He noted that the agreement was signed in May 2015 and this is his only copy. The Respondent was prepared to accept the document as the

executed Settlement Agreement between the Appellant and his former employer. The hearing proceeded on this basis.

[63] The Settlement Agreement includes the following recitals:

> Whereas the Applicant has applied for Employment Insurance which has now been revoked;
>
> Whereas the Applicant is desirous of seeking agreement from Employment Insurance that he does not have to pay back any monies paid and has continued eligibility;
>
> Whereas The Dixie Bloor Neighbourhood Centre (DBNC) does not want to stand in the way of the Applicant obtaining agreement from Employment Insurance that he does not have to pay back any monies and has continued eligibility;
>
> In order to resolve all the issues in this Application and regarding the employment and cessation of employment, the parties agree as follows …

[64] By the Settlement Agreement, the Appellant and his former employer agreed to terms which include:

> 1. The DBNC will furnish two original copies of an employment letter as per Appendix A attached.
>
> 2. The DBNC will respond to any inquiries regarding the Applicant's employment only as per the information in Appendix A attached.
>
> 3. There is no admission of liability or wrongdoing by any party, and this agreement terminates any and all matters, claims or actions between the parties, whether actual or potential, relating in any way to the employment of the Employee by the Employer.
>
> 4. The parties agree that any and all monies owing to the Applicant or which may be owed to the Applicant have been paid.

[65] Appendix A to the Settlement Agreement is the letter that the former employer would produce in a signed and dated format for the Appellant's use. A signed and dated copy was produced, and it is the May 2015 letter in the AD file. The letter confirms the employment of the Appellant as a "job developer" from August 7, 2007 to June 20, 2014 and describes his responsibilities during his employment. The Appellant submits that it describes more than one program and a mentorship program which he developed in his "extra work".

[66] *Boulton*, *supra*, is authority for the proposition that a settlement agreement can constitute evidence that could rebut other evidence of misconduct in some circumstances and may be considered by the Umpire in appropriate cases.

[67] In *Boulton*, the Federal Court of Appeal referred to *Canada (A.G.) v. Wile* (A-233-94) and stated:

> The ratio of the *Wile* decision is that before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct which would contradict the position taken by the employer during the investigation by the Commission or at the time of the hearing before the Board.

Under the agreement in *Boulton*, all grievances were withdrawn as fully and finally resolved and the claimant was reinstated to his employment and then laid off in accordance with his seniority on the same date. The Federal Court of Appeal held that the agreement did not expressly or implicitly admit that the facts on file with the Commission were erroneous or did not accurately reflect the events leading to termination of employment and, therefore, that the terms of the agreement did not contradict the earlier finding of misconduct.

[68] In *Wile*, the settlement agreement contained the following sentence: "Neither party admits or alleges any fault for the unhappy differences that have arisen between them." The Federal Court of Appeal held that this sentence could not be taken to nullify the basis for finding that the claimant lost his employment by reason of his own misconduct.

[69] The wording in the Settlement Agreement here is: “There is no admission of liability or wrongdoing by any party, and this agreement terminates any and all matters, claims or actions between the parties, whether actual or potential, relating in any way to the employment of the Employee by the Employer.” It is similar to the sentence in the *Wile* case.

[70] In *Courchene*, the Umpire concluded that the minutes of settlement “contradict a finding of misconduct on the claimant’s part”. The Federal Court of Appeal held that the terms, taken together, could reasonably be understood to contradict a finding of misconduct on the part of the claimant and referred specifically to:

> The letter of termination is replaced by a letter of resignation, the respondent’s personnel file is expunged to eliminate all information related to the grievance, the

> Record of Employment is amended to indicate that the employer was terminated by mutual agreement and, also of considerable significance, the respondent is given meaningful compensation (12 weeks pay after 1½ years of employment).

[71] The terms of the Settlement Agreement resemble the wording of the agreement in the *Wile* case and are very different from the terms of the agreements in the *Boulton* and *Courchene* cases. On the question of whether the Settlement Agreement is evidence in respect of the misconduct which contradicts the position taken by the employer during the investigation by the Commission or at the time of the hearing, I answer in the negative.

[72] Applying the Federal Court of Appeal jurisprudence to the current matter, it is clear that the Settlement Agreement between the Appellant and his former employer does not contradict the finding of misconduct made by the GD.

Breach of Natural Justice

[73] The Appellant relied, in this Appeal, on the lack of opportunity to be heard. However, I concluded in paragraphs [40] to [53], above, that the GD did not fail to observe a principle of natural justice in relation to weighing the evidence and make findings based on its consideration of the evidence.

Error of Law or Erroneous Findings of Fact

[74] The remainder of the Applicant's submissions in this appeal re-argues the facts and arguments that he asserted before the GD.

[75] The GD is the trier of fact, and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[76] It is not my role, as a Member of the AD of the Tribunal on hearing this appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew.

[77] The Appellant has not identified any errors in law or any erroneous findings of fact which the GD made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

CONCLUSION

[78] Considering the submissions of the parties, my review of the GD decision and the appeal file, I find that no reviewable error was made by the GD.

[79] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division