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

Citation: *S. W. v. Canada Employment Insurance Commission and Health Canada*, 2018 SST 672

Tribunal File Number: AD-16-423

BETWEEN:

S. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Health Canada

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, S. W., applied for Employment Insurance (EI) benefits in 2014. She lost her employment in October 2014. Her employer, Health Canada, had terminated her employment for misconduct. She argues that harassment in the workplace resulted in the loss of her employment, not her own misconduct.

[3] The Respondent, the Canada Employment Insurance Commission, denied EI benefits because it determined that the Appellant had lost her employment as a result of her own misconduct. Her employer advised that she had made a threat directed to another employee and she was dismissed when the threat came to light.

[4] The General Division found that the Appellant was dismissed for sending an email to her union threatening the life of a co-worker, that this conduct was wilful and reckless, and that she ought to have known that this conduct was of such a serious nature that it would lead to termination of her employment. Therefore, the Appellant's conduct constitutes misconduct, and she is disqualified from receiving EI benefits.

[5] The Appellant is appealing the General Division decision on the grounds of breach of natural justice, errors of law, and serious errors in the findings of facts. The Tribunal's Appeal Division granted leave to appeal.[1]

[6] The Appellant is also seeking a stay of proceedings on the basis of alleged bias of the General Division member and the length of time since she filed an application for EI benefits.

[7] The appeal hearing was held by teleconference.[2] The Appellant and the Respondent participated.

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[1] Leave to appeal decision, dated October 24, 2016.

[8] The Appeal Division finds that the General Division did not commit a reviewable error.

ISSUES

[9] **Preliminary issue:** Does the Appeal Division have the jurisdiction to consider the Appellant's motion for a stay of proceedings?

[10] The Appellant raises many grounds of appeal. After addressing the standards of review to be applied by the Appeal Division when it reviews a General Division decision, I will address the specific issues raised by the Appellant:

> **Issue 1:** Did the General Division fail to observe a principle of natural justice specifically, (a) by adjourning the General Division hearing and accepting further evidence into the record or (b) by showing bias?
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> **Issue 2:** Did the General Division err in law by admitting the email of June 30, 2014, into evidence?
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> **Issue 3:** Did the General Division err in law by failing to consider all of the evidence?
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> **Issue 4:** Did the General Division err in law by failing to conclude that the Respondent had not discharged its onus of proof?
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> **Issue 5:** Did the General Division base its decision on serious errors in the findings of fact, specifically, (a) that the Appellant sent an email that contained a threat and (b) that this conduct constituted misconduct?

ANALYSIS

[11] 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 otherwise acted beyond or refused to

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[2] The Appeal Division hearing was first scheduled to take place by videoconference. The form of hearing was changed to teleconference at the request of the Appellant and the Respondent, as set out in letters of March 29, 2017, April 20, 2017, and April 28, 2017.

exercise its jurisdiction, 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.[3]

Preliminary Issue: Does the Appeal Division have the jurisdiction to consider the Appellant's motion for a stay of proceedings?

[12] The Appellant seeks a stay of proceedings and an order requiring the Respondent to pay her EI benefits immediately. Her arguments include that the General Division member was biased, the Respondent did not conduct its investigation properly, the General Division member adjourned the hearing and allowed further evidence into the record, and a stay order would act as a deterrent to the Respondent taking three years to make a decision.

[13] However, I am not convinced that there is any legal authority for the Appeal Division to stay these proceedings.

[14] Firstly, this matter is not a proceeding brought against the Appellant by the Crown, such as a criminal charge or a deportation order. It results from the Appellant's request for EI benefits and the Respondent's denial of those benefits under the *Employment Insurance Act* (EI Act).

[15] Secondly, the Tribunal is established by legislation and only has the powers that are conferred to it by that legislation. It does not have the same inherent powers as superior courts. There are no provisions of the *Department of Employment and Social Development Act* (DESD Act), the *Social Security Tribunal Regulations* (SST Regulations), or the EI Act that give the Tribunal authority to grant a stay of proceedings or a stay order.

[16] The Federal Court of Appeal has repeatedly held that the mandate of the Appeal Division of this Tribunal is conferred to it by sections 55 to 69 of the DESD Act.[4] There is no reference to a stay of proceedings in these provisions.

