



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v D. R.*, 2019 SST 1387

Tribunal File Number: AD-19-427

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: November 29, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, the Canada Employment Insurance Commission (Commission), appeals the General Division's decision dated May 16, 2019. The General Division found that the Respondent, D. R. (Claimant), had not engaged in any misconduct.

[3] The Commission argues that the General Division made an error by basing its decision on an erroneous finding of fact. The Commission argues that the General Division overlooked key pieces of evidence, including two witness statements and the fact that there were criminal proceedings against the Claimant.

[4] The General Division referred to the two witness statements but did not analyze them to any degree. Furthermore, the General Division failed to refer to or consider other evidence that was clearly relevant. As a result, I find that the General Division made an error. For that reason, I have conducted the analysis that the General Division should have performed. Taking into account all of the evidence that was before the General Division, I find that the appeal should be allowed.

BACKGROUND FACTS

[5] Approximately one week after joining a building restoration service, the Claimant got into a verbal dispute with D. E., another employee. He had known D. E. since 2016, when they were working at another company. The Claimant did not have a good relationship with D. E..

[6] According to the Claimant, he wanted to avoid any confrontation. He tried to get away from D. E..

[7] On one occasion, the Claimant said that B. R., another employee, stood in his way and refused to move. The Claimant also knew B. R. from 2016 and did not have a good relationship

with him either. The Claimant stated that he pushed B. R., causing him to fall backwards and break his hip.¹

[8] On another occasion, the Claimant said that he tried to get away from D. E., who was screaming at him about how he was doing his work. He told the Commission that he turned around and accidentally knocked B. R. over because he did not know that B. R. was directly behind him.²

[9] The Claimant applied for Employment Insurance regular benefits, claiming that he lost his job through no fault of his own. The Commission approved his claim for benefits. But, the Commission received a request for reconsideration of its decision from the Claimant's employer. After reviewing additional information from the employer, the Commission changed its decision.

[10] The employer had written to the Commission, advising that it had dismissed the Claimant "because of [a] violation towards another worker." The employer alleged that the Claimant had physically assaulted another worker. The employer noted that the police had charged the Claimant (with aggravated assault) and that his union had released him.³

[11] The Claimant responded to the Commission that he would be disputing the criminal charges and that his union was investigating the incident. He alleged that his co-workers made up the story that he had pushed B. R..⁴ The Claimant insists that he accidentally bumped into B. R..

[12] The Commission concluded that it was not an accident because there had to have been some force involved for B. R. to have fallen and to have been injured. The Commission decided that the Claimant had been dismissed because of misconduct.⁵ This meant that he was also disqualified from receiving any Employment Insurance benefits. He would have to repay any benefits that he had already received.

[13] The Claimant appealed the Commission's reconsideration decision to the General Division. He argued that he had been wrongfully accused and that his co-workers had been

¹ See Supplementary Record of Claim, dated April 12, 2018, at GD3-16 to GD3-17.

² See Supplementary Record of Claim, dated June 5, 2018, at GD3-19.

³ See employer's letter dated July 4, 2018, at GD3-21.

⁴ See Supplementary Record of Claim dated August 16, 2018, at GD3-25.

⁵ See Commission's reconsideration decision dated August 21, 2018, at GD3-51 to GD3-52 / GD3-53 to GD3-54.

targeting him. The General Division accepted the Claimant's evidence that he had not pushed his co-worker and that he had accidentally bumped into him. It found that the Claimant's evidence was overall reasonably consistent.

[14] The Commission argues that the General Division based its decision on an erroneous finding of fact without regard for the material before it.

ISSUE

[15] Did the General Division overlook any evidence when it determined that there was no misconduct?

ANALYSIS

[16] In concluding that the Claimant did not push his co-worker, the General Division relied on the Claimant's oral testimony. The General Division found the Claimant's oral testimony plausible, reasonably consistent, and detailed. The General Division also found that he had given it under solemn affirmation.

[17] The General Division also preferred the Claimant's evidence because there were no statements on file from B. R..

