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

Citation: *S. M. v Canada Employment Insurance Commission*, 2019 SST 1380

Tribunal File Number: AD-19-571

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: November 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, S. M. (Claimant), appeals the General Division's decision. The General Division found that the Claimant lost his job because of misconduct. In particular, it found that the Claimant failed to let his employer know that he was going to be absent from work one day and late on other days. This was after the employer had already warned the Claimant about being on time for work. The General Division found the Claimant breached the conditions of his employment by being late for work. This led to the dismissal from his job.

[3] The Claimant argues that the General Division misconstrued or overlooked some of the evidence. He claims that the employer used the Claimant's lateness and absence from work as an excuse to dismiss him. This way, it could also avoid giving him any notice or severance payments. The Claimant argues that his employer actually dismissed him because there was insufficient work.

[4] For the reasons that follow, I am dismissing the appeal.

ISSUES

[5] The issues before me are as follows:

(a) Did the General Division err when it found that there was no shortage of work?
(b) What was the real reason for the Claimant's dismissal?

BACKGROUND FACTS

[6] The Claimant had just graduated from college in graphic design. In spring 2018, he found work with a print shop.

[7] The Claimant was happy working as a graphic designer. He found the work interesting and he had a good relationship with his manager. After six months, the Claimant received positive feedback from his employer and a favourable performance review. In fact, he received a pay raise.

[8] By the fall of 2018, the Claimant's manager informed everyone at work that he was going to hire one of his friends. He had worked with this friend 10 years ago, at another print shop location. The manager would be creating a position "as a favour" for his friend. His manager did not specify his friend's position or duties.

[9] Shortly after the new employee joined the company, the Claimant began to suspect that his manager planned to push him out of his position because there was not enough work for both the Claimant and the manager's friend. The work climate had changed. The new employee also worked as a graphic design specialist. Indeed, she became the primary designer.[1]The Claimant lost his workspace to this new employee. Worse, he also lost his primary work function to the new employee. The manager relegated the Claimant to doing menial tasks, such as filing.

[10] The Claimant claims that the changes in his work environment made him less motivated and probably affected his punctuality. He began to be late for work.[2] However, there was no evidence before the General Division to support these particular claims.

[11] In November 2018, the manager gave the Claimant a "coaching note." The note stated that it expected the Claimant to come to work on time. If not, then it would need 24 hours' notice of any lateness. The manager would review this issue. If the Claimant was unable to correct his behaviour, "then there will be further consequences up to termination."[3] The Claimant and his manager both signed the notice on November 21, 2018.

[12] In February 2019, the employer warned the Claimant about being habitually late. The Claimant signed the employer's Corrective Action Note."[4] The note reads:

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[1] See Notice of Appeal to General Division, at GD2-6, and letter of June 15, 2019, at GD6-11.
[2] Claimant's submissions on November 21, 2019.
[3] See Best Practices Coaching Note, dated and signed by the manager and the Claimant, on November 21, 2018, at GD3-34.
[4] See Corrective Action Note dated and signed by the employer and the Claimant, on February 11, 2019, at GD3-33.

> This is to be considered a final written warning and it is important that you are aware that further incidents of this nature will be considered serious and will result in further corrective measures, up to and including termination of your employment. …

[13] The Claimant was ill and did not show up for work on March 18, 2019. He was late for work on March 19 and 20, 2019, after which his employer dismissed him.

ANALYSIS

[14] The Claimant argues that the General Division erred when it made a finding that:

(a) the employer was unaware that the Claimant was absent on March 18, 2019 because he was sick;
(b) the employer dismissed the Claimant because of poor performance and habitual lateness; and
(c) there was no shortage of work.

[15] I addressed these arguments in my leave to appeal decision. I did not find any arguable grounds arising out of the first two arguments.

[16] In my leave to appeal decision, I noted that the General Division member had considered the evidence about the Claimant's absence on March 18, 2019.