[17] I asked the parties to point to the legal authority for the Appeal Division of this Tribunal to order a stay of proceedings. The Appellant stated that the EI cases where stays were denied

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[3] *Department of Employment and Social Development Act* at s. 58(1).
[4] *Canada (Attorney General) v. Jean*, 2015 FCA 242.

were different from her case. The Respondent replied that the Appeal Division does not have the jurisdiction to stay these proceedings.

[18] The Appellant referred to the Supreme Court of Canada's decision in *Blencoe*[5] and the Federal Court of Appeal's decision in *Norman*.[6] Neither case helps the Appellant. The present matter is not a human rights case, there is no issue related to the *Canadian Charter of Rights and Freedoms* (Charter) in question, and neither case held that this Tribunal (or its predecessor tribunals) has the same jurisdiction as the courts to order a stay of proceedings.

[19] *Blencoe* was a discrimination matter before the B.C. Human Rights Commission relating to complaints of sexual harassment against a minister in the B.C. government in the 1990s. Mr. Blencoe, the respondent, alleged unreasonable delay in processing the complaints against him and relied on sections 7 and 11(*b*) of the Charter. The B.C. Court of Appeal had directed that the human rights proceedings against him be stayed. The Supreme Court of Canada held that the Court of Appeal erred in transplanting principles set out in the criminal context to human rights proceedings. It concluded that "there is no constitutional right outside the criminal context to be 'tried' within a reasonable time." It also discussed whether a remedy was available to the respondent pursuant to administrative law principles (i.e. staying proceedings where there has been an abuse of process).

[20] In *Norman*, an EI matter in which the claimant had been disentitled to benefits and penalized, the Federal Court of Appeal discussed the *Blencoe* case. It noted that *Blencoe* was a human rights case, and an EI matter deals with economic rights, not human rights. It stated that it had "strong reservations about applying the principles developed in the human rights context to the realm of economic rights." Also, the Umpire in the *Norman* case allowed the claimant's appeal because it found a denial of natural justice, and the matter was ordered to be returned to the Commission for determination, not stayed. While the Federal Court of Appeal discussed *Blencoe* and the possibility of abuse of process that warrants a stay of proceedings in a broader administrative law context, it did not comment on whether the Umpire had the jurisdiction to order a stay of proceedings. The Federal Court of Appeal has that inherent jurisdiction, but it did not pronounce on the Umpire's jurisdiction. In any event, that is not what the Umpire did.

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[5] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.
[6] *Canada (Attorney General) v. Norman*, 2002 FCA 423.

Moreover, the Federal Court of Appeal set aside the Umpire's decision and referred the matter back for redetermination on the basis that the claimant was not entitled to benefits.

[21] Without clear legal authority for the Appeal Division to stay these proceedings, an analysis of whether the evidence in the present matter meets the high threshold discussed in *Blencoe* and *Norman* is unnecessary.

[22] Further, the request for an order requiring the Respondent to pay EI benefits forthwith without continuing with the merits of this appeal is essentially a request for an order compelling the Respondent to make a decision in favour of the Appellant. This is tantamount to a writ of *mandamus*,[7] and the Tribunal does not have the jurisdiction to rule on such a request. Only if the appeal on its merits is allowed, does the Appeal Division have the authority to order payment of EI benefits in accordance with the EI Act and *Employment Insurance Regulations*.

Standards of Review (or Deference to the General Division)

[23] When the Appeal Division reviews a General Division decision, must it apply the standards of review as adopted in *Dunsmuir*[8]or the statutory tests that the 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.

[24] The Appellant made no submissions on the deference, if any, that the Appeal Division owes to the General Division. She argues that the General Division erred and that the Appeal Division should allow her appeal and order that she is entitled to EI benefits.

[25] The Respondent submits that s. 58(1) of the DESD Act suggests that the Appeal Division should show deference to the General Division's findings of fact and questions of mixed fact and law. The Respondent argues that the Appeal Division should apply the standard of correctness to questions of law and the standard of reasonableness to questions of fact and questions of mixed fact and law.

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[7] *Mandamus* means "we command" in Latin. It is the name of a prerogative writ which may be issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.
[8] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.

[26] 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[9] and, if the standards of review must be applied, whether the standard of review for questions of law and natural justice differs from the standard of review for questions of fact and questions of mixed fact and law.

