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

Citation: *C. L. v Canada Employment Insurance Commission*, 2019 SST 964

Tribunal File Number: AD-18-599

BETWEEN:

C. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Community Living North Perth

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 8, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, C. L. (Claimant), was terminated from his position for failing to follow the employer's policy in how he administered medications to clients. He applied for Employment Insurance benefits and the Respondent, and the Canada Employment Insurance Commission (Commission), accepted his claim.

[3] After the employer asked the Commission to reconsider, the Commission changed its decision to find that the employer terminated the Claimant for misconduct. The Claimant was therefore disqualified from receiving benefits. The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed his appeal. He now seeks leave to appeal to the Appeal Division.

[4] The appeal is allowed. The General Division erred in law by failing to make required findings of fact and failing to consider all of the elements necessary to establish misconduct as identified in applicable jurisprudence. I have made the decision that the General Division should have made: I find that the Claimant should not have been disqualified because he was not dismissed for misconduct within the meaning of the *Employment Insurance Act* (EI Act).

ISSUE(S)

[5] Did the General Division err in law by failing to make required findings of fact or by failing to apply the legal test for misconduct?

[6] Did the General Division act in such a manner as to give rise to a reasonable apprehension of bias?

[7] Did the General Division base its decision on a finding of fact that misunderstood or ignored the Claimant's testimony?

ANALYSIS

General principles

[8] 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).

[9] The only grounds of appeal are as follows:

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 err in law by failing to make required findings of fact or by failing to apply the legal test for misconduct?

Section 30(1) of the EI Act states that "a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct".

[10] In its written submissions, the Commission stated that the General Division did not cite any binding jurisprudence to support its decision and that it did not justify its determinations.[1] The Commission took the position that the General Division erred in law. I agree.

[11] As noted in *Mishibinijima v Attorney General of Canada*,[2] "there will be misconduct where the claimant knew, or ought to have known, that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility." The General Division stated that the Claimant was dismissed for failing to administer a medication

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[1] AD2-5
[2] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

while signing that he had done so, which was said to be a breach of employer policy. It also found that the Claimant ought to have known that he could be dismissed for disregarding the employer's policy.

[12] However, the General Division did not make a clear finding that the Claimant actually engaged in the conduct for which he was dismissed, which is also a required element to establish misconduct.[3] Furthermore, the General Division did not determine whether the Claimant's conduct was deliberate or intentional, as required by the jurisprudence.[4]

[13] I find that the General Division erred in law under section 58(1)(b) of the DESD Act by not applying the jurisprudence and by failing to make findings on some of the required elements of the test for misconduct developed through the jurisprudence.

Issue 2: Did the General Division act in such a manner as to give rise to a reasonable apprehension of bias?

[14] The Claimant also argued that the General Division member was biased. The Claimant said that the General Division member was selective in the evidence that it chose to rely on and that it mistakenly characterized his own view of the employer's actions as a "witch hunt". The Claimant also argued that the General Division chose to disbelieve the Claimant's testimony that he did not make the error for which he was dismissed because the Claimant had admitted to having made other patient errors at other times.

[15] The Supreme Court of Canada has outlined the test for bias as follows:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case.[5]

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[3] *Canada (Attorney General.) v. Brissette,* A-1342-92
[4] *Canada (Attorney General.) v. Secours,* A-352-94
[5] R. v. S. (R.D.), [1997] 3 SCR 484

[16] The Claimant did not point to specific, significant evidence that could have refuted those conclusions—but which was rejected or ignored. The General Division decision does not address any of the evidence that does not support its conclusions. However, the decision is brief and refers to very little evidence even in support of its findings. I cannot find that the General Division's failure to explain its view of the Claimant's evidence supports a finding that it was biased against the Claimant. If the Claimant is correct that the General Division ignored significant relevant evidence, that is more properly considered under the ground of appeal defined by section 58(1)(c) of the DESD Act.

[17] The Claimant also argued that the General Division had inappropriately attributed the term "witch-hunt" to him. Regardless of whether the Claimant himself characterized the employer's actions as a "witch-hunt", or whether the Claimant related that others felt he was the subject of a "witch-hunt", I do not accept that the General Division chose the term to reflect badly on the Claimant or the evidence. The employer's actions were described as a "witch-hunt" in the evidence before the General Division. The Claimant admitted to the General Division and confirmed to the Appeal Division that he had felt unfairly targeted by the employer. Therefore, even if the General Division misattributed the actual use of the term to the Claimant, it is possible that it nonetheless captured the Claimant's perspective.

[18] The Claimant's final point was that he testified that he had not made the error that resulted in his dismissal, but that the General Division rejected this testimony because he admitted to making mistakes at work. That is not my reading of the decision. In my view, the General Division decision says only that the Claimant was known to have actually made other errors and that the employer's scrutiny of the Claimant cannot therefore be said to be entirely baseless.