[17] There was conflicting evidence about whether the Claimant contacted his employer on March 18, 2019. The Claimant claims that he called his manager to let him know that he was sick and would be off work. The employer denied that the Claimant had called.

[18] The General Division member preferred the employer's evidence that it was unaware that the Claimant was sick. Having assessed and weighed the evidence, the General Division was entitled to make findings based on that evidence.

[19] The General Division wrote that it would examine whether the employer dismissed the Claimant because of habitual lateness and poor performance.[5] However, the General Division did

[5] See General Division decision at para. 7.

not make any conclusions about whether the employer dismissed the Claimant because of poor performance.

Did the General Division err when it found that there was no shortage of work?

[20] The General Division also considered whether there was a shortage of work. It found that there was no shortage of work. The General Division found that the Claimant had not produced any evidence—such as layoffs or recent firings—to support his argument that there was a shortage of work. At paragraph 12, the General Division wrote, "In fact, his statements to the [Canada Employment Insurance] Commission that a third graphic designer had been hired point to the company having more work and not less."

[21] However, the General Division member's finding about the availability of work disregards the sequence of events, or at the very least, overlooks the Claimant's point. The Claimant's point was that the company did not have enough work to maintain three graphic designers by spring 2019. So, the employer dismissed the Claimant, thus leaving only two graphic designers. The employer reportedly did not replace the Claimant after dismissing him. The Claimant argues that this proves that there was not enough work for three graphic designers. Hence, the company is now left with the same number of graphic designers that it started with.

[22] It may be that there had been ample work to sustain three graphic designers when the employer hired the manager's fried in fall 2018. But, by the time the employer dismissed the Claimant in March 2019, it is apparent that either there was never enough work to sustain three graphic designers over the long run, or there simply was less work over time.

[23] The evidence was that the Claimant's position remained vacant after the employer dismissed him. The employer did not advertise the position and did not fill it. There was no evidence to the contrary, other than the employer's assertions that there was, "definitely no shortage of work."[6]

[24] The evidence also suggested that the employer had to have been aware that there was never enough work to sustain three designers and that downsizing would be required. For one,

[6] See Supplementary Record of Claim, dated May 10, 2019, at GD3-20.

much of the graphic design work was given to the manager's friend, leaving the Claimant having to do menial tasks instead,[7] outside his job description. And two, the Claimant ended up without a desk or chair. He lost his workspace to the manager's friend [8] and ended up without a desk. He was left having to sit on a stool in front of dual monitors that operated the printers.

[25] I find that the General Division made a factual error when it concluded that there could not have been a shortage of work because the company hired a third graphic designer. This conclusion is inconsistent with the sequence of events and with the evidence. The company hired a third graphic designer, but this occurred several months before it dismissed the Claimant. Between the time the company hired the new employee and the Claimant's dismissal, the Claimant lost any work assignments to the new employee. After the company dismissed the Claimant, the company was left with two graphic designers. The company left the Claimant's position vacant.

[26] This evidence does not show that, by the time the Claimant left the company, that there was ample work for three graphic designers. Had there been work for three graphic designers, likely the Claimant would have continued doing graphic design work, instead of being relegated to do other tasks. As well, if there had been work for three graphic designers, likely the company would have replaced the Claimant after it dismissed him.

What was the real reason for the Claimant's dismissal?

[27] The Claimant argues that the real reason his employer dismissed him was because there was insufficient work for three graphic designers, rather than because of any misconduct.

[28] Yet, the Claimant continued working at the company for several months, even after the company had hired the new employee. Even though the employer may have been motivated to dismiss the Claimant because of insufficient work, the employer nevertheless continued to employ the Claimant, even if it meant assigning him other work.

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[7] At approximately 18:40 of the audio recording of the General Division hearing.
[8] At approximately 18:59 to 19:50 of the audio recording of the General Division hearing.

