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

Citation: *A. R. v Canada Employment Insurance Commission*, 2020 SST 344

Tribunal File Number: AD-20-88

BETWEEN:

A. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 21, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Applicant, A. R. (Claimant), seeks leave to appeal the General Division's decision. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division found that the Claimant lost his job because of misconduct. This disqualified the Claimant from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made several erroneous findings of fact regarding his employment, without regard for the material before it, and that it based its decision on these findings.

[5] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

ISSUE

[6] The only issue before me is whether the General Division made any factual errors regarding the Claimant's employment.

ANALYSIS

[7] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the types of errors listed in

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[1] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

section 58(1) of the *Department of Employment and Social Development Act*. These errors would be where the General Division:

(a) Did not act fairly.

(b) Did not decide an issue that it should have decided, or it decided something that it did not have the power to decide.

(c) Made an error of law when making a decision.

(d) Based its decision on an important error of fact.

[8] The appeal also has to have a reasonable chance of success. This is a relatively low bar because claimants do not have to prove their case at this stage of the appeals process.

Background history

[9] In June 2018, the Claimant sustained serious injuries to his knee and foot in a non-work-related accident. He was off work between June 5 and June 20, 2018. During his absence from work, the Claimant provided his employer a sickness certificate prepared by his family doctor. His doctor stated that that the Claimant was unable to stand, walk long distances, climb stairs, run or jump for the period from June 6, 2018 to July 4, 2018.[2]. His physician subsequently provided an opinion stating that the Claimant was limited to walking no more than 100 to 200 metres.[3]

[10] The day before the Claimant returned to work, he and his employer agreed that the Claimant would start a graduated return to work (GRTW) and that he would be limited in his walking, or as tolerated.[4] The Claimant returned to work on June 21, 2018. He continued to have restrictions with walking. He objected over the distance he had to walk from his employer-assigned staff parking spot to his office, as it was more than 200 metres.

[2] See Sickness Certificate dated June 6, 2018, at GD3-71.
[3] See report dated July 9, 2018, at GD3-73.
[4] See Graduated Return to Work Schedule, at GD2-12, GD3-72

[11] The employer determined that the Claimant did not require any workplace accommodations because the Claimant's restrictions were unrelated to his job duties. The employer decided that the Claimant could assume his full duties and hours.[5]

[12] The employer says that in early October 2018 and again in mid-October 2018, the Claimant asked for a leave of absence for November 2018. The employer said it refused the Claimant's request because November was a busy time at work. The employer offered the Claimant other dates in October and December. However, the Claimant did not accept these other dates.[6]

[13] The Claimant continued to seek medical treatment and investigations for his injuries. In October 2018, the Claimant sought a referral to an orthopaedic specialist. He secured a November 5, 2018 appointment with a specialist at Yale Medicine Orthopedics & Rehabilitation Clinic. The Connecticut clinic is a world-class medical provider. However, the Claimant needed to take time off work to attend this medical appointment.

[14] On October 30, 2018, the Claimant informed his employer that he needed a leave of absence from work on November 5, 2018, so that he could attend a medical appointment.[7] The Claimant also provided his employer a note prepared by his family physician, stating that the Claimant needed to avoid long standing and walking, climbing stairs, kneeling and squatting because of his knee.[8]

[15] On November 1, 2018, the Claimant met with his manager and supervisor. They discussed his upcoming appointment on November 5, 2018. His manager denied his request to attend the upcoming appointment.[9]

[16] During this same meeting, the Claimant informed his employer that he would be meeting with his family doctor later that afternoon. He invited any questions from his employer for his

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[5] See employer's email with chronology, dated August 14, 2019, at GD3-36.
[6] See employer's email with chronology, dated August 14, 2019, at GD3-37.
[7] See Claimant's Statement of Facts, at GD3-67-68, para. 10 and letter to supervisor, dated October 29, 2018, at GD3-76.
[8] See family physician's medical note dated October 16, 2018, at GD3-75.
[9] See Claimant's Statement of Facts, at GD3-67-68, para. 11.

family physician. The Claimant claims that his supervisor confirmed that the employer had re-opened a GRTW file.[10]

[17] The Claimant's manager wrote to him later that day, denying his request for a leave of absence for November 2018. The manager wrote that the Claimant had "not provided medical satisfactory to the employer supporting the need for a medical leave of absence." The manager also wrote that, "Any absence without providing satisfactory medical information will be an unexcused absence and may result in termination of your employment." [11] There was no mention of re-opening the Claimant's GRTW file.

[18] Even though the Claimant did not get his employer's consent for a leave of absence, the Claimant went to his medical appointment on November 5, 2018. The Claimant saw an advanced practice registered nurse. The nurse was of the opinion that the Claimant should get the chance to limit his walking as needed. She was also of the opinion that his injury would not improve and that he might need to limit his walking in the future.[12] The Claimant sent a copy of this opinion to his employer's occupational and environmental safety and health (OESH) department.