[19] I do not find that the Claimant has established that a reasonable person would reasonably believe the General Division member to be biased. I find that the General Division did not fail to observe a principle of natural justice under section 58(1)(a) of the DESD Act by acting in such a manner as to give rise to a reasonable apprehension of bias.

Issue 3: Did the General Division base its decision on a finding of fact that misunderstood or ignored the Claimant's testimony?

[20] The employer's evidence was that it did not dismiss the Claimant because of a single incident but that it was engaged in a program of progressive discipline. The employer stated that the Claimant made a number of medication errors[6] leading up to his suspension. The employer asserted that the Claimant's refusal to complete error forms proves that the Claimant's actions were willful. [7] The employer characterized the Claimant's errors as a disregard for its policies.[8] It also stated that there was a final incident "as soon as [the Claimant] come back from suspension" in which the Claimant failed to administer a medication but completed a form in which he stated that he had done so.[9] The employer dismissed the Claimant after this final incident.

[21] The General Division accepted that the employer dismissed the Claimant because of the final incident following the suspension. It noted that the final incident "for which the Claimant was dismissed" was failing to administer a medication but signing that he did do so, contrary to the employer's policy.

[22] However, the General Division did not make an explicit finding that the Claimant actually failed to administer the medication in the final incident before his dismissal. If such a finding could be said to be implicit in the General Division's decision that the Claimant was fired for misconduct, then the General Division erred in law under section 58(1)(c) of the DESD Act.

[23] The General Division did not refer to the evidence on which it might reach such a conclusion, or weigh the Claimant's and the employer's very different narratives. If the General Division concluded that the conduct occurred, it did so without considering, or even referencing, the Claimant's evidence. The Claimant contradicted the employer's claim that he did not administer the medication in the final incident.[10] The Claimant also disputed that he did not fill out medication error forms in relation to other medication errors.[11] In relation to the other

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[6] GD3-160
[7] GD3-161
[8] Supra note 6.
[9] Supra note 7.
[10] GD3-165
[11] GD3-164

incidents, the Claimant explained that they arose during a change in policy or in the manner in which the policy was administered. According to the Claimant, all the warnings came at once so that he had not had time to respond or adapt to new practices.[12]

[24] However, I do not presume that the General Division intended to find that the conduct occurred as alleged. The General Division's finding that the employer fired the Claimant because it understood the Claimant to have engaged in certain conduct is not the same as finding that the Claimant actually engaged in the conduct.

REMEDY

[25] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter to the General Division with or without directions, or confirm, rescind or vary the General Division decision in whole or in part.

[26] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

Evidence

[27] The employer stated that a laxative medication that the Claimant was supposed to have administered "was found completely full"[13] (also described by the employer as having been found by "another worker"[14]) "and that therefore, the Claimant had not administered it as required.

[28] The Claimant said that he administered the medication as required and completed the form accordingly.[15] The Claimant also stated that his new coordinator prepared the medication capsules (also referred to as "vials" in the evidence) that he was supposed to deliver. The medication capsules he was to administer were transferred "without a form", not in their original packaging, were unlabelled, and "could be anything".[16] The Claimant said that believes the

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[12] *Supra* note 10
[13] GD3-161
[14] GD3-166
[15] *Supra* note 10
[16] *Ibid*.

coordinator could have made up evidence to prove that he had not given the medication.[17] He testified to the General Division that he had been meticulous to ensure he followed the policy and that he believes that someone must have refilled the vial that the employer said was found full.[18]

[29] The employer acknowledged that the new coordinator pre-measured the medications but that she also labelled them.[19] The employer said that they are then kept "in a zip-lock bag" and that the medication is also kept in its original packaging in the client's home.[20] The employer said that it followed the "medication transfer policy"[21] but that this policy did not require that a transfer form be completed where medication is not going from one location to another, as was the case here.[22]

[30] In response to the Commission's request for a "picture of the vial in question",[23] the employer submitted two photographs of the same five vials, which are small plastic containers (similar to paint-by-number paint containers) with pop-on lids. One photo is a top view and one is a side view, but they otherwise appear to be the same. [24]The lids are labelled with a marker to indicate the weekday and medication name. One of the vial labels reads "Restoralax – Fri". Restoralax is the laxative that the Claimant is alleged to have failed to administer. It is difficult to tell from either photograph whether the Restoralax vial is completely empty or completely full.

Analysis

[31] The Commission has the onus of proving on a balance of probabilities that the Claimant was dismissed for misconduct. In this case, the Claimant and the employer have competing versions of what happened in the final incident. During its reconsideration investigation, and prior to its receipt of the photograph, the Commission stated that it found both the Claimant and the employer to be equally credible.

