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

Citation: *J. R. v. Canada Employment Insurance*, 2018 SST 212

Tribunal File Number: AD-17-332

BETWEEN:

J. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Milepost Oilfield Services Ltd.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: November 23, 2017

DATE OF DECISION: March 5. 2018

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

J. R., Appellant, (referred to as the Claimant)
Krista McFayden, Representative for Appellant
Florentine Ngarambe, Interpreter in the Kinyarwanda language
DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration by a different member.

OVERVIEW

[2] On March 13, 2017, the General Division of the Social Security Tribunal of Canada determined that the Appellant (Claimant) had lost his employment by reason of his own misconduct. The General Division therefore found that the Claimant was subject to an indefinite disqualification from Employment Insurance benefits under section 30 of the *Employment Insurance Act* (Act). An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on April 20, 2017, and leave to appeal was granted on April 27, 2017.

[3] This appeal proceeded by videoconference for the following reasons:

a) The complexity of the issue(s) under appeal.
b) The fact that credibility may be a prevailing issue.
c) The fact that multiple participants such as a witness and/or a third party may be present.
d) The fact that an interpreter will be present.
e) The fact that the Claimant or other parties are represented.
f) The availability of videoconference in the area where the Claimant resides.
g) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Issue 1: Was the Claimant provided an adequate opportunity to be heard and to know the case against him?

[5] Issue 2: Was the General Division Member impartial, or did the actions of the General Division give rise to a reasonable apprehension of bias?

THE LAW

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

> **(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.

SUBMISSIONS

[7] The Claimant submits that the General Division failed to observe a principle of natural justice. He argues that there was difficulty with the interpretation and that the hearing was rushed, which affected his right to be heard. The Claimant further submits that the General Division member approached the hearing with "pre-set" assumptions, suggesting that she may have been biased.

[8] The Claimant also argues that the General Division erred in law in effectively equating incompetence with misconduct.

[9] The Claimant also argues that the General Division based its conclusion on erroneous findings of fact, including findings against the Claimant's credibility that were unfounded or based on a misapprehension of the evidence.

[10] The Respondent did not appear to provide oral submissions but had submitted in writing that there was no breach of natural justice. Neither the Claimant nor his representative objected to the impartiality and expertise of the Kinyarwanda interpreter, or to the quality of the interpretation. The Respondent also argues that nothing in the General Division's decision suggests that the Tribunal member was biased against the Claimant, or that she did not act impartially.

[11] The Respondent also submits that "the Tribunal Member did not misconstrue the applicable legal test to determine whether the claimant's conduct amounted to misconduct, nor did the member misunderstand or misinterpret the evidence in this case". The Respondent contends that the Tribunal member's decision was consistent and "entirely reasonable."

[12] The Added Party did not provide submissions to the Appeal Division.

ANALYSIS

Standard of review

[13] The Respondent's reference to the "reasonableness" of the General Division decision in its written submissions suggests that it considers a standard of review analysis to be appropriate. However, the Respondent does not specifically argue that I should apply the standards of review, or that reasonableness is the appropriate standard.

[14] I recognize that the grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, there has been some recent case law from the Federal Court of Appeal that has not required that the standards of review be applied, and I do not consider it to be necessary.

[15] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[16] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[17] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not provide that a review should be conducted in accordance with the standards of review.

[18] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[19] I agree with the Court in *Jean*, where it referred to one of the grounds of appeal set out in subsection 58(1) of the DESD Act and noted, “There is no need to add to this wording the case law that has developed on judicial review.” I will consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to “reasonableness” or the standard of review.

Merits of the Appeal: Did the General Division err in fact or in law, fail to observe a principle of natural justice, exceed its jurisdiction or fail to exercise its discretion?

[20] The Claimant was dismissed for his involvement in a number of safety-related incidents. This appeal concerns whether his actions can be found to have been misconduct as defined by the Act, or simply incompetence. The General Division found that the Claimant was terminated

for misconduct, with the result that he was disqualified from receiving Employment Insurance benefits.