[27] Given that the courts have yet to resolve or provide clarity on this apparent discrepancy, I will consider this appeal by applying the language of the DESD Act without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[28] The appeal before the General Division turned on the question of whether the Appellant's actions constituted misconduct within the meaning of the EI Act.

[29] The appeal before the Appeal Division rests on distinct questions of errors of law and errors of fact and principles of natural justice.

Issue 1: Did the General Division fail to observe a principle of natural justice, specifically, (a) by adjourning the General Division hearing and accepting further evidence into the record or (b) by showing bias?

[30] I find that the General Division did not fail to observe a principle of natural justice.

[31] The General Division first scheduled a teleconference hearing on September 17, 2015.[10] The records of the Tribunal show that:

a) the Appellant and the Respondent filed additional information in July 2015, after the notice of hearing was issued;[11]

b) about an hour before the start of the hearing, the Appellant contacted the Tribunal and said she wanted to submit documents for her hearing. She was told that she should speak

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[9] *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; *Quadir v. Canada (Attorney General), 2018 FCA 21*.
[10] Notice of hearing, dated June 4, 2015.
[11] GD6 and GD7.

to the General Division member at the hearing. She sent these documents to the Tribunal by email.[12]

c) the member had not received them by the time of the hearing. Because the Appellant indicated that the additional evidence was important to her case, the member adjourned the hearing to December 1, 2015.[13]

[32] The Appellant argues that the reasons for the adjournment were not correctly described in the adjournment letter, she wanted the hearing to proceed, and the member decided to adjourn the hearing anyway. She also argues that the adjournment gave the Respondent and the Tribunal time to seek further information from her former employer and use that evidence at the rescheduled hearing date. She insists that the General Division member should have requested additional information from her if he intended to rely on the Respondent's or the employer's additional evidence. Because of these things, the Appellant alleges that there is a reasonable apprehension of bias on the part of the General Division member.

a) Adjournment of Hearing and Additional Evidence

[33] The General Division member determined that the employer had a direct interest in this appeal and decided to add the employer as an added party to the appeal.[14] The Tribunal sent a letter to all the parties advising them of this decision. The letter also asked the employer for information about the security of its computer systems and whether someone can easily access another employee's computer.

[34] The Added Party replied and answered the question asked by the General Division.[15] It also stated that a Tribunal decision "will not impact the conclusion that [the Appellant] was found culpable for a serious act of misconduct that led to the decision to terminate her employment." A copy of this document was sent to the Appellant and the Respondent on November 7, 2015.

[12] GD 9: Appellant's additional information, emailed at 1:16 p.m. on September 17, 2015.
[13] GD10: letter granting adjournment, dated September 17, 2015.
[14] GD11: letter to Corporate Services Branch HR Directorate, dated September 18, 2015.
[15] GD12: letter from Health Canada, Labour Relations/Human Resources Directorate, dated October 29, 2015.

[35] A notice of hearing was sent to the parties on November 9, 2015, stating that the General Division member had rescheduled the hearing to December 7, 2015, due to a scheduling conflict. The teleconference hearing took place and was completed on December 7, 2015.

[36] The Appellant takes issue with the adjournments granted by the General Division member. However, the Tribunal must conduct proceedings while considering fairness and natural justice and may vary the SST Regulations or dispense a party from compliance with a provision.[16]

[37] Whether the additional documents filed by the Appellant just before the September 17, 2015, hearing time were available to the General Division member or not, they had not been provided to the Respondent. The principles of natural justice apply to all the parties to an appeal, not only the appellant.

[38] The General Division member determined that it was in the interests of natural justice to adjourn the hearing on September 17, 2015, and that the hearing should be held on December 7, 2015, rather than December 1, 2017, because of a scheduling conflict. He had the authority and the discretion to do so, and no breach of the principles of natural justice resulted.

[39] As for adding the employer as a party to this matter, the Tribunal may add a party to a proceeding on its own initiative.[17] The General Division did not breach the principles of natural justice in its determination that the employer has a direct interest in the appeal and ordering it to be an added party. In addition, it has the authority and the discretion to request information from any of the parties, and its request for information about the security of the employer's computer systems was within that discretion. A copy of the employer's response was sent to the other parties well prior to the General Division hearing. No breach of natural justice resulted from this.

b) Alleged Bias of the General Division Member

[40] The Appellant alleges that actual bias occurred and that there is a reasonable apprehension of bias, based on the manner in which the General Division member conducted the proceedings.