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[17] *Ibid*.
[18] Audio recording of General Division hearing at 01:34:00
[19] GD3-162
[20] GD3-166
[21] *Ibid*
[22] GD3-167
[23] *Ibid*.
[24] GD3-170, 178

[32] The additional evidence included the employer's medication transfer policy confirmed that a transfer form was unnecessary, and a June 22, 2017, note to staff. The note outlines new instructions for administering medication that is specific to the particular client that the Claimant was caring for on July 6, 2017. The Commission found that the Claimant was dismissed for misconduct because it "is not in a position to accuse the employer [of fabricating evidence]."[25]

[33] The employer represented that its photographs were of the actual vials from July 6, 2017. Accompanying the photographs was a brief statement describing the photos as "pictures of the containers left after [the Claimant's] shift which include the laxatives and vitamins over a two-day period (marked Thurs and Fri)."

[34] The employer did not otherwise attest to the significance of the photographs. It is unclear from the employer's evidence who found the full vial from which it was inferred that the Claimant did not give the medication; that is, whether the "worker" who found the vial was the coordinator who repackaged and labelled the medication in vials, or someone else. There is no statement or other direct evidence from whomever it was who found the full container. The employer said it would send in some kind of statement from the coordinator[26] but it did not.

[35] I place no weight on the photographs as proof that the Claimant did not administer the laxative medication on Thursday, July 6, 2017. There is no evidence from whomever it was that may have actually discovered the full Restoralax vial by which the vials in the photographs might be authenticated as vials left from the Claimant's shift on July 6, 2017. In addition, the employer did not attempt establish a chain of custody between July 6, 2017, and December 6, 2017, when the photographs were provided. It is not even possible to determine from the photographs whether the laxative vial is full or empty.

[36] Furthermore, the vial labels in the photographs provided by the employer are inconsistent with the employer's dismissal and statements to the Commission. The single vial for Restoralax is labelled "Fri". I take this to mean that it is the medication for Friday. However, the employer described the Claimant's final medication error as occurring on Thursday, July 6, 2017, in its

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[25] GD3-181
[26] GD3-168

termination letter[27] and the employer again referred to this incident as occurring on July 6, 2017, in conversation with the Commission.[28] I take notice that July 6, 2017, was a Thursday according to the 2017 calendar.

[37] Therefore, the photograph supplied by the employer purporting to be the actual full vial of laxative medication that the Claimant is said to have failed to administer on Thursday, was either mislabeled as a Friday dose by the coordinator that prepared it, or it was mistakenly related to the Thursday shift after the fact. On that basis alone, the photographic evidence cannot support an inference that the Claimant did not administer the laxative medication on Thursday.

[38] If the coordinator can mislabel the vials, this would suggest that the employer's medication delivery system was fallible and that it cannot reliably verify from the remaining medication in a vial, when and whether a medication dose was delivered as required. The patient's home is also where the coordinator filled and labelled the vials. If mislabeled, this vial could have been from any day or any worker's shift, or for a future shift. If not mislabeled, it could have been from the Friday before (when the Claimant was still suspended) or prepared in advance for the next day, also Friday.

[39] Therefore, even if the evidence established that someone found a full vial in the patient's home at some point after the Claimant's shift, this would not necessarily mean that the patient missed a dose or that it was the Claimant that failed to administer a dose.

[40] It is clear from the evidence that the Claimant did not agree with a policy that restricted his discretion to provide a laxative medication in circumstances where he believed that it was not required or was contraindicated. However, the Claimant insisted that he cautiously followed the policy to administer medication after his suspension.[29] He was also clear that he did, in fact, give the patient/client the medication on July 6, 2017. He is the only one in a position to know for certain whether he did or did not administer the laxative.

[41] The only evidence provided by the employer in support of its position that the Claimant did not administer the medication on July 6, 2017, is the employer's second-hand account of its

[27] GD3-33
[28] GD3-160
[29] GD3-176

understanding that the medication vial was found full after the Claimant’s shift. It is not clear who it was that found the vial full or who it was that told the employer it was found full. Whoever that person was, he or she provided no direct evidence. The photographic evidence supplied by the employer does not support the employer’s position, but it is relevant in that it suggests to me that I should not rely on evidence suggesting that someone found a full vial related to the Claimant’s shift on July 6, 2017.

[42] The Commission has the burden of establishing on a balance of probabilities that the Claimant engaged in misconduct. I find that it has not met this burden even in relation to the question of whether the conduct occurred that was alleged to be misconduct.

[43] I therefore find that the Claimant was not dismissed for misconduct as it is defined for the purposes of section 30 of the EI Act and that he is not thereby disqualified from receiving benefits.

CONCLUSION

[44] The appeal is allowed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. L., Appellant Kathy-Jo O’Grady, Representative for the Appellant