



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. A. v Canada Employment Insurance Commission*, 2019 SST 1470

Tribunal File Number: AD-19-640

BETWEEN:

A. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: December 30, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, A. A. (Claimant), is appealing the General Division's decision of June 26, 2019.

[3] The General Division decided that the Claimant lost his Calgary-based job with a car sharing rental company because of his own misconduct. The employer alleged that the Claimant breached the company's policy against using company vehicles for personal use. The General Division concluded that because of his misconduct, the Claimant was disqualified from receiving Employment Insurance regular benefits. The General Division also decided that the Claimant did not have enough hours of insurable employment to qualify for benefits after he lost his job with the car sharing rental company.

[4] The Claimant argues that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, he argues that the General Division failed to consider that the real reason his employer dismissed him was because of a growing shortage of work. In this regard, he argues that the General Division failed to consider text messages from his employer.

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

ISSUE(S)

[6] The issues before me are as follows:

- (a) Can the Appeal Division accept the Claimant's new materials?
- (b) Did the General Division overlook important facts or issues?

ANALYSIS

(a) Can the Appeal Division accept the Claimant's new materials?

[7] The Claimant argues that his employer dismissed him because there was insufficient work. Indeed, after the General Division hearing on May 30 and June 20, 2019, the Claimant's employer announced that it would be ceasing operations in the Calgary area. The Claimant produced screen shots of headlines taken from various online news articles. The headlines are dated September 27, 2019. They show that the Claimant's employer would be pulling out of the Calgary market, along with other North American cities.¹ The Claimant also provided links to the websites to the news articles.

[8] The Claimant relies on these articles in support of his appeal. The Claimant says that these articles prove that his employer dismissed him because there was not enough work for him.

[9] The information from September 2019 is new. The General Division did not have this information. In fact, it somewhat contradicts the Claimant's evidence at the General Division hearing. The Claimant testified that his employer wanted him to wait until the following winter to return to work. He suggested that there was more work in the winter.²

[10] As a general rule, the Appeal Division does not consider new evidence. There are exceptions. For instance, if new evidence helps to understand the issues relevant to the appeal but does not add new evidence on the merits, or if it highlights defects in the evidence that was before the General Division, then the Appeal Division might be able to accept it. But, the Claimant's new evidence does not fall within any of the exceptions to the general rule against accepting new evidence.³ As such, I cannot accept the Claimant's new materials.

¹ See AD2-4.

² At approximately 57:53 to 59:29 of the audio recording of the General Division hearing on June 20, 2019.

³ See *Marcia v Canada (Attorney General)*, 2016 FC 1367.

(b) Did the General Division overlook important facts or issues?

[11] The Claimant argues that text messages from his employer show that the real reason it dismissed him was because of insufficient work.⁴

[12] The text messages show that in early May and June 2018, the Claimant asked his employer for work. On May 7, the employer responded that there was not much work available. The employer wrote, "I need you to take a break for now while I figure out our staffing needs please." It also wrote, "Just keep in touch with me and I'll let you know what's happening."

[13] Then, on June 14, 2018, the Claimant followed up with his employer. The employer responded, "No sorry ...I said give me a shout and I would see what I could do for you," "We don't quite have room for you yet," "Give me a little more time. I think I can find a spot for you" and "But I like your enthusiasm!" (The Claimant exchanged other text messages with his employer in April 2018. These other text messages do not relate to any of the issues surrounding his claim for Employment Insurance benefits.)

[14] After this exchange of text messages, the employer contacted the Claimant with work. The Claimant worked for two days. The employer then dismissed him.

[15] The Claimant argues that the real reason for his dismissal was a shortage of work. He argues that, because of this, the General Division should have considered the text messages. He argues that the text messages prove that his employer dismissed him because there was little work available.

[16] The General Division briefly referred to the text messages. It did not consider whether the text messages showed that there were work shortages or that the employer wanted to dismiss the Claimant.

[17] The text messages suggest that the company had little work. But, the record of employment also showed that the company had little work. The Claimant did not work for several weeks between April and June 2018. So, the Claimant did not have to rely on the text messages to argue that there was a shortage of work. The General Division already recognized

⁴ See text messages at pages GD3-60 to 61.

that there was a shortage of work over the summer.⁵ But, it is clear that the member did not consider the work shortage as the reason for the Claimant's dismissal.

[18] This begs the question: should the General Division have turned its mind to examining whether the employer dismissed the Claimant because of work shortages?