[18] The General Division did not rely on the accident investigation report. It found the report unreliable for two reasons: one, the site supervisor who prepared it had not witnessed the incident, and two, the report did not include any statements from the Claimant.

[19] The Commission acknowledges that generally I should defer to the General Division's findings of fact. I would do this unless the General Division based its decision on factual findings that it made in a perverse or capricious manner or without regard for the material before it. The Commission argues that this is one of those cases where I should not defer to the General Division's findings. The Commission argues that the General Division based its decision on a factual error without considering some of the material before it.

[20] The Commission acknowledges that the site supervisor did not witness the accident and that the investigation report did not include a statement from the injured party. Even so, the

Commission argues that there was other evidence, apart from the Claimant's oral testimony, that the General Division should have considered. The Commission argues that the General Division ignored this other evidence when it assessed whether there was any misconduct. It argues that if the General Division had considered this other evidence, it would have concluded that there was misconduct.

Admissibility of New Document

[21] On November 4, 2019, the Claimant filed a new document. It consists of a statement from the owner of a local sports bar and eatery. The owner stated that B. threatened other customers and asked questions about the Claimant.

[22] The new document also includes a photograph of B. R. sitting at the counter at the sports bar and eatery.

[23] The Claimant frequents the sports bar. He claims that, by showing up at the sports bar, B. R. was targeting him. The Claimant argues that the owner's statement and the photograph prove that B. R. wants to harm him.

[24] The Commission has not seen the new document. It argues that the Appeal Division normally does not accept new evidence, but the Commission is open to the new document being entered into evidence. It objects if the new document somehow changes existing witnesses' statements. The Commission argues that the new document does not change its position.

[25] Generally, the Appeal Division does not accept new evidence. There are exceptions to this general rule.

[26] For instance, I may admit new evidence if I find that it relates to one of the grounds of appeal under section 58(1) of the *Department of Employment and Social Development Act*. I may also admit new evidence if it provides general background in circumstances where that information might help me understand the issues related to the appeal but does not add new evidence on the merits. I may also admit new evidence if it highlights the complete absence of evidence on a particular finding or if it shows defects that cannot be found in the evidence.

[27] None of those exceptions apply here. The new document raises new issues.

[28] I question the new document's relevance to any of the issues that were before the General Division. The General Division examined whether the Claimant's actions could constitute misconduct. The Claimant claims that he accidentally bumped into B. R., causing him to fall over and injure his hip. Witness statements indicate that the Claimant pushed B. R.. The General Division did not have a copy of any written statements from B. R.. The new document does not deal with any of these facts or to the issue of misconduct.

[29] Even if I could accept the new document, I do not see how it would help the Claimant. The document does not deal with the incident when B. R. was injured. If anything, the fact that B. R. is allegedly targeting the Claimant would only prompt questions of motive on B. R.'s part. Any motives could spring from the incident when he was injured, rather than from any ongoing disagreements from 2016. This would not help the Claimant.

[30] I find that the new document cannot be accepted, so I do not have to be concerned with what happened at the sports bar and eatery and whether and why B. R. is allegedly targeting the Claimant.

Witness Statements

[31] The Commission notes that there were two other witnesses to the incident involving the Claimant and the injured party. Yet, it argues that the General Division seemingly did not consider the statements that these two witnesses gave.⁶

[32] There are minor discrepancies in details between the two witness statements. Even so, both witnesses paint a different story than the one that the Claimant gave to the General Division.

[33] One witness wrote that "in one quick motion [the Claimant] walked up towards another worker on the crew (B. R. [...]) who had no part in the argument and was about 10' away. [The Claimant] took 2 to 3 steps at him and two armed him telling him to get the [f—] out of [his] way."⁷

⁶ See statements at GD3-35 to GD3-36 and GD3-37.

⁷ Statement of Dave, undated, at GD3-35.

[34] The other witness wrote, “then suddenly [the Claimant] turned to his left and then pushed B. R. to the floor as he passed by him then accused B. R. of laughing at him earlier. Witch [*sic*] I do not believe.”⁸

[35] The Claimant suggests that the witness statements may not have been in evidence. He says this would explain why the General Division did not consider them. However, the General Division referred to both statements, so they were clearly in evidence.

