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

Citation: *J. D. v. Canada Employment Insurance Commission*, 2018 SST 213

Tribunal File Number: AD-17-365

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 5, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant (Claimant) was working as a Lead Agent in Passenger Services for an aviation services company, before she was dismissed from her employment for unblocking seats on a flight without proper authorization, and for refusing to admit her mistake. This was said to be the culminating incident resulting in her dismissal.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) determined that the Claimant was not entitled to Employment Insurance benefits because she had lost her employment due to her own misconduct. It reaffirmed this decision on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal but the Tribunal's General Division upheld the Commission's decision. The General Division confirmed that the Claimant had unblocked the seats without authorization and found this to be misconduct within the meaning of the *Employment Insurance Act* (Act). It concluded that she had lost her employment by reason of her misconduct and that she was therefore disqualified from benefits. Leave to appeal to the Appeal Division was granted on the basis that the General Division may have misapprehended the Claimant's evidence.

[4] The Commission now supports the Claimant in her appeal, agreeing that the Claimant had not admitted to unblocking the seats in her testimony as reported in the General Division decision and that there was no basis for the General Division's finding that she had. The Commission submits that the General Division's erroneous finding had an impact on the fairness of the hearing.

[5] Having reviewed the audio recording, I accept that there is no basis in fact for the finding that the Claimant admitted to unblocking the seats, or for the finding that her evidence on this point was contradictory. This misunderstanding of the evidence factored directly into the finding of misconduct. The General Division based its decision on this misunderstanding and I find this

to be an error under paragraph 58(1)(*c*) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE(S)

[6] Did the General Division ignore or misapprehend the evidence in finding that the Claimant had improperly unblocked seats?

ANALYSIS

General principles

[7] The General Division is required to consider and weigh the evidence that was before it and to make findings of fact. It is also required to apply the law. The law would include the statutory provisions of the Act and *Employment Insurance Regulations* that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must reach its conclusions on the issues that it must decide by applying the law to the facts.

[8] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a General Division decision only if the General Division has made certain types of errors, which are called "grounds of appeal." In this case, the relevant ground of appeal is described in paragraph 58(1)(*c*) of the DESD Act, which is where 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. In other words, the General Division made a finding that overlooked or misunderstood significant evidence.

[9] The General Division considered whether the Claimant was disqualified from receiving benefits because she was terminated for misconduct, as required by section 30 of the Act. According to the courts, conduct can be found to be "misconduct" only if it is

- conscious, deliberate or intentional,
- conduct that the employee knew or ought to have known would impair the performance of his duties and that, as a result of the conduct;

· dismissal was a real possibility.[1]

Did the General Division ignore or misapprehend the evidence in finding that the Claimant had improperly unblocked seats?

[10] Before the General Division can find that certain conduct is misconduct, it must first find that the conduct occurred. The Claimant denies unblocking those particular seats that she is said to have unblocked without authorization. The employer submitted computer records and stated that it had reviewed video surveillance by which it could determine that the Claimant had unblocked the seats.

[11] The General Division preferred the "consistent evidence of the employer that it was the Appellant who unblocked the seats in question," over the evidence of the Claimant, which it considered to be contradictory. The General Division decision reports that the Claimant at one point stated that she did unblock the two seats 31AB (the seats in question). The General Division found that she had "again breached the employer's procedure when she unblocked two seats on a flight on January 25, 2015 without authorization."

[12] In fact, a review of the audio recording of the hearing does not disclose any such admission and the Claimant did not contradict herself on this point. She consistently denied unblocking the seats. The General Division Member was mistaken as to the Claimant's evidence.

[13] The finding that the Claimant contradicted herself and at one point admitted to unblocking the seat was clearly a significant factor in the General Division's preference for the employer's evidence and calls into question the finding that the impugned conduct actually occurred. This necessarily undermines the General Division's conclusion that the Claimant lost her employment because of her misconduct. I therefore find that the General Division based its finding on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it. This is an error described in paragraph 58(1)(*c*) of the DESD Act.

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[1] *Mishibinijima v. Canada (Attorney General*), 2007 FCA 36

[14] 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* was 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.

CONCLUSION

[15] The appeal is allowed. The matter is remitted to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	J. D., Appellant S. D., Representative for the Appellant Employment Insurance Commission, Respondent Susan Prud'homme, Representative for the Respondent

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