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

Citation: *M. A. et al. v. Canada Employment Insurance Commission*, 2018 SST 64

Tribunal File Number: AD-15-1346

BETWEEN:

M. A. et al.

Appellants

and

Canada Employment Insurance Commission

Respondent

and

U.S. Steel Canada Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: January 24, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellants, 475 workers at Lake Erie Works, Nanticoke plant, sought Employment Insurance (EI) benefits in 2013. Their claims were denied by the Respondent, the Canada Employment Insurance Commission (Commission).

[3] The Commission denied the EI benefits because it determined that the Appellants had lost their employment due to a "work stoppage attributable to a labour dispute" with the Added Party, U.S. Steel Canada Inc. (Employer), pursuant to the *Employment Insurance Act* (EI Act).

[4] The Appellants appealed this Commission decision to the Social Security Tribunal of Canada. The Tribunal's General Division found that the work stoppage, on April 28, 2013, was attributable to a labour dispute and, therefore, that a disentitlement must be imposed.

[5] The Appellants are appealing the General Division decision on the grounds of breaches of natural justice, errors of law, and serious errors in the findings of fact. The Tribunal's Appeal Division granted leave to appeal on the basis that the appeal had a reasonable chance of success.[1]

[6] The appeal hearing was held in person. All the parties participated, represented by legal counsel.

[7] The Appeal Division finds that the General Division did not commit a reviewable error in making its decision. The Appellants lost their employment due to a work stoppage attributable to a labour dispute, and the EI Act does not entitle them to EI benefits in these circumstances.

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[1] Leave to appeal decision dated April 14, 2016.

ISSUES

[8] The Appellants raise many grounds of appeal. After addressing the standards of review to be applied by the Appeal Division when reviewing a decision of the General Division, I will address the specific issues raised by the Appellants as follows:

Issue 1: Did the General Division fail to observe a principle of natural justice by (a) the non-availability of an audio recording of a portion of the hearing; or (b) permitting the Employer's counsel to interrupt the Appellants' representative during the hearing and, thereby, not allowing the Appellants' representative the opportunity to present their case?

Issue 2: Did the General Division err in law by (a) reversing the burden of proof; (b) misinterpreting case law; (c) failing to determine the credibility of a witness; or (d) misinterpreting subsection 36(1) of the EI Act?

Issue 3: Did the General Division base its decision on serious errors in fact finding, namely, that (a) the "No Board" report was jointly requested; (b) blast maintenance was to start in March 2013; and (c) idling of the coke oven was because a labour dispute was imminent.

Issue 4: If it did, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[9] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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.[2]

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[2] *Department of Employment and Social Development Act* at subsection 58(1).

Standards of Review (or Deference to the General Division)

[10] When the Appeal Division reviews a decision of the General Division, must it apply the standards of review as adopted in *Dunsmuir*[3] or the statutory tests that the *Department of Employment and Social Development Act* (DESD Act) associates with issues of natural justice, issues of law, and issues of fact? The applicable approach also determines whether the Appeal Division owes deference to the General Division on these issues as well as on issues of mixed fact and law.

[11] The Appellants and the Respondent submit that the language of the Tribunal's governing statute, the DESD Act, is binding on the Appeal Division and that the standards of reasonableness and correctness, as adopted in *Dunsmuir*, should not apply to the Appeal Division's review of the General Division's decision. However, the governing statute does not refer to an error of mixed fact and law.[4]

[12] The Employer, on the other hand, submits that this question (standards of review that the Appeal Division applies to reviewing General Division decisions) has not yet been resolved by binding judicial authority and, therefore, that the Appeal Division is bound by the existing, long-standing, and settled authority[5] establishing that decisions of the General Division are entitled to deference. This judicial authority provides that the standard of review applicable to questions of natural justice and law is correctness, and that the standard of review applicable to questions of fact and questions of mixed fact and law is reasonableness. The Employer submits that the main issue at hand—whether the work stoppage was attributable to a labour dispute—is a question of mixed fact and law and, therefore, attracts a standard of reasonableness.