[36] The member wrote, “I realize the [Commission] submitted that the employer’s witness statements noted the [Claimant] pushed the worker to the ground in a deliberate manner.” But, the member did not say anything more about the statements. It preferred the Claimant’s oral testimony over the two witness statements because it found the Claimant’s statements plausible, reasonably consistent, and detailed, and that it was provided under solemn affirmation.

[37] There is a general assumption that a decision-maker has considered all of the evidence. However, that assumption can be disproven.

[38] In this case, the General Division member referred to the two witness statements and briefly explained why he preferred the Claimant’s oral testimony over the two witness statements (and the investigation report). I am of the view, however, that it is insufficient to merely refer to the two witness statements.

[39] The nature of the evidence from the two witnesses warranted further analysis. The witnesses provided an equally compelling narrative to explain how B. R. got injured.

[40] The same reasons for the General Division’s preference of the Claimant’s oral testimony could have applied equally to the two witness statements. For instance, the General Division found that the Claimant’s statements were reasonably consistent. Yet, the same could be said for the two witness statements. Both witnesses said that the Claimant pushed B. R.. The only difference between the two statements and the Claimant’s oral testimony was that the Claimant gave his evidence under solemn affirmation.

⁸ Statement of Mr. Marion, dated April 7, 2018, at GD3-37.

[41] Without any analysis of the two witness statements, or any indication that the General Division member understood the significance of this evidence, it is questionable whether the General Division actually considered them.

[42] Without such an analysis by the General Division, I find that the Commission has shown that the general assumption that the General Division considered all the evidence should not apply in this case.

Criminal Charges against the Claimant

[43] The Commission also argues that the General Division overlooked other key evidence. This includes the fact that the Claimant was charged with a criminal offence.

[44] The Claimant acknowledged that he faced charges for aggravated assault. He advised the Commission that he would be pleading “not guilty” to these charges.⁹

[45] The status of the criminal proceedings is unknown. The Claimant correctly points out that any information he can provide about the status of the criminal charges would constitute new evidence. He also correctly points out that evidence of this nature is inadmissible at the Appeal Division.

[46] The Commission argues that the outcome of any criminal charges or the fact that the Claimant intended to dispute them is irrelevant because misconduct does not require criminal liability. The Commission argues that the charge of aggravated assault represented the injured co-worker’s position regarding the incident. It argues that it was a key piece of evidence that the General Division should have considered.

[47] The General Division did not mention the criminal proceedings against the Claimant.

[48] I agree with the Commission that the criminal proceedings were relevant and that the General Division should have considered the fact that the Claimant had been charged. Charges likely would not have been laid unless there were reasonable grounds to believe that the

⁹ See Supplementary Record of Claim dated August 16, 2018, at GD3-25.

Claimant had committed a criminal offence. The charges had to have been based on some evidence against the Claimant.

[49] The General Division should have considered the fact that there were criminal charges against the Claimant.

[50] I find that the General Division based its decision on a factual error because it overlooked the evidence regarding the criminal charges against the Claimant.

The Claimant's Own Statements

[51] The General Division found the Claimant's evidence that he accidentally bumped his co-worker overall reasonably consistent. Yet, I notice that, when the Claimant first spoke with the Commission, he reported that his co-worker stood in his way and would not move, prompting the Claimant to push him.¹⁰ Yet, the General Division did not refer to the Claimant's initial statement to the Commission, despite the fact that it directly contradicted other statements that he made. If the General Division had considered this initial statement that the Claimant gave to the Commission, and had assigned it any weight, the General Division could not possibly have concluded that the Claimant's evidence was "reasonably consistent."

[52] The Commission, however, does not place much weight on the Claimant's initial statement. It acknowledges that the agent recorded a conversation with the Claimant. Even so, it was evidence that the General Division should have addressed, first by asking the Claimant about it.