[21] The General Division set out the test for misconduct at paragraph 47. Misconduct is defined as conduct that the employee knew or ought to have known would impair the performance of the duties the employee owed to the employer, and that, as a result, dismissal was a real possibility. It must also be shown that the misconduct is wilful, deliberate or so reckless as to approach willfulness.

Issue 1: Was the Claimant provided an adequate opportunity to be heard and to know the case against him?

The quality of interpretation

[22] At the Appeal Division hearing, the Claimant said that he had had difficulty understanding the interpreter. He said that Kinyarwanda is a mixture of Rwanda and Burundi but that he spoke the Congo dialect of Kinyarwanda, which is different from that spoken in Burundi or Rwanda. He did not think that the interpreter spoke the same dialect. This was not raised at the General Division hearing and was argued for the first time at the Appeal Division.

[23] The Claimant argues that information was lost in translation or misinterpreted. Having reviewed the audio recording of the General Division hearing, it is clear that there were difficulties in the interpretation. Many of the questions posed to the Claimant had to be repeated or reframed, and his answers were not always responsive to the questions. I cannot comment on the accuracy or precision with which English was translated to Kinyarwanda but the translations from Kinyarwanda into English were relatively crude and I would have to assume the Claimant to have a fairly limited vocabulary in his native language to accept that the translations had much precision.

[24] Regardless of the quality of the translation, the Member appeared skeptical of the Claimant's difficulty with English, saying that she was "troubled to repeatedly observe the Claimant answering questions posed by his representative before the Interpreter could translate them from English to Kinyarwanda for him, and correcting the Interpreter's English translation of his answers" (paragraph 63). I listened to the audio recording of the hearing and I was able to

identify two instances in which the Claimant answered the question before the Interpreter had translated the question or corrected the interpreter. The first is where the Claimant is testifying as to who had instructed him to cut the small pieces on August 20. He is asked, "Who is 'he'?" and he answers with the trainer's name, "F. I." before the interpreter translates. The second instance relates to the November 6 incident and involves the Claimant's description of the hoist at his workplace. He corrected what had been interpreted as "cable" to "chain". While I could not otherwise confirm the General Division Member's observations, she had the advantage of viewing the Claimant's demeanour via video link, and there may have been additional occasions that were more readily apparent to her.

[25] That the Claimant had some ability in English does not suggest to me that an interpreter was unnecessary or that it was unreasonable for him to request an interpreter's assistance in quasi-judicial proceedings. At the same time, it would seem that he had sufficient facility in English at the time of the hearing so as to mitigate the interpreter's difficulties. I note that the Claimant had been working in Canada for 18 of the 20 months he had been in Canada at the time of the General Division hearing, and that he did not claim that he could not speak any English. Given this, and the obvious English limitations of the interpreter, it should not be surprising that he might occasionally correct the interpreter, particularly in respect of naming components of the equipment with which he had been working.

[26] In addition, the Claimant was represented at the hearing by a student-at-law from the Edmonton Community Legal Centre. Neither the Claimant nor his representative objected to the quality of the interpretation at the hearing, or claimed that the Claimant could not understand the evidence, the questions, or the process. Between the hearing and the issuance of the decision, the Tribunal recorded two calls from the Claimant and two additional calls between the representative and the Tribunal. No concerns were raised in any of those calls about the quality of the interpretation.

[27] None of the employer's direct evidence, represented by its general manager, or the general manager's responses to the questions of the General Division Member were interpreted for the benefit of the Claimant. The interpreter failed to interpret the entire testimony of the employer, and the General Division Member's questioning of the general manager—some 23

minutes in total. The Claimant has not raised it as an issue but it is an obvious defect on the face of the record.

[28] I feel that I must address it. The failure to conduct any portion of the hearing in a language understood by the Claimant or with interpretation would generally be a serious matter. It is potentially significant in terms of the Claimant's right to know the case against him, including his right to cross-examine evidence adverse to the Claimant's interests.

