



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. M. v. Canada Employment Insurance Commission and Thomas Circle of Care Inc*,  
2018 SST 788

Tribunal File Number: AD-18-11

BETWEEN:

**K. M.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**Thomas Circle of Care Inc**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 8, 2018

## **DECISION AND REASONS**

### **DECISION**

[1] The Tribunal allows the appeal. The case is returned to the General Division for reconsideration before a different member.

### **OVERVIEW**

[2] The Appellant, K. M. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), disqualified the Claimant from receiving benefits as a result of her misconduct. The Commission determined that the Claimant's employment was terminated by the Added Party, the Claimant's employer, because she had been found sleeping while on duty. The Claimant requested a reconsideration of this decision, but the Commission maintained the original decision. The Claimant appealed the Commission's decision to the General Division.

[3] The General Division concluded that given that management had issued the Claimant a verbal warning and called staff meetings to address the issue of sleeping while on duty, the Claimant would have been fully aware of the consequences she would face if she was sleeping while at work. As a result, the Tribunal finds that the Claimant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility. It concluded that the Claimant lost her employment by reason of her own misconduct.

[4] The Claimant was granted leave to appeal to the Appeal Division. The Claimant submits that the General Division ignored the evidence before it, particularly the numerous contradictions in the facts presented by the employer. She submits that pieces of the employer's evidence alleging misconduct are not dated, not signed, or dated months after her employment had been terminated. The Claimant submits that the General Division erred by giving any credibility to the employer's evidence.

[5] The Claimant also submits that the General Division erred in law in its application of the legal test for misconduct, because she could not have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.

[6] The Tribunal must decide whether the General Division failed to observe a principle of natural justice. It must also determine whether the General Division erred in law by ignoring the evidence before it, particularly the numerous contradictions in the facts presented by the employer. Finally, it must also decide whether the General Division erred in law in its interpretation of the legal test for misconduct.

[7] The Tribunal allows the Claimant's appeal.

## **ISSUES**

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

**Issue 2: Did the General Division err in law by ignoring the evidence before it, particularly the numerous contradictions in the facts presented by the employer?**

**Issue 3: Did the General Division err in law in its interpretation of the legal test for misconduct?**

## **ANALYSIS**

### **Appeal Division's mandate**

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to s. 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by ss. 55 to 69 of that Act.<sup>1</sup>

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<sup>1</sup> *Canada (A.G.) v. Jean*, 2015 FCA 242; *Maunder v. Canada (A.G.)*, 2015 FCA 274 (CanLII).

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.<sup>2</sup>

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

### **PRELIMINARY ISSUE**

[11] The Commission and the employer failed to appear at the hearing. The Tribunal proceeded with the hearing in their absence because it was satisfied that they had received notice of the hearing, in accordance with s. 12 of the *Social Security Tribunal Regulations*.

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

[12] After listening to the recording of the hearing before the General Division, the Tribunal is convinced that the Claimant was denied the right to a fair hearing.

[13] It is clear to the Tribunal that the Claimant did not have the opportunity to present the evidence and arguments she wished to submit to the General Division. In particular, the Claimant wanted to introduce evidence to attack the credibility of the employer's witness, who signed a written declaration to the effect that she had taken a picture of the Claimant while the Claimant was sleeping at work.

[14] This evidence was clearly relevant, especially that the Claimant testified before the General Division that the employer's witness—who allegedly saw the Claimant sleeping during her work shift—had not been working with her for weeks prior to her dismissal and that there was no indication on the signed declaration of when and where exactly the picture was taken.

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<sup>2</sup> *Idem*.

[15] The evidence was also relevant in view of the fact that the General Division seems to have based its decision in part on the declaration of said witness.

[16] Therefore, the Tribunal finds that the General Division failed to consider the Claimant's evidence, which would have enabled it to make a credibility finding regarding the employer's witness.

[17] The Tribunal also finds that when the employer's representative mentioned during the hearing that she did not know what to say in rebuttal to the Claimant because she was "not even sure where half the time [the Claimant] is coming from," the member made an inappropriate comment to the effect that he did not know whether there was anything to rebut, giving the appearance that he had already decided on the matter before the end of the hearing.

[18] The concept of "natural justice" includes the right of a claimant to a fair hearing. So fundamentally important is this right that there must not exist even the appearance of prejudice to the right of any claimant to make a full presentation before an unbiased General Division. The law requires that not only must justice be done, it must manifestly and undoubtedly be seen to be done. The mere suspicion that a claimant has been denied his or her right is justification in itself for an order returning the matter to the Tribunal's General Division.

[19] Furthermore, the Tribunal agrees with the Commission's submissions that the General Division decision, when reviewed in its entirety, is not transparent and intelligible.

**Issue 2: Did the General Division err in law by ignoring the evidence before it, particularly the numerous contradictions in the facts presented by the employer?**

[20] The Tribunal finds that the General Division, faced with contradictory evidence, failed to consider in its decision the Claimant's arguments that the employer's evidence lacked credibility because she had never been given the alleged undated warning letter; the alleged letter of dismissal was dated weeks after her dismissal and erroneously

claimed that the warning letter had been given to the Claimant; and because an alleged complaint made by another co-worker on Claimant's last day of work consisted of an email that the employer's Program Director had sent to herself and that was dated two months after the Claimant's dismissal.

**Issue 3: Did the General Division err in law in its interpretation of the legal test for misconduct?**

[21] In view of the Tribunal's conclusions on the Claimant's two first grounds of appeal, it is not necessary to address the third ground that the Claimant has raised.

**Matter referred back to the General Division**

[22] For the above-mentioned reasons and because the Tribunal is convinced that the factual findings are incomplete, the Tribunal is justified in referring the matter back to the General Division (Employment Insurance Section) for reconsideration before a different member.

**CONCLUSION**

[23] The Tribunal allows the appeal. The case is returned to the General Division for reconsideration before a different member.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	July 24, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	K. M., Appellant