[13] There appears to be a discrepancy in relation to the approach that the Appeal Division should take when reviewing appeals of decisions rendered by the General Division[6] and, if the standards of review must be applied, whether the standard of review for questions of law and

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[3] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.
[4] *Quadir v. Canada (Attorney General)*, 2018 FCA 21.
[5] Including *Dunsmuir, ibid.*; *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175; and *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399.
[6] *Canada (Attorney General) v. Paradis*; and *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274; *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Canada (Attorney General) v. Peppard*, 2017 FCA 110; and *Quadir, supra*.

natural justice differs from the standard of review for questions of fact and questions of mixed fact and law.

[14] Given that the courts have yet to resolve or provide clarity on this apparent discrepancy, I will consider this appeal, first, by applying the language of the DESD Act and, second, by applying the standard of reasonableness to questions of fact.

[15] The Appeal Division does not owe any deference to the General Division's conclusions on questions of law and natural justice.[7] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[8]

[16] The appeal before the General Division turned on the question of whether the work stoppage was attributable to a labour dispute, which is a question of mixed fact and law, as it depends on the application of the facts to the wording "attributable to a labour dispute" in subsection 36(1) of the EI Act.

[17] The appeal before the Appeal Division turns on distinct questions of possible breaches of natural justice, errors of law, and serious errors in the findings of fact.

[18] In relation to questions of law and natural justice, the DESD Act and the *Dunsmuir* approach ("correctness") are effectively the same. If the General Division failed to observe a principle of natural justice or erred in law, then the decision is incorrect and the standard of correctness is not met.

[19] Since I have not identified possible errors of mixed fact and law, I do not have to determine what statutory test should be applied to such issues. However, since it is possible that the Appeal Division must apply the standard of "reasonableness" to questions of fact, I will also state my conclusions with the *Dunsmuir* approach. In conducting a review of the reasonableness of the General Division's findings of fact, I will determine whether there was

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[7] *Paradis, supra,* at para. 19.
[8] DESD Act at para. 58(1)(*b*).

some basis in the evidence for the General Division's findings, rather than whether, on the evidence, alternative findings are available or are more reasonable.[9]

Issue 1: Did the General Division fail to observe a principle of natural justice?

[20] I find that the General Division did not fail to observe a principle of natural justice. The missing audio recording for part of the General Division hearing does not deny the Appellants of their right of appeal before the Appeal Division. Also, the General Division did not fail to observe the principle of *audi alteram partem*; the member provided the Appellants with an opportunity to be heard, and intervened where necessary to maintain order during the hearing.

(a) Non-availability of audio recording

[21] The General Division hearing took place over three days. The parties agree that there is a gap in the audio recording, specifically, that there is no recording for one to two hours of the hearing.

[22] The non-availability of an audio recording from the General Division hearing (or a part of the hearing), in and of itself, is not a ground for setting aside its decision.[10] However, if gaps in or the absence of an audio recording effectively denies a party their right of appeal before the Appeal Division, then the General Division decision may be set aside.[11]

[23] The Appellants assert that their right of appeal is effectively denied because of this gap in the audio recording. They submit that the missing portion contained interruptions and allegations that the Appellants' representative was incompetent (according to the Employer's counsel). However, the Appellants did not present evidence on what was contained in the missing portion, such as an affidavit or sworn testimony of someone who was present at the General Division hearing.

[24] I note that Ms. C. B. and Mr. M. T. were present at the General Division hearing and were present at the Appeal Division hearing. Also, the Appellants were alerted to the other parties' position that there was no evidence submitted regarding fairness of the General

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[9] Dr. *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 SCR 226, at para. 41.
[10] *Canada (Attorney General) v. Scott*, 2008 FCA 145; and *Patry v. Canada (Attorney General)*, 2007 FCA 301.
[11] *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 795.

Division hearing.[12] The Appellants could have proffered affidavit evidence or oral evidence to the Appeal Division but did not.

[25] Appellants must do more than assert that their right of appeal is effectively denied. The Appellants have the burden to prove, on a balance of probabilities, that the appeal record does not allow the Appeal Division to properly dispose of this appeal. Having provided no evidence on this point, the Appellants have not met their burden.

[26] I find that the appeal record is adequate for me to hear and decide this appeal.

(b) Opportunity to present one's case

[27] During the Appellants' representative's submissions at the General Division hearing, the Employer's counsel intervened using terms such as "completely wrong," "blatantly wrong," and "misleading" to describe the Appellants' submissions.