[19] The Claimant testified that his employer asked him to take time off work, but after about 40 days, he insisted on returning to work. He needed money to pay rent and cover his expenses. He testified, "That's why I insisted on going back, but he was looking for any reason, or any means to dismiss me."⁶ This was the closest that the Claimant came to testifying about or arguing that his employer dismissed him because of any work shortages.

[20] The Claimant did not advance or clearly articulate any arguments at the General Division that his employer dismissed him because of any work shortages.⁷ The Notice of Appeal also makes no reference to this argument. As such, I cannot fault the General Division member for not examining whether the Claimant's employer dismissed him because of a lack of work.

[21] Even if the Claimant had asked the General Division member to look at the text messages to prove that he was dismissed for reasons unrelated to his misconduct, I do not find that they show that his employer dismissed him because of a lack of work.

[22] On their own, the text messages do not say anything about dismissing the Claimant from his employment. The text messages also do not suggest that the employer thought about dismissing the Claimant. Significantly, the text messages show that the Claimant's employer appreciated his enthusiasm. It invited him to check back for any work.

[23] The Claimant says that the series of texts in May and June 2018 prove that the employer wanted to dismiss him. The company did not have much work to offer him. He argues that the employer asked him to return to work for a couple of days so it could make up an excuse to

⁵ At approximately 1:15:35 of the audio recording of the General Division hearing on June 20, 2019.

⁶ At approximately 55:10 of the audio recording of the General Division hearing on June 20, 2019.

⁷ The General Division member conducted two hearings. The hearing on June 20, 2019 included an interpreter, so that the member could be satisfied that she fully understood the Claimant. Even so, the interpreter noted that the Claimant was not expressing himself clearly. At approximately 1:34:20 of the audio recording of the June 20, 2019 hearing.

dismiss him. He claims that his employer hid behind the Claimant's alleged wrongdoing to disguise the real reason for his dismissal. At the General Division hearing, he argued that his employer used the fact that he used a company vehicle for personal use as an excuse to dismiss him.⁸

[24] It is not clear from the text messages alone that the employer wanted to dismiss the Claimant because of a work shortage. In fact, the Claimant testified that his employer wanted him to wait until the following winter to return to work.⁹ The General Division member asked the Claimant about this contradiction. It would have made no sense to dismiss the Claimant in the summer, if it also wanted the Claimant to return to work in the winter.¹⁰

[25] So, in my leave to appeal decision, I indicated that the Claimant should explain how the text messages showed a connection between any work shortages and his dismissal. I also suggested that the Claimant should point to any other evidence before the General Division to show that there were other dismissals or layoffs of other employees in about June 2018. This way, the General Division member might have been aware that there was a possible issue over the text messages.

[26] The Claimant responded that if his employer had been truly concerned about any wrongdoing on his part, then it would have mentioned any misconduct in the text messages, instead of asking him to return to work. But, there is no evidence that suggests that the employer found out about the Claimant's misconduct before it gave him more work. It makes no sense that the employer would give him work to somehow build a pretense for dismissal. For one, if the employer already knew about the Claimant's misconduct, it could have dismissed him without giving him any work. Two, if it wanted to build a case for dismissal, it could not have anticipated that the Claimant would have engaged in any future misconduct.

[27] At the General Division hearing, the Claimant did not ask the General Division to consider the text messages or to accept them as proof that his employer dismissed him because of a shortage of work. While the text messages indicate that there was little work, I find that the text

⁸ At approximately 1:18:23 to 1:19:15 of the audio recording of the General Division hearing on June 20, 2019.

⁹ At approximately 58:40 of the audio recording of the General Division hearing on June 20, 2019.

¹⁰ At approximately 1:01:35 of the audio recording of the General Division hearing on June 20, 2019.

messages do not indicate that the employer wanted to dismiss the Claimant. The fact that there was a shortage of work is not enough to connect or tie it to the Claimant's dismissal, in light of the Claimant's misconduct.

[28] There was other supporting evidence that the company had little work. The General Division knew there were work shortages. But, it is clear that the member determined that the Claimant's employer dismissed him because of his own misconduct, rather than because of any work shortages.

[29] For these reasons, I find that the General Division did not err when it did not consider the text messages and the issue of whether the employer dismissed the Claimant because of work shortages.

CONCLUSION

[30] The appeal is dismissed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	A. A., Appellant