Other Evidence

[53] At the General Division hearing, the Claimant testified that, after the incident occurred, he went to get his foreman. The Claimant told the foreman what had just happened. The foreman took a statement from the Claimant, but he did not write anything down. The foreman also said

¹⁰ See Supplementary Record of Claim, dated April 12, 2018, at GD3-16 to GD3-17.

to him “You’re probably going to get fired... We’re probably going to have to dismiss you or whatever.” The Claimant responded, “Whatever.”¹¹

[54] The General Division did not mention this conversation between the Claimant and his foreman, although it appears to be relevant because it could have showed that the foreman concluded from the Claimant’s statement that the Claimant’s conduct warranted dismissal.

[55] I note that the Claimant also testified at the General Division hearing that one of the witnesses changed his evidence. The witness, M. M., had apparently told the police in his statement that night or the following day that he did not see what had happened.¹²

[56] This same witness then gave another written statement claiming that he saw what happened. He claimed that he saw the Claimant push B. R.. The Claimant wonders why that witness changed his story. Either way, the General Division did not analyze any of this evidence.

[57] The Claimant also testified that he provided a statement to the police.¹³ He did not produce a copy of this statement to the General Division. The General Division did not mention the Claimant’s evidence that he had given a statement to the police.

[58] Typically, an accused receives copies of witness statements as part of the Crown’s disclosure obligations. That way, an accused knows the case against them, and they can make full answer and defence.

[59] I find it curious (assuming that he received this evidence) that the Claimant did not produce a copy of the police officers’ notes if, as he says, it was helpful to his case. The notes would have included copies of M. M.’s statement where he allegedly stated that he did not witness the incident. The notes would have also included a copy of the Claimant’s own statement to the police.

[60] The Claimant could have also called the witness to testify on his behalf at the General Division hearing. All of this information could have supported the Claimant’s arguments.

¹¹ At approximately 32:38 of the audio recording of the General Division hearing.

¹² At approximately 42:15 to 43:05 of the audio recording of the General Division hearing.

¹³ At approximately 43:05 to 43:23 of the audio recording of the General Division hearing.

[61] The employer spoke with the Commission and reported that there were witnesses who stated that the Claimant pushed his co-worker. Clearly, the employer did not witness the incident, so the secondhand statements that it gave would have been either inadmissible or given very little weight. However, the employer did state that it held a meeting with the Claimant and his union representative and that the union released the Claimant after this meeting.

[62] Finally, there is a medical report signed by the injured co-worker and a physician.¹⁴ Portions of the report are difficult to read or are cut off, but Section B asks for incident dates and details. The injured co-worker wrote, “was pushed by another employee during an altercation.” The bottom of the report is signed by the injured co-worker. This statement was significant because it gave the co-worker’s perspective on how the accident occurred.

Whether the General Division Overlooked Any Key Evidence

[63] The Commission acknowledges that the General Division is the trier of facts and is in the best position to weigh the evidence and assess credibility, but it argues that the General Division’s findings in this case were incompatible with the bulk of the employer’s evidence. The Commission suggests that the General Division should have assessed the witnesses’ statements and the evidence in a more meaningful manner.

[64] Although the General Division referred to the two witness statements, it is unclear whether it considered them. Certainly, it did not analyze them to any degree. This is despite the fact that the witness statements were generally consistent with each other and that one of the witnesses provided his statement soon after the incident happened. Indeed, out of all of the evidence, the witness’s statement was the closest in time to the incident.

[65] As I have noted above, there is a general assumption that a decision-maker has considered all of the evidence before it, even evidence that the decision-maker did not refer to in their decision. A party can prove that this assumption is wrong by showing that the decision-maker failed to discuss evidence of significant probative value. That means that the evidence is of some significance.”

¹⁴ See medical report filed in context of claim for Workplace Safety Insurance Board benefits, at GD3-47 and GD3-48.

[66] While a decision-maker does not need to mention all of the evidence before it, they should at least address any evidence that has some significant value.

[67] I agree that the General Division overlooked key pieces of evidence, including the two witnesses' statement, the fact that criminal charges had been laid against the Claimant, the Claimant's exchange with his foreman, and the medical report signed by the injured co-worker and his physician.