[28] The Appellants submit that these interjections caused their representative to lose her place during her submissions, were not adequately addressed by the General Division, and resulted in the Appellants not having the opportunity to present their "best case."

[29] I note that the General Division member did intervene and at least twice asked the Employer's counsel to wait his turn;[13] she also simply ignored his interjection on another occasion.[14] In addition, the member encouraged the Appellants' representative to explain their position throughout her submissions.[15]

[30] The *audi alteram partem* rule requires that a person who is party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard.[16] The "opportunity to be heard" is not, however, a guarantee that each party has presented their "best

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[12] Respondent's additional submissions, November 22, 2016, AD13-7 to 9, and oral submissions at the Appeal Division hearing.
[13] General Division hearing transcript, AD11-55, paras 297–300; and AD11-56, paras 310–315.
[14] General Division hearing transcript, AD11-72 to 11-73, paras 517–519.
[15] General Division hearing transcript, AD11-55, AD11-70, and AD11-73, paras 292, 498, and 522; AD11-46, AD11-62, AD11-64, and AD11-82, paras 209, 405, 409, 435, and 620; AD11-54, para. 283; AD11-62 and AD11-69, paras 203 and 490; AD11-59, para. 349.
[16] *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission*), [1995] 2 SCR 781 at para. 29.

case.” In this regard, the Appellants must establish that they were deprived of an opportunity to be heard and not that they were unable to present their “best case.”

[31] While the Appellants’ representative may have been affected by the opposing party’s interjections, the right to be heard does not entitle parties to present their case without challenge. I find that the interjections complained of were in the nature of challenges to the Appellants’ submissions, albeit rather harsh ones, and where the General Division member felt they were out of turn or disruptive, she properly redirected or ignored them. She also asked the Appellants’ representative to continue with her presentation and encouraged her to complete her submissions. In addition, the General Division’s decision summarized the Appellants’ arguments, which also establishes that the Appellants were heard.

[32] I find that the Appellants were afforded the opportunity to present their case before the General Division.

Issue 2: Did the General Division err in law?

[33] I find that the General Division did not err in law in its interpretation of subsection 36(1) of the EI Act. The General Division also did not err in law in its interpretation of jurisprudence or its treatment of the oral evidence of the only witness at the hearing (Ms. J. K.).

[34] Subsection 36(1) of the EI Act states that if a claimant loses an employment, or is unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which the claimant was employed, the claimant is not entitled to receive benefits until the earlier of: (a) the end of the work stoppage, and (b) the day on which the claimant becomes regularly engaged elsewhere in insurable employment.

[35] The following facts are not in dispute in this appeal: (a) the Appellants lost their employment due to a work stoppage; and (b) a labour dispute existed at that time, at the place they were employed.

[36] Whether the work stoppage is attributable to a labour dispute is at issue and is greatly contested.

(a) Burden of proof

[37] The burden of proof lies with the Commission to demonstrate that the Appellants are disentitled to benefits.[17] Therefore, the Commission had to establish, on a balance of probabilities, that the work stoppage was attributable to a labour dispute.

[38] The Appellants submit that the General Division erred by requiring them to disprove that the work stoppage was attributable to the labour dispute, thereby reversing the onus on the Appellants.

[39] However, the General Division's decision states that "the onus lies with the Commission to demonstrate that a claimant is disentitled to benefits"[18] and "the Commission bears the burden of demonstrating that a disentitlement should be imposed."[19] It goes on to state that "the Commission has met that burden by appropriately applying the evidence (the facts) to the legal term 'labour dispute,' finding that the work stoppage was attributable to a labour dispute and imposing a disentitlement."

[40] On the face of the General Division decision, the burden of proof was not reversed. Was the burden of proof reversed *de facto*?

[41] The Appellants argue that the General Division's analysis focused on the evidence and submissions of the Appellants and the Employer, and not those of the Commission, which "is evidence that the General Division improperly placed the onus on [the Appellants] to demonstrate why they ought to be entitled."