[29] Furthermore, the General Division Member did not offer the representative an opportunity to cross-examine the general manager (although she had invited the general manager to cross-examine the Claimant and he did so). The General Division decision simply records that there were no questions for the employer from the Claimant's representative (paragraph 36). As it happens, the General Division Member completed her own examination of the general manager, and then immediately asked the Claimant's representative if she still wished to *redirect the Appellant*. She did not offer the representative an opportunity to cross-examine the general manager.

[30] It is quite possible that the representative would have had questions to put to the general manager if she had been invited by the General Division to do so, although she might have been limited in her ability to cross-examine, if the Claimant had failed to understand any of the general manager's English testimony that he might otherwise have refuted.

[31] However, I am not satisfied that the lack of interpretation for 23 minutes and the lost opportunity to cross-examine the employer significantly detracted from the Claimant's right to be heard. Once again, the Claimant did not raise any concern at the hearing about the interpreter's failure to interpret the employer's testimony. Similarly, his student-at-law representative did not object to the lapse in interpretation or request the opportunity to cross-examine the employer. Neither concern has since been raised before or after the General Division decision, or before or at the Appeal Division hearing (after the representative had the opportunity to review the audio recording or transcript of the hearing).

[32] I accept that there were difficulties with the interpretation as provided. However, given that the Claimant had some facility in English, that he was represented, and that no objection was

raised at the time, I do not consider those deficiencies to have been of such a degree that they significantly affected the Claimant's right to be heard and to know the case against him. I would further expect the Claimant's representative to have requested the opportunity to challenge the employer's evidence if she felt it was in the interests of the Claimant.

Interference with the Claimant's presentation of his case

[33] The Claimant argues that his testimony was rushed. Despite the difficulty and delay inherent in the use of an interpreter, the Claimant's representative was instructed by the Member to "move along" at 38 minutes and 30 seconds (denoted 00:38:30) after she had examined the Claimant for about 15 minutes, although it does not appear that the Claimant was pursuing an irrelevant line of inquiry or belabouring any point. She was given a "3 minute warning" (at 01:02:06). She later asked for additional time to clarify the Claimant's testimony on a certain point but the General Division Member responded that there was a "need to keep moving" (at 1:11:35).

[34] While the General Division still spent significantly more time on the Claimant's evidence than on that of the employer, this was not because the Member constrained the employer's evidence in any way. The employer chose to provide only three minutes of undirected testimony. The General Division then led him through an additional 20 minutes of questions and answers, all without interpretation and therefore more productive.

[35] There were limits imposed on the Claimant's testimony but those limits were imposed with a view to completing the hearing in the allocated time. The Claimant argues that the two hours allocated to the hearing was unreasonable given the involvement of an interpreter. I disagree. In my view, it was reasonable for the Tribunal to have allocated two hours for such a hearing, even knowing that an interpreter would be required. If the hearing could not be completed in two hours, it was also open to the General Division to adjourn the hearing to continue at a later date.

[36] The General Division Member acknowledged that adjournment could be an option but was clearly intent on completing the hearing within the allocated time, and accordingly took steps to control the proceedings. This is understandable, but I accept that the Claimant felt

rushed. Any party that will be directly affected by the outcome of the process should be provided wide latitude to present their full case as they are directly affected by the hearing result. At the same time, some limits must be imposed as a practical matter. There is a fine line between the actions a member must take to manage the proceedings and the actions that might be considered as undue interference in the manner in which a party presents its case. In a general sense, I am of the view that the manner in which the Member conducts the hearing is entitled to significant deference and I will defer to the General Division Member's judgment to this degree: I do not find that the time restraints placed on the Claimant were such as to be a breach of natural justice under paragraph 58(1)(*a*).

Issue 2: Was the General Division Member impartial, or did the actions of the General Division give rise to a reasonable apprehension of bias?