[68] The medical report in which the injured co-worker described how his accident occurred is not fully legible. Nevertheless, it was a significant piece of evidence that the General Division should have addressed.

[69] While the General Division explained why it preferred the Claimant's evidence, it should have considered all of the other evidence and explained why it necessarily found it less compelling than the Claimant's own evidence.

[70] I find that the General Division based its decision on an erroneous finding of fact without regard for all of the material before it.

DISPOSITION

Giving the Decision that the General Division Should Have Given

[71] Having found that the General Division based its decision on a factual error without regard for the material before it, I have to decide how I should resolve this matter. The Commission argues that I should give the decision that the General Division should have given. The Commission argues that the evidentiary record is sufficient for me to make a decision.

[72] The Commission argues that the bulk of the evidence before the General Division shows that the Claimant intentionally pushed his co-worker. The Commission argues that I should accept this evidence and find that this act constitutes misconduct and was what led to the Claimant's dismissal from his job. The Commission argues that I should also find that the Claimant should have reasonably known that his conduct might lead to dismissal.

[73] The Claimant maintains that both D. E. and M. M. lied in their statements. Because of that, he argues that I should not consider the two statements, or, at the very least, he says that he should have the chance to prove that the witness statements are false.

[74] He claims that the two witnesses' statements are "full of lies." He says that he has had problems with D. E. and B. R. since 2016 and that they are out to get him. I note that the Claimant testified at the General Division hearing that he would have quit his job anyway, even if his employer had not dismissed him. When he first noticed both D. E. and B. R. at the worksite, he asked himself whether he should even take the job.¹⁵

[75] I asked the Claimant why he would have accepted rides to and from work from B. R., if he had had problems with him since 2016. The Claimant said that he thought they were on good terms when they worked together at the building restoration service. He claims that they had been treating him well until the incident happened. This explanation does not seem consistent with the Claimant's overall evidence regarding his impressions and relationship with D. E. and B. R..

[76] The two witness statements were in evidence at the General Division. The Claimant had the opportunity then to address the two witness statements. Indeed, he addressed one of the witness statements and tried to undermine its reliability.

[77] The Claimant simply disagrees with the two witnesses' statements. His proof that the witnesses are lying comes down to a matter of whether one believes him or the two witnesses. This is why other evidence, such as that I have outlined above, becomes important.

[78] The Claimant essentially argues that the General Division could not rely on one of the witness statements because that same witness gave a completely conflicting statement to the police. This witness allegedly told the police that he did not see the incident in which the Claimant came into contact with B. R..

¹⁵ At approximately 54:10 of the audio recording of the General Division hearing.

[79] Exculpatory evidence is evidence that helps to show that an accused is not responsible for whatever charges he faces. If the Claimant had any exculpatory evidence, surely he would have already produced it by now.

[80] For instance, the Claimant filed a new document that included a photograph of B. R.. He did this because he thought it helped his case.

[81] The Claimant says that one of the witnesses gave a statement to the police, denying that he witnessed the incident. The police likely would have recorded the statement. The Claimant says that he gave a statement to the police. If his statement is consistent with what he told the General Division, he likely would have obtained and produced a copy of his statement to help his case. Similarly, if the witness told the police that he did not witness the incident, surely the Claimant would have obtained the statement or the police officers' notes to help his case.

[82] In short, I am led to believe that, if I were to return this matter to the General Division for a redetermination, the Claimant would not produce any further evidence that is relevant. While the evidentiary record may be incomplete because it does not include the police file with witness statements, there is no indication that the police file would be produced anyway. There is no indication that any of the parties would be calling any witnesses either. For this reason, I find that the evidentiary record that was before the General Division is as complete as it ever will be.

[83] Furthermore, the Claimant had a chance to make arguments at the General Division about any of the evidence that was unfavourable to him.

[84] I see no reason why I should not give the decision that the General Division should have given.