[42] With respect, I cannot agree. The Appellants made numerous submissions on this issue and suggested alternate explanations for the work stoppage. The General Division considered and discussed these submissions in detail, and it explained its reasons for not adopting them. Its depth of analysis is not evidence that the General Division placed the onus on the Appellants. It shows that the General Division considered the Appellants' evidence and submissions fully.

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[17] *Canada (Attorney General) v. Valois* [1986], 2 S.C.R. 439.
[18] General Division decision at para. 71.
[19] General Division decision at para. 139.

[43] The Appellants also submit that instead of evaluating the evidence put forward by the Commission, the General Division measured the Appellants' evidence against that of the Employer. They argue that by basing its findings of fact mostly on the evidence of the Appellants and of the Employer, the "onus of proof was improperly shifted to the Appellants."

[44] I do not read the General Division decision in this manner. That the burden of proof lies with the Commission to demonstrate disentitlement does not mean that the Commission has to enter the evidence it relies upon or make the submissions that are the most convincing. Each of the parties may rely on the parts of the evidence that support their case, and one of the General Division's roles is to weigh that evidence and find the facts from the totality of it.

[45] The General Division was faced with evidence that was not entirely consistent, and in weighing that evidence, it explained its reasoning. The General Division correctly stated that the burden of proof is with the Commission to demonstrate that the Appellants are disentitled to benefits, and it concluded that the Commission had discharged this burden.

[46] The General Division's reasons did not reverse the onus or burden of proof.

(b) Interpretation of case law

[47] The General Division referred to the *Caron* decision[20] of the Supreme Court of Canada.[21] Each of the parties relied on this decision before the General Division for a number of propositions.[22] The General Division stated that the decision in *Caron* "deals with the chain of causation" and concluded that nowhere in the decision does the Supreme Court of Canada say that the labour dispute must be the "sole" or "singular" cause of the work stoppage.[23]

[48] The Appellants submit that the General Division improperly relied on only one part of the *Caron* decision in concluding that the decision stands only for the premise that there is a chain of causation that begins with a labour dispute that causes a work stoppage, which ultimately results in a claimant's unemployment.

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[20] *Caron v. Canada (Employment and Immigration Commission)*, [1991] 1 SCR 48.
[21] General Division decision at para. 87.
[22] For example: General Division decision at paras 62(g), 63(e), and 64(c).
[23] General Division decision at para. 87.

[49] The General Division did not conclude that the *Caron* decision stands "only for the premise that there is a chain of causation" (emphasis added). The General Division stated that *Caron* "deals with a chain of causation."

[50] In *Caron*, the EI claimants were unable to return to work immediately after a labour dispute had been resolved and a new collective agreement was signed. The Supreme Court of Canada held that the work stoppage ended once the parties involved agreed to settle the strike. The General Division did not err in law by saying that *Caron* deals with a chain of causation. The Supreme Court of Canada, in summarizing the matter under appeal, stated that a majority of the Federal Court of Appeal "noted that s. 44(1) [now subsection 36(1)] creates a chain of causation: a labour dispute may cause a stoppage of work to a group of employees, and the stoppage of work in turn may cause a loss of employment to an individual. The difficulty arises when the stoppage of work is over, and the second effect (the individual's loss of employment) persists."

[51] The General Division's conclusion that nowhere in *Caron* does it say that the labour dispute must be the "sole" or "singular" cause of the work stoppage is also not an error of law. The Appellants submit that the Supreme Court of Canada held that "subsection 36(1) requires a singular cause," but asserting this does not make it so. I do not read the *Caron* decision as the Appellants assert, and the Appellants have not provided a specific reference in *Caron* for asserting this proposition as the *stare decisis* (the point that is binding) of this case.

[52] The Appellants also submit that the jurisprudence referred to by the General Division[24] does not deal with circumstances that are analogous to the present situation, and that therefore, it erroneously applied factually dissimilar cases to uphold the Appellants' disentitlement.

[53] The General Division's references to jurisprudence were, for the most part, to set out general principles and not to apply the cited cases to the present one. It is not an error of law to refer to jurisprudence that does not have an analogous fact situation in order to state general principles.

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[24] *Canada (Attorney General) v. Simoneau*, 1997 CanLII 5138 (FCA); *Dallaire et al.v. Canada Employment Insurance Commission*, A-825-95; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Caron, supra*; *Canada (Attorney General) v. Benedetti*, 2009 FCA 283; *Gionest v. Canada*, A-787-81.