[37] The Claimant argues that it was not fair that the General Division accepted the general manager's (of the employer) entire testimony in preference to his own direct testimony, despite the general manager's admission that he was "not privy to all conversations." The Claimant also submits that the Member had "pre-set assumptions about the matter" which, to my view, is a suggestion that she came to the hearing with a closed mind or was not otherwise impartial.

[38] The impartiality of the decision-maker is determined based on whether their impugned conduct gives rise to a reasonable apprehension of bias. The Supreme Court of Canada has put it this way:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. This test contains a twofold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and also apprised of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the

> prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.[1]

[39] Thus the Claimant has the onus of establishing that he is reasonable in holding his apprehension of bias and that the circumstances of the case are such that would give rise to an apprehension of bias in a reasonable and fully informed person.

[40] As argued by the Claimant's representative, the apprehension of bias arises in part from the manner in which the Member appears to have had "pre-set assumptions." However, I have additional concerns with the decision that derive from the record itself, such as the manner in which the Member elicited evidence. The Member extensively questioned both the Claimant and the employer and, in both cases, asked highly leading questions. Even more concerning was her occasional mischaracterization of the evidence.

[41] For example, when she questioned the employer as to what would be done "beyond the giving of the near-miss report," the employer responded, "discuss what happened and find ways to prevent it from happening and enforce that." Neither the Claimant nor the employer had ever testified that the Claimant had been given a copy of the near-miss report. The Claimant had already testified that these incident reports were filled out by someone else and that there was no translation. Nothing in the record confirms that a copy of the near-miss report was provided to the Claimant.

[42] Later in the hearing, the Member again leads the Claimant with the following question: "In each case you stopped work, and you were given a piece of paper and there was discussion about what happened, correct?" In his response, the Claimant rejects the premise of the member's question, stating that he had not been given any paperwork: there was no contrary evidence that he had ever been given "a piece of paper." I agree with the Claimant's submission that the General Division appears to have simply assumed this to be true, without evidentiary support.

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[1] *R. v. S. (R.D.)*, [1997] 3 SCR 484.

[43] The General Division Member also challenged the Claimant in respect of the statement in his application for reconsideration (GD3-24) that he "never received any warnings." With reference to the statement in his application that "he had never received any warnings" she put it in his way: "That's not actually the case was it? You've received multiple warnings. Why did you say you received no warnings?"

[44] The Claimant responded, through the interpreter, that he did not understand the question and the Member's response was, "It's a very simple question." It may have been a simple question if the Claimant had actually received multiple warnings or if he understood himself to have received multiple warnings, but the evidence did not lead inescapably to such a finding. In fact, the Claimant testified that he did not know the difference between a warning and other papers and that they were "sealing those papers" (by which I presume the employer was keeping the papers confidential). If at the time of his warning, he did not understand that he was being warned, or if he understood a warning as a written notice that had to be given to him, than this question could have been confusing.

[45] So far as documented warnings are concerned, only one of the documents in evidence is an actual warning (not including the final incident for which he was fired). The Claimant's un-contradicted evidence was that it had not been translated to him, and that no copy had been provided to him. The employer told the Canada Employment Insurance Commission (Commission) that the Claimant had received many warnings, both verbal and written, on January 12, 2016 (GD3-12), but the documents before the General Division were the only corroborative evidence provided by the employer in response to the Commission's request. In his sworn testimony, the employer did not repeat his assertion that there had been many verbal and written warnings, or otherwise elaborate on the nature of these warnings. Therefore, the General Division was not putting to the Claimant an uncontroversial fact borne out by all the evidence on file, but rather its own conclusion on the matter.

[46] Further to the Claimant's testimony related to his expectation of consequences for safety-related incidents, the Member asks the following:

> I am not able to understand how you have incidents, they are documented, you're asked to sign papers, you know there is a problem

> because you're asked to sign papers or you're stopped from doing your work and in one particular case you actually lost part of your finger and yet you do not somehow believe that you had any warnings or any disciplinary practices or any issues with respect to your safety.
>
> Did you think you would be able to work indefinitely and continue unsafe practices and not have consequences?