Determining whether There Was Misconduct

[85] I agree with the Commission's submissions. Other than the Claimant's own evidence, the overall evidence indicates that the Claimant intentionally pushed his co-worker, that he was aware that such conduct could lead to dismissal, and that it was this incident that led to the Claimant's dismissal.

[86] Two witnesses allege that the Claimant intentionally pushed his co-worker. The Claimant says that I should disregard these two witness statements. Even if I were to disregard these two witness statements, the balance of the evidence still indicates that the Claimant pushed his co-worker.

[87] The Claimant is facing aggravated assault charges, which suggests that there was sufficient evidence that he pushed his co-worker to bring charges against him. It is not clear what those charges are based on, but charges are not made in a vacuum. Either the injured co-worker or the witnesses, or both, stated to the police that the Claimant pushed his co-worker.

[88] Although the Claimant argues that his injured co-worker and the two witnesses are unreliable and untrustworthy because they have been conspiring against him, even the Claimant initially reported to the Commission that he pushed his co-worker.

[89] I place greater weight on the Claimant's initial report than any of his subsequent statements. I find that his initial report to the Commission is more reliable than the testimony he provided to the General Division because he made these statements closer in time to the actual occurrence of the event, when his mind was fresher.

[90] When the Commission asked the Claimant how he reconciled his earlier statement with his later ones, the Claimant did not try to explain why he would have told the Commission early on that he had pushed his co-worker and was now saying that he accidentally bumped into his co-worker. The Claimant simply explained that he "wanted to get out of the situation and away from the individual with whom he was arguing."¹⁶

[91] Even if the phone log notes are inaccurate, there is other evidence.

[92] The Claimant testified that he immediately reported the incident to his foreman, who commented that the employer would likely have to dismiss the Claimant. This suggests that whatever the Claimant reported to the foreman was unfavourable. It is unlikely that the foreman would have responded to the Claimant that the employer would probably have to dismiss the Claimant if the Claimant had not reported that he had done something inappropriate.

¹⁶ See Supplementary Record of Claim dated August 16, 2018, at GD3-25.

[93] If the Claimant had stated that he accidentally bumped into his co-worker, it is highly unlikely that an accidental bump would have prompted the foreman to suggest that the employer would have to dismiss the Claimant. It is likely that the Claimant told his foreman that he pushed B. R., causing him to fall over and injure himself. This is consistent with the bulk of the evidence.

[94] The Claimant had a meeting with his employer. His union represented him at the meeting. After the meeting, the union released the Claimant. The Claimant does not deny that he is no longer a member of the union.

[95] Most important of all was the injured co-worker's statement. Although it was brief and contained within a medical report, the co-worker clearly stated that he had been pushed by his co-worker.

[96] Taking all of the evidence that was before the General Division into account, I reject the Claimant's assertions that he accidentally bumped into his co-worker. I conclude that, on a balance of probabilities, the Claimant intentionally pushed his co-worker, causing him to fall over and fracture his hip.

[97] I find that the Claimant's behaviour amounted to misconduct.

[98] The Claimant's actions were deliberate or so reckless as to approach wilfulness, and he knew that such conduct—being physically aggressive towards another employee, even if he did not intend to injure—would lead to dismissal.

[99] I also find that the employer dismissed the Claimant because of this incident. The employer confirmed this. It wrote the following:

The fact is that the claimant was dismissed from his employment because of violation towards another worker. The Claimant has physically assaulted another worker at the job site, on Apr7, 2018 [*sic*] which caused him serious injury. As a result of this violation, [the Claimant] is under criminal charge of X police department. I should also point out that claimant has been discharged from the X.¹⁷

¹⁷ See employer's letter dated July 4, 2018, at GD3-21.

[100] There was a direct, causal link between the Claimant's intentional actions when he pushed his co-worker and the dismissal. He lost his job because of his own misconduct.

CONCLUSION

[101] The appeal is allowed. I am substituting my analysis for the General Division's analysis. I find that the Claimant lost his employment because of his own misconduct.

Janet Lew
Member, Appeal Division

HEARD ON:	November 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Louise LaViolette, Representative for the Appellant D. R., Respondent