



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. B. v Canada Employment Insurance Commission*, 2019 SST 77

Tribunal File Number: AD-18-609

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 1, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, L. B. (Claimant), was dismissed from her employment because of the way she handled a conflict with a customer. She applied for Employment Insurance benefits, but the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim, finding that she had been dismissed because of her misconduct. The Commission maintained this decision on reconsideration. The Claimant's appeal to the General Division of the Social Security Tribunal was dismissed, and she now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division based its decision on an erroneous finding that the Claimant acted in a physically aggressive or threatening manner without regard for the Claimant's explanation of her actions, and it also erred in law by failing to find that the Claimant was dismissed for the misconduct alleged by the employer.

[4] I have given the decision that the General Division should have given. I find that the Claimant was not dismissed because of her misconduct.

ISSUE

[5] Did the General Division base its decision on an erroneous finding (that the Claimant engaged in physically aggressive behaviour) that it made in a perverse or capricious manner or without regard for the material before it?

[6] Did the General Division err in law by failing to find that the Claimant had been dismissed for the conduct alleged by the employer?

ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of

appeal” in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only grounds of appeal are described below:

- 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.

Issue 1: Did the General Division base its decision on an erroneous finding (that the Claimant engaged in physically aggressive behaviour), that it made in a perverse or capricious manner or without regard for the material before it?

[9] The General Division concluded that the Claimant’s behaviour was “rude, aggressive and hostile”,¹ and that her act of following the customer to her car was itself “physically aggressive behaviour”.² In addition, the General Division implied that it considered the Claimant’s behaviour to be threatening, stating, “[i]t is not clear why she would raise her arms if she did not intend a threat.”³

[10] In so doing, the General Division failed to consider the Claimant’s explanation that she walked the customer out of the store to get the customer’s licence plate number, so that she could do her “duty” to report to Fish and Wildlife;⁴ the customer’s expressed intentions to violate the law—an explanation that was consistent with the Claimant’s narrative of all the events that day.

[11] The General Division also ignored the Claimant’s evidence that the customer was already in her vehicle⁵ when the Claimant said, “Oh my God, you don’t belong here,”⁶ and when the

¹ General Division decision at para 20.

² General Division decision at para 21.

³ *Ibid.*

⁴ Audio recording of General Division hearing at 15:20.

⁵ Audio recording of General Division hearing at 19:25.

⁶ Audio recording of General Division hearing at 14:49.

Claimant waved her hand in the air.⁷ In her application for benefits, the Claimant wrote that she “was upset enough to wave [her] arms [but] in no way intended to hurt [the customer].”⁸ The Claimant expressly denied making any threats⁹ or making any threatening motion with her hand or body language.¹⁰ There was no statement or other evidence from any person who actually witnessed what happened in the parking lot that could contradict the Claimant’s account.

[12] As I noted in the leave to appeal decision, people have been known to make unconscious gestures when they are agitated, or even in the course of ordinary conversation, without intending a threat. The General Division did not explain why it assumed that the Claimant intended a threat from the fact that she raised her arms.

[13] Immediately after its discussion of the Claimant’s actions of following the customer out to the store and raising her arms, the General Division stated that “[a]ll of these actions were engaged in by the [Claimant] in front of store customers and staff, including managers who attempted to stop her behaving in this manner.”¹¹ However, there is no statement in evidence from anyone who actually witnessed the Claimant’s actions in the parking lot. The only evidence other than the Claimant’s direct testimony is the written statement of an off-duty manager who said that a customer had told him that the Claimant was grabbing another customer.¹² The General Division did not refer to this evidence when it found the Claimant’s actions to have been physically aggressive. However, the Claimant specifically refuted this evidence when she testified that she did not even touch the customer,¹³ and the General Division made no finding against the credibility of the Claimant.