[54] *Benedetti* and *Gionest* were referenced in the analysis of the term "labour dispute"; there is no question in the present case that there was a labour dispute.[25] *Simoneau* and *Dallaire* were cited for the principle that the existence of a causal connection between a labour dispute and a work stoppage is a question of law; there is no dispute on this point.[26] The General Division recognized that the fact situations in the cited jurisprudence did not have analogous circumstances; for example, *Dallaire* was distinguished on its facts.[27] *Hills* and *Caron* are central to the Appellants' arguments,[28] despite their submission that it was an error for the General Division to refer to them.

[55] The General Division did not err in law by citing the case law it did in its decision.

(c) Credibility finding

[56] The Appellants contend that an assessment of the Employer's credibility was necessary and that because the General Division failed to assess the credibility of the Employer's representative, Ms. J. K., the General Division's preference of her evidence over that of the Appellants is based on "unqualified preference."

[57] It is important to put this submission into context. There were over 1,500 pages of documentary evidence in the record. At the General Division hearing, the Appellants were represented by a consultant to their union and two representatives of the union, and they called no witnesses. The Respondent was represented by staff of the Commission's Appeals Division and called no witnesses. The Employer was represented by legal counsel and assistant legal counsel, and the Employer's witness, Ms. J. K., Director of Human Resources, was present and testified.

[58] Before the General Division, the Appellants asked for an overall assessment of the Employer's credibility based on its actions in the present case and in past labour disputes. The General Division found that such an assessment was both unnecessary and unreliable.[29] In addition, the member noted that she had the submissions of all three parties and direct evidence

[25] General Division decision at paras 71, 73, and 75.
[26] General Division decision at para. 86.
[27] General Division decision at para. 89.
[28] Appellants' written submissions and supplementary submissions, AD11
[29] General Division decision at paras 126 and 127.

of Ms. J. K. at the hearing and was "able to assess the credibility of the evidence on its own merits and weighed it against the merits of the opposing evidence."

[59] In addition, the General Division stated that "[t]here was no reason presented (or found) to question the credibility of the witness and in fact, her testimony was found to be consistent and supported by documentary evidence."[30] This is another clear indication that the General Division considered Ms. J. K.'s credibility. Stating that there is no reason to question the credibility of a witness is not the same as saying the witness's credibility was not assessed.

[60] Further, the General Division decision makes mention of its assessment of Ms. J. K.'s credibility using expressions such as "testimony is consistent," "explanation is plausible and reasonable," and "documentary evidence supports her testimony."[31]

[61] Therefore, although the General Division did not make an overall assessment of the Employer's credibility, it did assess the credibility of the oral evidence and the documentary evidence and weigh the evidence before it.

[62] There is no foundation for this alleged error of law.

(d) Interpretation of subsection 36(1) of the EI Act

[63] The Appellants argue that the General Division's interpretation of subsection 36(1) of the EI Act produces an absurd result that cannot be found to be harmonious with the scheme of the EI Act and the intentions of Parliament. They rely on the *Hills* decision[32] for the proposition that an interpretation of the disentitlement provisions that becomes a coercive tool in collective bargaining is untenable.

[64] This argument differs from the one the Appellants presented at the General Division based on *Hills*. Employer's counsel submits that the Appellants are not entitled to put forth new arguments on appeal. I do not agree. If the General Division made an error in interpreting the

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[30] General Division decision at para. 127.
[31] General Division decision at paras 103, 104, and 107.
[32] *Hills, supra*.

law, that is a reviewable error.[33] The parties are not limited to arguing an error in interpreting or applying jurisprudence only as they had previously presented it to the General Division.

[65] The General Division considered *Hills*[34] and found that the decision "stands for the principle that a narrow interpretation must be given to the disentitlement provision of subsection 36(1) and that any doubt should be resolved in favour of the claimant." The General Division stated that *Hills* did not state that the work stoppage must be attributable to only a labour dispute, and that the ambiguity that existed in the *Hills* fact situation did not exist in the present case.

[66] I find that there is no error in law in the manner that the General Division interpreted *Hills*.