[47] This question is leading, it is suggestive of the Member's incredulity, and it actually misrepresents the Claimant's position. The Claimant never denied that he had been involved in safety-related incidents so the General Division is incorrect in asserting that he believes he has never had any issues with respect to safety.

[48] Even the General Division's assertion that the Claimant somehow believed he had never had any "warnings" is a selective view of the available evidence. While it is true that the Claimant's reconsideration application states that the Claimant had never received any warnings about his way of working (GD3-25), this has to be taken together with the record of his earlier telephone conversation of January 18, 2016 (GD3-20): After the Commission put it to the Claimant that he got a disciplinary notice on August 7, 2016, and another warning on November 6, 2016, the Commission asked the Claimant whether he remembered "getting the warnings," to which he replied "yes."

[49] I accept that the Claimant was aware that he had made mistakes at the time he spoke to the Commission. He may also have been aware that these mistakes justified a warning or other response. He may even have understood that he had been "warned" in some fashion. Nonetheless, the Claimant's answer to the Commission's question is not necessarily an acknowledgement that he received multiple warnings or that he had understood them to be warnings *at the time* the incidents occurred or at any time before his termination. In respect of the November 6, 2016, "warning", the employer shortly substituted a termination for the warning without any intervening incident, and so that "warning" might be understood both subjectively and objectively to have been a termination, as opposed to a warning.

[50] The question of whether the Claimant received multiple warnings is not so incontrovertible that the General Division could put it to the Claimant as an established fact that

should speak to whether he knew or ought to have known of his jeopardy if he didn't modify his conduct, as the General Division seems to suggest.

[51] Further to the General Division's apparent skepticism that the Claimant "somehow" believed that he had not had any warnings, disciplinary practices, or safety issues, the evidence that was before the General Division (and that is set out below), was not such as to rule out the possibility that the Claimant was unaware that he had been "disciplined":

- On their face, the near-miss reports are not disciplinary in nature, and there was no evidence to suggest that was their purpose.

- The Claimant did not dispute that he had filed a workers' compensation claim in respect of his cut finger but there is no evidence that he was disciplined for injuring himself.

- The Claimant did not dispute that the employer had originally determined a three-day suspension in respect of the November 2016 incident but, as it turns out, that incident actually resulted in his termination. It was not a disciplinary suspension that the Claimant might have taken as a warning to correct his behaviour.

- The single warning that the Claimant received was in relation to the August 7 skid-steer (also referred to as bobcat) incident, but no actual discipline is described under the heading "Disciplinary action" on the form.

- With reference to the August 7 incident, the Claimant stated that he had not understood the difference between a near-miss report and a disciplinary report, or that he could be terminated for any further violation, and that the paper had not been translated to him.

[52] In challenging the Claimant on his knowledge of warnings or disciplinary actions, the Member assumed that the Claimant had claimed to have never had "issues with respect to his safety" and that he had "stopped work, and (been) given a piece of paper" after each safety-related incident. This was not in evidence, and/or the Member interpreted facts such as the Claimant's receipt of multiple warnings in a fashion that was not necessarily supported by the evidence.

[53] Furthermore, questions such as those set out above are framed in such a way as to suggest that the Member has taken on a less-than-neutral interrogative role.

[54] In his attempt to respond to the General Division's assertion that the Claimant does not believe he has been warned or disciplined, the Claimant said that he "[…] was new at work he didn't know all this information about someone who's working. Then he didn't know all that would happen after the incident because he was not having this information in [his] head." When questioned by the Member as to "which information?" he began to explain how he had never seen someone who had been cut by the machine that cut his finger and that he did not know it could cut him. Before the Claimant can finish, the Member interrupts, saying that this is "not the answer to [her] question" (and I note that the Member raised the finger injury incident in the original question). He asks through his interpreter, "if he can repeat—he can maybe answer correctly?" but the Member responds, "No, I don't need any more."

