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

Citation: *T. C. v. Canada Employment Insurance Commission*, 2018 SST 752

Tribunal File Number: AD-16-1393

BETWEEN:

T. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 20, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, T. C., applied for Employment Insurance (EI) benefits in 2015. He lost his employment in November 2014. His employer terminated his employment for misconduct. He argues that his employment was terminated because he caught his company committing fraud, not due to his own misconduct.

[3] The Respondent, the Canada Employment Insurance Commission, denied the Appellant EI benefits because it determined that he had lost his employment as a result of his own misconduct. His employer advised that he was dismissed for not reporting his time properly, for acting in a conflict of interest, and for using marijuana, contrary to the employer's work policies.

[4] The General Division found that the Appellant was dismissed for falsifying his work hours and issuing purchase orders to a company of which he was part owner. It also found that he ought to have known that this conduct was of such a serious nature that it would lead to termination of his employment. Therefore, the Appellant's conduct constitutes misconduct, and he is disqualified from receiving EI benefits.

[5] The Appellant is appealing the General Division decision on the grounds of breach of natural justice. The Tribunal's Appeal Division granted leave to appeal.[1]

[6] The appeal hearing was held by teleconference. The Appellant and the Respondent participated. The employer was initially an added party to the General Division matter, but it withdrew prior to the hearing.

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

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[1] Leave to appeal decision, dated August 31, 2017.

ISSUES

[8] The Appellant raises grounds of appeal based on the General Division member's conduct at the hearing. They can be summarized as follows:

> **Issue 1:** Did the General Division fail to observe a principle of natural justice, specifically by the member attending to personal matters during the hearing, thereby failing to give the Appellant a full opportunity to present his case?
>
> **Issue 2:** Did the General Division err in law by failing to consider all of the evidence?

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 otherwise acted beyond or refused to 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.[2]

Issue 1: Did the General Division fail to observe a principle of natural justice by the member attending to personal matters during the hearing?

[10] The Appellant alleges that the General Division member failed to observe a principle of natural justice, based on the manner in which the General Division member conducted the proceedings. He alleges that the General Division member attended to his dog(s) or other personal matters during the hearing.

[11] The Appellant first made this allegation in his application for leave to appeal. He did not object to the member's conduct during the General Division hearing.

[12] A breach of natural justice must be brought up at the earliest practicable opportunity and if no objection is made at the hearing, the party alleging the breach is taken to have provided an implied waiver of any perceived breach of unfairness: *Benitez et al* v. *Minister of Citizenship and Immigration*.[3] The earliest practical opportunity arises when the applicant is aware of the

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[2] *Department of Employment and Social Development Act* at s. 58(1).
[3] 2006 FC 461, at paras. 204–220.

relevant information and it is reasonable to expect him or her to raise an objection.[4] However, the doctrine of waiver does not preclude an applicant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of, for example, badgering in cross-examination.[5]

[13] Because the Respondent did not argue this point and the Appellant was able to listen to the audio recording of the hearing only after the General Division decision was rendered, I am not applying the doctrine of waiver here.

[14] The Appellant pointed to time stamps during the audio recording of the hearing to attempt to establish the "unacceptable" conduct of the General Division member. The Appellant submits that the member was attending to his dog(s), rather than paying attention to the Appellant's evidence and submissions.

Did the member fail to give the Appellant a full opportunity to present his case?

[15] I find that the member did not fail to give the Appellant a full opportunity to present his case.

[16] 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.[6]

[17] While the Appellant alleges that the General Division member attended to his dog(s) or other personal matters throughout the 46-minute teleconference hearing, I do not agree. I listened to the audio recording in its entirety and took note of the time stamps provided by the Appellant. This is what I heard:

a) At about 4:43, the sound of a dog barking;

b) At about 4:48, the sound of a door closing;

c) At about 9:05, the vibration of an electronic device;

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[4] *Ibid.* at para 221.
[5] *Ibid.* at para 222.
[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699, at paras. 21 and 22.

d) At about 13:40, there is what the Appellant describes as "a weird noise," which the Appellant attributes to the member playing with his dog(s) or attending to other personal things;

e) At about 31:10, the sound of a dog barking;

f) At about 31:23, the sound of a door closing.

[18] In each of these instances, with the exception of the "weird noise," the sound is momentary. For the most part, the sounds do not interrupt or interfere with the hearing at all. In one instance, the General Division member asks for a momentary pause and then returns to the line.[7] None of these sounds interfered with the Appellant's opportunity to present his case.

[19] As for the "weird noise," the Appellant argues that it was evident "all throughout" the hearing and that this demonstrates that the General Division member was petting his dogs or playing with something. I disagree. The noise is present in various parts of the recording. I find that it is consistent with the sound of the scroll wheel of a computer mouse. It is also present when documents in the record are being discussed. The Tribunal's record is an electronic one (not printed on paper), so when a member reviews it on screen, the member would use a computer mouse to scroll and read through documents.

[20] This noise is apparent on the recording in the same manner that typing on a keyboard would be while a person is taking notes. However, it did not interfere with the conduct of the hearing. The Appellant's complaint in this regard is akin to complaining about the sound of pages turning as a person refers to a printed copy of a document.

[21] Even taking the totality of these sounds noises together, there is no basis for the Appellant's allegation that the General Division member attended to personal matters during the hearing, rather than paying attention to the Appellant's evidence and submissions.