[29] It was only after the Claimant had been late for three consecutive days that the employer dismissed him.

[30] The employer did not explain why it dismissed the Claimant in its letter of termination.[9] When the Respondent, the Canada Employment Insurance Commission (Commission) contacted the employer in May 2019, the employer explained that it had dismissed the Claimant because of "lateness"[10] and his "perpetual lateness."[11]

[31] The Claimant acknowledged that he had been late during his last week, but explains that he had been very sick and had medical appointments.[12] The Claimant expressed surprise that the employer dismissed him.

[32] The Claimant should not have been surprised when his employer dismissed him, given the previous warnings he had received.

[33] The Corrective Action Note dated February 11, 2019, indicated that the employer had recorded the Claimant's issue with tardiness in performance reviews dated May 21, 2018 and October 8, 2018. In November 2018, the Claimant signed a Best Practices Coaching Note. His employer warned him that if his punctuality did not improve, there could be "further consequences up to termination."[13] The employer also noted that it had verbally warned the Claimant on December 3, 2018, about his tardiness.

[34] Finally, in the Corrective Action Note, the employer noted that the Claimant's ongoing tardiness was unacceptable.[14] It noted that "timely, regular and reliable attendance at work [was] a condition of [his] employment." The employer cautioned that further incidents would result in further corrective measures, up to and including termination. This was the "final written warning."

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[9] See letter of termination dated March 21, 2018, at GD3-35.
[10] See Supplementary Record of Claim dated May 2, 2019, at GD3-19.
[11] See Supplementary Record of Claim of May 31, 2019, at GD3-31.
[12] See Claimant's letter dated May 10, 2019, at GD3-26 and GD3-29.
[13] See Best Practices Coaching Note dated and signed November 21, 2018, at GD3-34.
[14] See Corrective Active Note dated and signed February 11, 2018, at GD3-33.

[35] The General Division noted this evidence. It pointed out that the February 2019 warning noted that the Claimant had been late 17 out of 28 working days in 2019. This represented 60% of the Claimant's scheduled shifts. That day, the Claimant had been 45 minutes late.

[36] Clearly, there was a causal link between the Claimant being late on March 19 and 20, 2019, and his dismissal on March 21, 2019. The employer dismissed the Claimant from his employment because he was habitually late, not because there was a shortage of work.

[37] The General Division noted that "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."[15] The General Division properly identified the applicable test for misconduct. It then proceeded to apply the facts to the law.

[38] The General Division noted that the Claimant's conditions of employment required him to be on time for work. The employer considered the Claimant's habitual lateness a serious breach of his conditions of employment and constituted misconduct. The Claimant had received corrective notes, a verbal and final written warning. From this, he was aware that ongoing tardiness could lead to dismissal.

[39] The General Division's findings were consistent with the evidence. I find that the General Division properly applied the facts to the law. The General Division assessed whether the Claimant's conduct—his habitual lateness—constituted misconduct.

[40] To some extent, the Claimant is arguing that I should reassess the evidence and come to a different conclusion. However, I do not have any authority to conduct a reassessment.[16]

CONCLUSION

[41] Although the General Division erred when it found that there could not have been a shortage of work, I am dismissing the appeal. Any work shortages did not account for the

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[15] See General Division decision at para.20. See also *Nelson v. Canada (Attorney General*, 2019 FCA 222, citing *Mishibinijima v. Canada (Attorney General),* 2007 FCA 36 at para. 14.
[16] See subsection 58(1) of the *Department of Employment and Social Development Act*.

Claimant's dismissal. The General Division found that ultimately the Claimant's employer dismissed the Claimant because of his habitual lateness. The Claimant's habitual lateness breached the employer's conditions of employment and constituted misconduct. The Claimant was aware that any further tardiness could result in his dismissal.

[42] The appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	November 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Donna McMahon, Representative for the Appellant J. Lachance, Representative for the Respondent