[14] The Commission has supported this appeal with submissions, agreeing with the leave to appeal analysis where it is said that, “[t]he General Division did not take into account the Claimant’s evidence about her purpose, or the supportive evidence of the manager, when finding that her actions were physically aggressive behaviour.” The Commission agrees that the evidence does not support the finding that the act of following a customer outside to her car is

⁷ Audio recording of General Division hearing at 19:59.

⁸ GD3-14.

⁹ Audio recording of General Division hearing at 19:00.

¹⁰ Audio recording of General Division hearing at 19:55.

¹¹ General Division decision, para. 22

¹² GD3-58.

¹³ *Supra* note 9.

itself physically aggressive behaviour.¹⁴ It suggests that this General Division finding was an error.

[15] I find that the General Division erred under section 58(1)(c) of the DESD Act by basing its decision on an erroneous finding that the Claimant's behaviour was physically aggressive or threatening, without regard for the Claimant's evidence to the contrary.

Issue 2: Is there an arguable case that the General Division erred in law by failing to find that the Claimant had been dismissed for the conduct alleged by the employer?

[16] According to section 30(1) of the *Employment Insurance Act*, a claimant "is disqualified from receiving any benefits if the claimant lost any employment **because** of their misconduct" (emphasis added). As stated by the Federal Court of Appeal in *Canada (Attorney General) v Brissette*, "It is not sufficient, in order for the disqualification to come into play, for the misconduct to be a mere excuse or pretext for the dismissal [...]. It must cause the loss of employment and must be an operative cause."¹⁵

[17] The General Division did not define which of the Claimant's actions it considered to be misconduct with any precision. It is unclear if the General Division considered the Claimant's misconduct to be "follow[ing] the customer outside to the parking lot,"¹⁶ "rais[ing] her arms,"¹⁷ or other unspecified "rude, aggressive and hostile" behaviour.¹⁸ The employer was clear that it was terminating the Claimant for racist language and threats of physical violence. However, the General Division did not find the Claimant to have engaged in racist language. In fact, it found that the Claimant's comments were *not* racially motivated.¹⁹ While the General Division suggested that it was physically aggressive for the Claimant to have followed the customer to the parking lot and also suggested that the Claimant could not have raised her arms without intending a threat, the General Division did not find that the Claimant's actions amounted to threats of *physical violence*. Furthermore, the General Division failed to find that the conduct that it considered to be misconduct was the actual reason the Claimant was dismissed.

¹⁴ AD3-3.

¹⁵ *Canada (Attorney General) v Brissette*, A-1342-92; see also *Davlut v Canada (Attorney General)*, A-241-82.

¹⁶ General Division decision at para 21.

¹⁷ *Ibid.*

¹⁸ General Division decision at para 20.

¹⁹ *Ibid.*

[18] The General Division erred in law under section 58(1)(b) of the DESD Act in failing to determine whether the Claimant was dismissed for misconduct.

CONCLUSION

[19] The appeal is allowed.

[20] Having allowed the appeal, I have the authority under section 59(1) of the DESD Act to refer the matter back to the General Division for reconsideration, as requested by the Commission. However, I also have the authority to give the decision that the General Division should have given or to confirm, rescind, or vary the General Division decision in whole or in part.

[21] I consider the record to be complete. Therefore, I will give the decision that the General Division should have given.

REMEDY

[22] The employer dismissed the Claimant with these words: “You are being dismissed for just cause due to an altercation with a customer on October 15, 2017, in which you used racist language and threats of physical violence against them.”²⁰

[23] The General Division noted the statement given by another manager who was apparently present when the Claimant was dealing with the customer at the counter.²¹ According to the statement, the Claimant said, “When you come to my country you should speak English and follow our customs and laws! If not, then go back where you came from.”²² The Claimant vigorously denied that she said this.²³ She said that the customer’s purposes in seeking ammunition were illegal, and she had repeatedly refused to sell ammunition to the customer who changed her reasons for the purchase several times and argued with the Claimant.²⁴ The Claimant stated that she finally had a “burst of insight”²⁵ and reacted to the customer’s disregard

²⁰ GD3-60.