[67] The Appellants are asking the Appeal Division to interpret the *Hills* decision as meaning that the EI Act cannot be used to allow an employer to orchestrate an involuntary work stoppage to create a situation where employees are unable to access the benefits of the EI Act, and therefore, where the disentitlement provisions may become an instrument of coercion in bargaining, a disentitlement should not be imposed. This reasoning is based on the "neutrality principle."

[68] This argument invites the Appeal Division to make policy for which it does not have jurisdiction. Also, the "neutrality principle" can be interpreted in other ways, such as those described in the dissenting reasons in the *Caron* case.[35]

[69] In addition, the Appellants are suggesting that a further element be added to subsection 36(1) of the EI Act—that the Commission maintain a "neutral stance"—in order to find disentitlement. The Tribunal is bound by its enabling legislation and the provisions in the EI Act and Regulations. It cannot add elements to a provision that are not present.

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[33] DESD Act at para. 58(1)(*b*).
[34] General Division decision at para. 88.
[35] *Caron*, *supra*, reasons of Sopinka and Stevenson JJ.

[70] While I am cognizant that the modern principle of statutory interpretation recognizes that statutory interpretation cannot be founded on the wording of the legislation alone[36], this principle does not empower tribunals to expand legislative provisions.

[71] Subsection 36(1) of the EI Act refers to "a work stoppage attributable to a labour dispute." It does not read "attributable only to a labour dispute" or "attributable to a labour dispute and no other factors," and it does not require the Commission to be the arbiter of the relative bargaining positions of the employees and the employer.

[72] The General Division did not err in law in its interpretation of subsection 36(1) of the EI Act.

Issue 3: Did the General Division base its decision on serious errors in fact finding?

[73] I find that the General Division did not base its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it.

(a) "No Board" report

[74] The Ministry of Labour's notification to the Employer that a conciliation board would not be appointed is the "No Board" report.[37] The General Division found that both parties (the Employer and the Appellants through their union) had requested a "No Board" report from the conciliator. It also found that regardless of whether one or both parties had requested the report, it is the conciliator who decides whether the parties have reached an impasse and whether it is not advisable to appoint a conciliation board.

[75] The Appellants submit that the finding of fact that both parties requested the "No Board" report was erroneous. They argue that the Employer made the request, as evidenced by the meeting notes of the Employer's counsel.[38] The significance of who requested the report lies in the Appellants' submission that the Employer's request on March 19, 2013, demonstrates

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[36] …and that the words of the statute have to be read in their entire context, having regard not just to their ordinary and grammatical meaning but also to the scheme and object of the Act and to the legislature's intention.
[37] GD3-24: letter from the Ministry of Labour (Ontario) to Employer's counsel, dated March 30, 2013.
[38] GD3-893: March 19, 2013 meeting notes.

the Employer's lack of intention to bargain at a date that was weeks prior to the expiration of the collective agreement (April 15, 2013) and the work stoppage (April 18, 2013).

[76] Ms. J. K., the Employer's representative, testified at the General Division hearing that at the March 19, 2013, meeting with the conciliator, both the union and the Employer requested the "No Board" report. No one gave oral evidence on behalf of the Appellants at the General Division hearing. In the documentary evidence, in handwritten notes taken at the meeting, there is a note that reads, "Union requested conciliation – joint request both parties." The Appellants argue that these notes show that the Employer requested the report. The Employer argues that they show that the request was made jointly.

[77] The General Division considered these pieces of evidence and made its findings of fact on this point. It considered the material before it in finding that the "No Board" report was made by both the Employer and the union. This finding of fact was not made without regard for the material before it or in a perverse or capricious manner.

[78] The General Division did not draw the inferences that the Appellants suggested—that the Employer alone requested the "No Board" report and that this demonstrates the Employer's lack of intention to bargain. While the Appellants continue to maintain this position, they have not satisfied me that this finding of fact is erroneous.

[79] I also conclude that this finding of fact was "reasonable" in that there was some basis in the evidence for the General Division to make this finding.

(b) Blast furnace maintenance and shutdown

[80] Blast furnace maintenance was started on April 2, 2013, during the labour dispute. The Employer maintains that the timing had nothing to do with the labour dispute. The Appellants argue that the maintenance was scheduled to be done months earlier and was delayed by the Employer to coincide with the expiry of the collective agreement.