[55] At paragraph 67 of the decision, the General Division provides some insight into why the member responded as she did to the Claimant's request to answer the question: she considered the Claimant's responses to her questioning to be "evasive." "Evasive" is not so much an observation, as a conclusion. The member does not state on what grounds she considers the Claimant's responses to be evasive. However, she abandoned the question at paragraph 46 above because she did not feel she was getting an answer so presumably this is one example at least. I note that this particular question was prefaced with a lengthy recitation, summed up with a misstatement of the Claimant's position, and also strained through the services of an interpreter. Even assuming the translation to be accurate, the Claimant might understandably have been confused by this question, as opposed to deliberately evading the question.

[56] It is apparent on review of the audio recording that the General Division challenged the Claimant's evidence through cross-examination on several occasions. By way of contrast, the General Division led the employer through evidence less critically, in a manner that could be perceived as making or fortifying the Respondent's case.

[57] There would be no justification for approaching the employer's evidence with greater credulity than the Claimant's evidence. The employer cannot be presumed to be a neutral witness or disinterested party. After the Respondent relied on the employer's statements to find

that the Claimant had been dismissed for misconduct, the employer requested of its own volition to be added to the appeal as a party, and chose to testify in a matter that concerned only the Claimant's entitlement to Employment Insurance benefits. In this case, the answer to the question of whether the Claimant's unsafe actions may be considered misconduct is largely dependent on the degree to which the Claimant can be held responsible for his own unsafe actions (which must therefore consider the degree to which his actions were encouraged, enabled or permitted by the employer's workplace culture, training, or processes). Given the broader context of workplace safety and injury prevention and the fact that the Claimant was still recovering from a workplace injury with an open workers' compensation claim, the employer might reasonably be mindful of Workers' Compensation Board scrutiny. Just as the Claimant may be presumed to have an interest in obtaining benefits from the Commission, the employer has an interest in supporting its safety practices and in maintaining its safety reputation. To be absolutely clear, I am not suggesting that the any such employer interest in the outcome should cause the General Division to disbelieve the employer's testimony or statements. I am noting only that there is no reason for treating the employer's evidence as more objective or less self-serving than the evidence of the Claimant.

[58] In the general manager's brief direct testimony before the General Division, he referred to the statement at GD3-31 to note that the Claimant was instructed to use a different method to cut the steel but that the Claimant said it takes too long. Beyond that, the general manager stated that the evidence speaks for itself. From this, the General Division embarked on an expansive exploration of whatever other evidence the general manager could bring to bear on the case. For example, the General Division Member directed the general manager to specific testimony of the Claimant, such as his testimony that he had been trained for mere minutes before being left on his own to do tasks, and then she invited him to refute that evidence in detail.

[59] The General Division also suggested evidence to the general manager. The general manager had not testified to any specific or actual knowledge of the training received by the Claimant, until the following exchange:

> Q. Is that the process that you have specific knowledge that [the Claimant] went through at your place of employment? Do you have actual …?
>
> A. Yes.

> Q. Okay. So your testimony is that [the Claimant] went through this process every time he was put on a new piece of equipment?
>
> A. Yes

[60] Prior to these questions, the general manager's testimony, particularly regarding the type of training the Claimant had received, had not been delivered from a first-person perspective, nor was it firmly declarative, except to the extent that he said that all employees were trained in the same fashion.

[61] Nor had there been any evidence by which the General Division might assume that the Claimant had followed the same training process on each piece of equipment, until the General Division suggested it. There was no evidence that the Claimant's training would have been delivered by the same person or by a similarly positioned or trained "trainer" on all equipment, or that the time the Claimant spent in training would have been the same for each machine (however simple or complex the operation might have been). It remained unclear what the general manager would have considered to be included in the "process" that he agreed the Claimant went through for each piece of equipment, even after the Member's questioning.