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[16] *Social Security Tribunal Regulations*, s. 3(1).
[17] *Social Security Tribunal Regulations*, s. 10(1).

[41] 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.[18] In *Arthur*,[19] 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.

[42] The Appellant relies on the adjournments, the information provided by the Added Party, the General Division member's questions and comments at the hearing (which she describes as "badgering"), and his treatment of the evidence to support her allegations of bias.

[43] I have already addressed the adjournments and the Added Party, above.

[44] The Appellant expressed her concerns about the June 30, 2014, email being evidence at the General Division hearing. The General Division member reviewed the email and asked the Appellant questions about it. He did not exclude the email, as the Appellant requested, and weighed it along with the other documentary and oral evidence. This did not demonstrate bias or partiality. Analysing and weighing the evidence are the General Division's proper roles.

[45] Even with the Appellant's arguments taken at face value, the evidence falls short of showing that the General Division did not give the Appellant sufficient opportunity to be heard or that the General Division was prejudiced or biased. Based on the Appellant's description of the hearing and on review of the audio recording of the hearing, I find that there was no evidence of badgering of the Appellant during the hearing or conduct that prevented her from presenting her case.

[46] While the Appellant may not have appreciated the member's questions at the General Division hearing, the evidence does not demonstrate that the General Division's conduct derogated from the standards of the right to be heard and the right to an impartial hearing. The right to be heard does not entitle parties to present their case without challenge or question.

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[18] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, at paras. 21 and 22.
[19] *Arthur v. Canada (Attorney General)*, 2001 FCA 223.

Issue 2: Did the General Division err in law by admitting the email of June 30, 2014, into evidence?

[47] I find that the General Division did not err in law by admitting this email into evidence.

[48] The Appellant gave many reasons for her argument that this email should have been excluded from the evidence, including that it was redacted, it was protected by solicitor-client privilege, it was protected by litigation privilege, it is "fruit of a poisonous tree," and she has never admitted to having sent this email.

[49] The email of June 30, 2014, is found at GD3-32, among other places in the appeal record. The "From:" field shows S. W./HC-SC/GC/CA (the Appellant's work email) as the sender. The "To:" field is blank, having been redacted, and the salutation after "Hi" is also redacted. It is entitled "Grievance request: Family Leave request denied," and the time stamp is June 30, 2014, at 7:13pm. The third paragraph reads: "We need to have [blank] removed as my supervisor/leave approver as soon as possible. He is not conducive to my occupational health nor safety. I am tired of the constant workplace violence. One day soon I will snap, bring one of my guns in to work, and shoot the bastard."

[50] I will refer to this email as "the Email"

[51] The Respondent was provided a copy of the Email by the employer.[20] The Email was sent from the employer's email system.

[52] Regarding the redacted recipient field and name after "Hi", the Appellant provided an email chain with the subject "Grievance for Family Leave," and the last email in the chain from J. G. to her was dated and time-stamped June 30, 2014, at 5:43pm. She noted that the Email was sent to J. G., LL.B., and she submits that it was protected by solicitor-client privilege (because the recipient is a lawyer working as an employment relations officer with the Public Institute of the Public Service of Canada, PIPSC, the union) and litigation privilege (because the Appellant had filed a harassment grievance against her employer, which was ongoing).

[53] The Appellant argues that redaction of the Email removed her ability to show that the Email was sent to a lawyer on staff with her union. However, the Tribunal did not exclude the

[20] GD3-31.

Appellant's evidence about who the Email was sent to. The General Division accepted that the Email was sent to a lawyer.[21] The redaction of the Email in this way had no impact on the Appellant's argument on excluding it because of alleged privilege.

[54] The Appellant submits that the Email was sent to the police by the union and that the employer was informed of the Email by the RCMP[22] and then went into her work computer as part of the criminal investigations to obtain a copy of the Email. As a result, the Appellant argues that the Email is "fruit of a poisonous tree" and should have been excluded from the evidence in the appeal record.

[55] I will discuss each of these concepts: solicitor-client privilege, litigation privilege and excluding "fruit of a poisoned tree."