[81] The General Division member found that the Appellants' submissions regarding the timing of the blast furnace shut down for maintenance were "unsupported conjecture."[39] The

[39] General Division decision at para. 119.

Employer's representative had testified about the timing of the blast furnace maintenance delays. The General Division found that this testimony was consistent and supported by the documentary evidence, and that it provided a reasonable explanation.

[82] The Appellants now argue that there were inconsistencies in the Employer's evidence, for example:

a) That maintenance required planning in advance, yet an estimate for maintenance was prepared in March 2013 based on a start date for maintenance in March 2013;

b) That maintenance required planning in advance, however, in March 2013, it was not clear that maintenance would be starting in April 2013; and

c) That maintenance required the purchase of parts, but the Employer provided no other evidence of parts having been purchased or received.

[83] These inconsistencies, the Appellants submit, cannot be found to provide a reasonable explanation. Therefore, they submit that the General Division erred in its findings of fact.

[84] An appeal to the Appeal Division is not a *de novo* hearing of the matter. The appropriate time to present evidence and to challenge opposing parties' evidence is before the General Division. The Appellants chose not to present oral evidence at the hearing. They had the opportunity to cross-examine the Employer's representative and to present their submissions.

[85] In its decision, the General Division explains its reasoning for according more weight to the witness's direct evidence than to the Appellants' submissions. This finding of fact was not made without regard for the material before it or in a perverse or capricious manner.

[86] I also conclude that this finding of fact was "reasonable" in that there was some basis in the evidence for the General Division to make this finding.

(c) Idling of the coke ovens

[87] The General Division found that the Employer had started to idle the coke ovens on April 12, 2013.[40] Coke is used in the blast furnace and was produced on site and at other sites. The Employer's position is that there was no plan to idle the coke ovens until it was clear that the collective agreement would not be ratified. The Appellants' position is that the Employer started idling the coke ovens well before the expiration of the collective agreement.

[88] The Appellants submit that the General Division's finding that "[t]he Employer interpreted the events to indicate that a collective agreement would not be ratified" is not supported on the record. They point to a number of factors—meetings from April 11 to 15, 2013; the April 15, 2013, expiry date of the collective agreement; and a 72-hour protocol in the case of a strike or lockout—as evidence that on April 12, 2013, the Employer could not have believed that a labour dispute was imminent.

[89] The General Division considered Ms. J. K.'s evidence that the Employer had started idling the coke ovens when it was clear to them that an agreement would not be ratified, so the only reason the coke ovens were taken down was the labour dispute; the events in that time period; the documentary evidence referred to by the Appellants; and the Appellants' submissions.[41] Ultimately, the General Division gave more weight to the testimonial evidence that was based on Ms. J. K.'s direct participation at the meetings, as supported by the documentary evidence, over the Appellants' submissions.

[90] This finding of fact was not made without regard for the material before it or in a perverse or capricious manner.

[91] I also conclude that this finding of fact was "reasonable" in that there was some basis in the evidence for the General Division to make this finding.

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[40] General Division decision at para. 114.
[41] General Division decision at paras 120 and 121.

Summary on Alleged Errors

[92] I have found that the General Division did not breach a principle of natural justice and did not err in law in making its decision.

[93] In terms of findings of facts, the Appellants are, essentially, asking the Appeal Division to re-weigh the evidence with a view to substituting its own findings. The Appeal Division has an appellate role, which precludes rehearing the matter anew. Its role is to determine whether the General Division has made a reviewable error set out in subsection 58(1) of the DESD Act and, if so, to provide a remedy for that error.

[94] Having found no reviewable error, I need not deal with "Issue 4" (remedies).

CONCLUSION

[95] The General Division did not make a reviewable error in making its decision.

[96] Therefore, the appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	October 12, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. T., S. H., and C. B., on behalf of the Appellants Saneliso Moyo, Ursel Phillips Fellows Hopkinson LLP, Representative for the Appellant Penny Brady, Representative for the Respondent P. L., on behalf of the Added Party Stephen Shamie and Allison MacIsaac, Hicks Morley Hamilton Stewart Storie LLP, Representatives for the Added Party