[62] Another example of the manner in which the General Division suggested evidence to the general manager, followed the manager's testimony that the Claimant would receive several days monitoring by the shop foreman or some delegate of the shop foreman:

> Q. Presumably, if there were issues with his operation of the machine he would have been corrected at that time?
>
> A. Absolutely.

[63] The General Division Member actively sought evidence from the general manager as to whether the Claimant knew that his conduct could lead to his dismissal, as follows:

> Q. With respect to the three-day discipline suspension, the three-day suspension, which very clearly indicates that any further violations will result in termination, what evidence do you have that the Appellant understood that that was the case? That any further infractions would cause his termination?
>
> A. The policies and procedures themselves.

> Q. But did anybody actually tell him ….You testified to me that after the near misses there was a meeting, there would be discussions about what happened and what could be done to improve safety. So presumably after the three-day suspension there would have been some discussion. Did anybody actually say to the Appellant, if you continue, if there is another incident you will be terminated?
>
> A. I can't confirm that … because I was not privy to all conversations at work.
>
> Q. Well, one of the important things we have to establish is whether the Appellant knew or ought to have known that a further incident, such as the final incident which we discussed, would have led to his termination, so can you speak to that?
>
> A. Yes, he ought to have known.
>
> Q. Why do you say that?
>
> A. Because it's demonstrated in our work culture all the time. People be [*sic*] let go for a lot less.
>
> Q. So the Appellant would have, just by virtue of being on the job, understood that safety infractions of the nature he was engaged in would lead to termination?
>
> A. Well, not just that. Sorry. You've changed the way this worded but I would say, by nature of safety infractions, yes it was demonstrated to him that that would lead to termination if he didn't change.
>
> Q. Okay, so, all right, so here's the thing. I need to—the question is, did the appellant understand that termination was the next step for any further safety infractions after he returned from his finger incident? Did he understand that?
>
> A. I don't know.
>
> Q. So, I'm making a note that your evidence is that you don't know for sure but the nature of the infractions in the workplace were such that other people were terminated for similar things.
>
> A. That's right.

[64] It is clear that the Member's initial question had been asked and answered repeatedly but that the Member was simply not satisfied with the answer. Not only did she lead the general manager's testimony, she assisted him by reminding him of the legal test. One might reasonably

conclude that she had "entered the fray," i.e. that her questions were intended to direct his testimony, rather than to just seek clarification or elaboration.

[65] Having reviewed the audio recording, I am left with a firm impression that the Member's approach to questioning was one that generally challenged the Claimant's evidence, but assisted the general manager to support the Respondent's position.

[66] Earlier, I referenced the lapse of interpretation during the course of the general manager's testimony and the Member's failure to invite the Claimant to question the general manager. I found that those defects were not so significant as to have denied the Claimant the right to be heard. Similarly, I did not find that the Claimant's rights were significantly prejudiced by the manner in which the Member curtailed the representative's examination of her client, the Claimant. However, I do consider the Member to have been somewhat inattentive to the protection of the Claimant's procedural rights. Taken together with the manner in which the hearing was conducted, I am concerned that the Claimant might reasonably have perceived the Member to have been biased.

[67] While I make no finding on whether the General Division Member was actually biased, I find on a balance of probabilities that the Claimant is reasonable in holding an apprehension that the Member was biased, and that a reasonable person, fully informed as to the circumstances, would share that apprehension of bias.

[68] This means that the General Division failed to observe a principle of natural justice as described in paragraph 58(1)(*a*) of the DESD Act.

[69] Having found as I have, I see no need to consider other the grounds of appeal advanced by the Claimant. The Court of Appeal in *Mette*[2] stated that "[subsection 58(2)] does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so interrelated that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." While *Mette* is concerned with an application for leave to appeal and not an appeal on the merits, I consider that the same principle applies to the appeal on the merits.

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[2] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

CONCLUSION

[70] The appeal is allowed. The matter is referred back to the General Division for reconsideration by a different member.

Stephen Bergen
Member, Appeal Division