[56] The General Division noted that the Appellant had argued that the lawyer breached a relationship of confidentiality by disclosing the Email to the police or the employer.[23] Before the Appeal Division, the Appellant referred more specifically to solicitor-client privilege and litigation privilege.

[57] Solicitor-client privilege only applies to communications between a lawyer and their client for the purpose of legal advice. Litigation privilege creates a zone of privacy in relation to pending or anticipated litigation.

[58] The Appellant's evidence at the General Division did not establish that either solicitor-client privilege or litigation privilege attached to the Email. Just because the recipient of an email has an LL.B. degree and works for one's union, and there is a pending workplace harassment complaint, does not mean that either privilege attaches to the Email. An assertion by the Appellant that the Email was privileged does not make it so.

[59] The recipient of the Email did not consider that it was subject to privilege as the Appellant's union reported it to the RCMP. The RCMP advised the employer and conducted an

[21] General Division decision at paras.11, 14, 17, 35, 36 and 40.
[22] GD6-3.
[23] General Division decision at para. 17.

investigation, and a restraining order was issued against the Appellant. The Email was sent from the employer's system to which the employer had access.

[60] The reference to "fruit of a poisoned tree" is an evidentiary doctrine, which may result in exclusion of evidence, created by the courts in criminal prosecutions. This criminal law doctrine has been incorporated into sections 8 and 24(4) of the Charter, relating to illegal search and seizure by the Crown and limited to criminal matters. This doctrine, however framed, is not applicable to the present appeal, which is not a criminal prosecution.

[61] The Appellant's arguments based on privilege and "fruit of a poisoned tree" are red herrings. The General Division did not err in law by omitting an analysis of these arguments in its decision.

[62] As for the Appellant's argument that she has never admitted to sending the Email, this is equally without merit. The Respondent need not prove beyond a reasonable doubt that the Appellant sent the Email. The Email exists, the union reported it to the RCMP, and the RCMP issued a restraining order against the Appellant and conducted an investigation.

[63] The Appellant was asked by the General Division member whether she told her employer that she had not written the Email. She responded, "I have never acknowledged sending the email."

[64] The Tribunal does not need the Appellant to admit to having sent this email. Common sense easily prevails. On a balance of probabilities and after considering all the relevant evidence, the General Division found that the Appellant wrote and sent the Email.[24]

[65] The General Division did not err in law by admitting this email into evidence.

Issue 3: Did the General Division err in law by failing to consider all of the evidence?

[66] I find that the General Division did not fail to consider all of the relevant evidence.

[67] The Appellant submits that the General Division should have considered evidence that the employer wanted to get rid of her because she had filed grievances for harassment. She

[24] General Division decision, paras. 27 to 37.

referred to a list of grievances that she had filed[25] and letters that she had sent to the Respondent asserting that she was the victim of workplace harassment.

[68] These assertions were not evidence that required analysis. The appeal relates to the Appellant's alleged misconduct and not to a voluntary leaving by the Appellant. There is nothing more in the appeal record about the Appellant's grievances than that she filed some.[26]

[69] The Added Party suspended the Appellant on July 3, 2014, because of the Email.[27] Her employment was terminated, because her employer found that she made a threat of violence in the Email, which constitutes serious and severe misconduct.[28]

[70] The General Division did not err by failing to specifically address the evidence that the Appellant had filed grievances against her employer. Its decision refers to "the Appellant's allegations of workplace harassment."[29]

Issue 4: Did the General Division err in law by failing to conclude that the Respondent had not discharged its onus of proof?

[71] I find that the General Division did not err by failing to conclude that the Respondent had not discharged its onus of proof. The Respondent had discharged its burden.

[72] The burden of proof lies with the Commission to demonstrate that the Appellant lost her employment because of her own misconduct.[30] That the burden of proof lies with the Commission to demonstrate disentitlement does not mean that the Commission has to be the source of the evidence it relies upon. 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.

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[25] GD3-24: letter from counsel for PIPSC, dated December 19, 2014.
[26] The Appellant recently submitted a decision of the Federal Public Sector Labour Relations and Employment Board, dated February 16, 2018, which dismissed one of her complaints. It was not in the record before the Appeal Division at the hearing in November 2017, and it was not considered in this appeal.
[27] GD9-3 and 4: letter from Health Canada to the Appellant, dated July 3, 2014.
[28] GD9-5 and 6: letter from Health Canada to the Appellant, dated October 9, 2014.
[29] General Division decision, para. 44.
[30] *Meunier v. Canada (Employment and Immigration Commission)*, [1996] FCJ No 1347.