[22] I reviewed the audio recording (and the documentary record), and I find that the Appellant had a fair opportunity to present his case.

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[7] Time stamp 31:20 to 31:27 approx: the member says "Hang on for a second" during a pause in the Appellant's testimony. The Appellant acknowledges with "Yes."

[23] The Appellant also alleged that the audio recording was manipulated. His "evidence" in this regard is that the telephone call lasted for longer than the recording. I find that there is no basis for this allegation. The audio recording is between 42 and 43 minutes long. The Appellant asserts that the hearing was longer than that and accuses the General Division member of manipulating the audio recording to remove the parts when the member was tending to and speaking about his dog(s). However, there is simply no evidence that the recording was manipulated.

Issue 2: Did the General Division err in law by failing to consider all of the evidence?

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

[25] The Appellant alleges that the General Division member did not consider his testimony at the hearing because the member was attending to personal matters. He also submitted that the member did not consider the Appellant's additional evidence filed after the hearing "in the same 24 hour period."

[26] The allegation about the member attending to personal matters during the hearing was discussed above. There was no breach of natural justice or error of law in this regard.

[27] The Appellant submits that the General Division should have considered his evidence that the employer wanted to get rid of him because he had discovered wrongdoing on the part of a manager and that the real reason given to him for his dismissal was that he had a prescription for medical marijuana.

[28] These assertions of wrongdoing on the part of a manager were not evidence that required analysis. The appeal relates to the Appellant's alleged misconduct and not to alleged wrongdoing of other employees. There is nothing more in the appeal record about the Appellant being fired for whistleblowing than his own assertions.

[29] The use of medical marijuana was one of many reasons that the employer cited for its dismissal of the Appellant. However, the General Division found that it was not the main reason for the Appellant's job loss.[8]

[30] In arriving at its decision, the General Division considered the Appellant's oral and documentary evidence and the documentary evidence that the Respondent had filed. Where there was contradictory evidence and the General Division dismissed or assigned little or no weight to some of it, the member explained the reasons for that decision. The General Division did not fail to consider the Appellant's evidence. It weighed the evidence and afforded more weight to some parts of it than to other parts, which is properly within the General Division's mandate.

[31] With regard to the Appellant's additional evidence filed after the hearing, the Appellant filed a Settlement Agreement made through the Ontario Labour Relations Board and some vendor purchase order reports within a day of the General Division hearing.[9] He filed an exchange of emails between himself and the office of the Minister of Employment, Workforce Development and Labour (Minister) about six weeks after the hearing.[10]

[32] The Appellant argues that the Settlement Agreement states that he will receive EI benefits and that the General Division ignored it. The Settlement Agreement is referenced in the General Division hearing.[11] The General Division considered the document.

[33] The Appellant submits that the result of the Settlement Agreement and the employer's withdrawal from the matter[12] is that the information in the appeal record originating from the employer is also withdrawn and there is no evidence upon which to determine that he was dismissed for misconduct. The Appellant asks that the Appeal Division accept his assertion that the employer admitted to lying and settled his labour relations matter as a result. The Respondent submits that the employer withdrew from the proceeding and that neither the notice of withdrawal nor the Settlement Agreement states that the employer recanted the information that it provided previously.

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[8] General Division decision, para. 30. It also accepted the Appellant's evidence that he did not use marijuana while at work.
[9] GD9, received by the Tribunal on October 3, 2016.
[10] GD10, received by the Tribunal on November 30, 2016.
[11] General Division decision, paras. 24 and 38.
[12] GD8 and GD9, respectively.

[34] I find that the employer did not recant information previously provided. The employer withdrew as a party in this appeal and confirmed this in writing by letter to the Tribunal. The information in the appeal record that originates from the employer was not struck from the record or otherwise affected. There is no evidence that the employer gave false information apart from the Appellant's accusations.

[35] There was no reference to the vendor purchase order reports, but the General Division need not specifically refer to every single document in the appeal record. These purchase orders were in the same document bundle as the Settlement Agreement.

[36] There is also a cover note to this bundle, written by the Appellant. It states, among other things, that a fellow employee can be contacted and he will "tell the truth" about the purchase orders. The Appellant argues that the General Division did not investigate or do its "due diligence" because it did not contact this witness to his work situation. However, it is not the role of the General Division (or this Tribunal) to contact the Appellant's former co-workers or to seek out evidence on the Appellant's behalf. It is incumbent on the Appellant to bring forward the evidence upon which he wishes to rely, including having witnesses at the General Division hearing to testify.

[37] As for the exchange of emails, they are immaterial to the General Division's decision. The Appellant appears to have written to the Minister's office after the General Division hearing and before a decision was rendered; the Minister's office replied that the Minister cannot intervene in any Tribunal decisions and suggested that he direct his questions to the Tribunal. This documentation is entirely immaterial to the General Division decision.

[38] During the Appeal Division hearing, the Appellant stated that he has talked to the Premier's and the Prime Minister's office about this matter and that "you are all in big trouble." He also stated that he would go to the media with "everything." These statements did not factor into the Appeal Division decision.

Summary of Alleged Errors

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

CONCLUSION

[40] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	June 14, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. C., self-represented Claudia Richard, Representative for the Respondent