²¹ General Division decision at para 14.

²² GD3-57; the original quotation is in all capital letters.

²³ Audio recording of General Division hearing at 13:22.

²⁴ Audio recording of General Division hearing at 13:47.

²⁵ Audio recording of General Division hearing at 14:50.

for Canadian law by saying, “Oh my God, you don’t belong here.” She said this after walking the customer out the door of the store and while she was copying down the customer’s licence plate to report her to Fish and Wildlife.²⁶ She said that another customer was passing her on the way into the store who witnessed her reaction only and, without knowing anything else, “rushed into the store saying that she’s a racist”.²⁷

[24] The statement “you don’t belong here” is not an inherently racist statement; it must take its meaning from the context. The General Division considered the circumstances and made a finding of fact that the Claimant’s comment to a customer that the customer didn’t “belong here” was not racially motivated. I accept the Claimant’s account and agree with the General Division on this point.

[25] I therefore do not accept that the Claimant used racist language toward the customer on October 15, 2017.

[26] The dismissal letter also referred to “threats of physical violence”. As I have already found, the General Division erred in finding that the Claimant was “physically aggressive” and made no finding that she was threatening physical violence. The General Division made no finding against the Claimant’s credibility, and I have likewise not discovered any inconsistency or implausibility that would cause me to doubt the Claimant’s account of events. According to the Claimant, she refused to sell the customer ammunition because this sort of vigilance was part of her job,²⁸ and she said she went out to get the customer’s licence plate number because it was her duty to report²⁹ the customer’s suspicious activities. She testified that she meant no harm or threat to the customer and only raised or waved her arms as she said, “Oh my God, you don’t belong here.” This was, in my view, a spontaneous gesture of exasperation or incredulity and not a threat and certainly not a threat of physical violence.

[27] Immediately after its discussion of the Claimant’s “aggressive” behaviour in the parking lot, the General Division stated that “[a]ll of these actions were engaged in by the [Claimant] in front of store customers and staff, including managers who attempted to stop her behaving in this

²⁶ Audio recording of General Division hearing at 15:25.

²⁷ Audio recording of General Division hearing at 15:42.

²⁸ Audio recording of General Division hearing at 14:00.

²⁹ Audio recording of General Division hearing at 15:30.

manner.” However, there is no statement in evidence from anyone who actually witnessed the Claimant’s actions in the parking lot.

[28] An off-duty manager who was not a witness to these events provided a written statement in which he said a customer had told him that the Claimant was grabbing another customer.³⁰ The General Division did not rely on the manager’s statement that the Claimant grabbed the customer but found her to be physically aggressive because she followed the customer and raised her arms at some point. The Claimant specifically testified that she did not even touch the customer, and the General Division made no finding that she did.

[29] I accept that the Claimant accompanied the customer outside the, and I accept that she waved her arms in the air while saying, “Oh my God, you don’t belong here.” However, I also accept that the Claimant followed the customer out of the store for the purpose of obtaining the customer’s licence plate number. I accept that she believed that she had a duty to report to Fish and Wildlife the customer’s suspicious attempts to obtain ammunition and that she believed she needed the customer’s plate number to do so. I also accept that she did not touch the customer nor gesture in a threatening way, nor act in any other way that she intended as a threat or that she thought would be threatening to the customer.

[30] I do not accept that the Claimant’s conduct on October 15, 2017, amounted to threats of physical violence toward the customer.

[31] Whether or not the Claimant managed her frustration with the customer appropriately, her termination was based on the employer’s determination that she engaged in specific and reprehensible conduct, namely, she used racist language and threatened physical violence against a customer. However, the Commission has not convinced me, on a balance of probabilities, that the Claimant either used racist language or threatened physical violence against a customer.

³⁰ GD3-58.

[32] Therefore, I find that the Claimant was not dismissed because of her misconduct.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 29, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	L. B., Appellant