[73] In addition, the burden of proof in an EI matter is not "beyond a reasonable doubt." The Appellant refers to the burden as "heavy." However, the General Division correctly referred to and applied "the balance of probabilities."

[74] There is no dispute on the following: the Appellant lost her employment and the employer's reason for terminating her employment was that she made a threat of violence in the Email, which, to the employer, constituted serious and severe misconduct.[31]

[75] The Appellant argues that the burden on the Commission rested entirely on one email, in other words, that the sending of the Email is the only conduct that is alleged to constitute misconduct.

[76] Without a doubt, sending of the Email is the conduct that the employer and the Respondent determined constitutes misconduct and a copy of the Email was in the record. However, it is not the only evidence in the record that the Respondent could use to discharge its burden of proof.

[77] The employer had determined that the Appellant wrote and sent the Email. The recipient of the Email had acted on receiving it and reported it to the police. The RCMP acted by informing the employer, conducting an investigation, and issuing a restraining order. All of this was established by evidence in the appeal record.

[78] On the totality of the evidence, the General Division found that the Appellant had written and sent the Email. The Respondent had discharged its onus of proof.

[79] The Appellant argues that the objectionable statement in the Email was not a threat, that sending the Email does not constitute misconduct, and that, therefore, the Respondent could not discharge its burden. These arguments will be discussed below in the section on findings of fact.

[31] GD9-5 and 6: letter from Health Canada to the Appellant, dated October 9, 2014.

Issue 5: Did the General Division base its decision on serious errors in the findings of fact, specifically, (a) that the Appellant sent an email that contained a threat and (b) that this conduct constituted misconduct?

[80] Did the email contain a threat? The General Division quoted the text and found that it did.[32] This finding of fact was based on documentation in the appeal record and evidence and the Appellant's submissions at the General Division hearing.

[81] The Email stated: "One day soon I will snap, bring one of my guns in to work, and shoot the bastard." The General Division found that this statement was a threat.

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

[83] Did this conduct constitute misconduct? This question is one of mixed fact and law.

[84] I note that there appears to be a lack of consensus in case law regarding whether the Appeal Division has jurisdiction over questions of mixed fact and law.[33] If the Appeal Division does not have jurisdiction, then this finding of the General Division is not reviewable by the Appeal Division.

[85] I will, nevertheless, consider this issue.

[86] The General Division relied on applicable jurisprudence,[34] reviewed the evidence in the record, and found that the Appellant's conduct was "willful and reckless" and "wilfully disregarded the affects her actions would have on job performance" and that she ought to have known that "her action, in sending a threatening email, was misconduct of such a serious nature that it would lead to termination of employment."[35]

[87] These findings of fact were not made without regard for the material before it or in a perverse or capricious manner.

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[32] General Division decision at paras. 10, 21, 27, 34, 36, 37, 40, and 42.
[33] *Quadir v. Canada (Attorney General)*, 2018 FCA 21, at para. 9; *Sharma v. Canada (Attorney General)*, 2018 FCA 48, at para. 12; *Canada (Attorney General) v. Jean*, 2015 FCA 242, at para. 14; *De Jesus v. Canada (Attorney General)*, 2013 FCA 264, at para. 45.
[34] General Division decision, paras. 24, 39, 43, and 45.
[35] General Division decision, paras. 37 to 46.

[88] The Email was sent from the employer's email system by the Appellant. It contained a threat of extreme violence directed at a co-worker. The Email was alarming to the recipient, the union, the RCMP, and the employer.

[89] The Appellant continues to maintain that her conduct could not have been wilful, as she was not in a state of mind to know what she was doing, did not know that expressing frustration to a lawyer in an email could lead to termination, and the mental element of the conduct was not present. She made similar arguments before the General Division. It is not the role of the Appeal Division to rehear the matter *de novo*, i.e. anew.

Summary of Alleged Errors

[90] I have found that the General Division did not commit a reviewable error.

CONCLUSION

[91] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	November 16, 2017
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. W., self-represented Rachel Paquette, Representative for the Respondent