[19] On November 6, 2018, the employer's human resources director wrote to the Claimant, advising that, as she had indicated in her email of November 2, 2018, that he had "not provided medical that excuses your absence and therefore you are on an unauthorized leave and disciplinary action is being considered. If you do not return to work tomorrow morning (Nov. 7), by 9:00 a.m. at …, we will review your employment and you may be terminated."[13]

[20] The Claimant did not return to work on November 7. Instead, he stayed in the Connecticut area to try to get another appointment that week, in case one became available.[14]

[21] On November 8, 2018, the human resources director wrote to the Claimant that the Claimant's employment was "terminated effective immediately for [his] unexcused absences."[15]

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[10] See Claimant's Statement of Facts, at GD3-68, para. 11.
[11] See manager's email dated November 1, 2018, at GD3-43 and GD3-77.
[12] See medical opinion dated November 5, 2018, at GD3-79.
[13] See letter of human resources director, dated November 6, 2018, at GD2-14, GD3-44, and GD3-78.
[14] See Claimant's Statement of Facts, at GD3-68, para. 16.
[15] See employer's email and termination letter dated November 8, 2018, at GD3-80 to GD3-82 (and GD2-10 to GD2-11, GD3-25 to GD3-26 and GD3-46 to GD3-47).

[22] The Claimant was shocked that his employer dismissed him.[16] He was shocked because he had kept his employer fully informed about his ongoing physical limitations and his need for additional medical treatment. He had also been an excellent employee.

[23] The Claimant applied for Employment Insurance benefits, but the Commission turned down his application for benefits. When he appealed to the General Division, it found that the Claimant's absence from work on November 7, 2018, was unauthorized and that it amounted to misconduct. The General Division also found that this conduct led to his dismissal. The General Division also found that the Claimant knew or should have known that his absence could lead to dismissal.

[24] The Claimant argues that the General Division made several erroneous findings of fact. He places these alleged errors into four distinct categories, which he describes as follows:

- June activation, leave, and return

- October reactivation

- November leave request

- November return ultimatum

[25] The Claimant identified several paragraphs where he alleges the General Division made erroneous findings of fact.

June Activation, Leave, and Return – Paragraph 3

[26] At paragraph 3, the General Division wrote, "The Claimant … had been unable to work due to an injury from June 5, 2018, to June 20, 2018. The Claimant returned to his job on June 21, 2018, with a guarantee return to work agreement (GRTW)."

[27] The Claimant argues that the General Division was wrong in its finding that he was unable to work between June 5, 2018 and June 20, 2018.

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[16] See Claimant's Statement of Facts, at GD3-69, para. 18.

[28] The Claimant relied on his physician's sickness certificate dated June 6, 2018.[17] The certificate indicated that the Claimant would be unable to stand, walk long distances, climb stairs, run, or jump from June 6 to July 4, 2018. The OESH department had opened a GRTW file. After he and the OESH department agreed to a schedule and a GRTW plan that included accommodations, the Claimant resumed working, on June 21, 2018.

[29] It is true that the family physician's medical certificate does not state that the Claimant was unable to work or that he had to be off work. In this regard, the General Division misstated the evidence. However, the General Division did not base its decision on this issue. Instead, the General Division focused its analysis on the Claimant's absence on November 7, 2018. This is clear when the General Division wrote at paragraph 24 that it found that the Claimant lost his job when he did not attend at work on November 7, 2019, and after his employer had denied his request for time off.

[30] Nothing turned on the General Division's findings that the Claimant was unable to work between June 5, 2018 and June 20, 2018. For this reason, I am not satisfied that there is an arguable case that the General Division based its decision on this erroneous finding that the Claimant was unable to work between June 5, 2018 and June 20, 2018.

October Reactivation – Paragraphs 3, 25, 26, and 28

[31] The Claimant cites erroneous findings in the following paragraphs:

- At paragraph 3, where the General Division wrote, "He says that he provided his employer with additional medical information and believed he was going to be returning to the GRTW that would allow him to be absent from work to attend the medical appointment."

- At paragraph 25, where the General Division wrote, "And the Claimant has not provided any evidence to support that on November 1, 2018, he had received confirmation that he had been approved to return to the GRTW."

[17] See Sickness Certificate, at GD3-71.

- At paragraph 26, where the General Division wrote, "I find the employer has provided documentary evidence of email correspondence on October 17, 2018, that clearly shows … that if there was a change to his restrictions to please provide medical documentation and his file would be reopened. I find the doctors [sic] letter dated October 18 [sic], 2018, does provide medical information of his limitations but it does not support that the employer had reopened his file.

- At paragraph 28, where the General Division wrote, "I find that in the letter October 29, 2019, the Claimant did not make any reference to being back on the GRTW or that he was or had been in consultation with the OHS. I considered the Claimant's statement that he had a meeting on November 1, 2018, and was confirmed to be back on the GRTW. However, I am giving more weight to the employer's email dated November 1, 2018, that he had not been approved to return to the GRTW as it makes no mention of this issue.

[32] The Claimant argues that the General Division made a factual error regarding his GRTW. The Claimant says that his employer had approved his return to the GRTW. He argues that resuming his GRTW was important because it meant that his employer could not dismiss him if he was on a GRTW. He says that the General Division was wrong when it concluded that the GRTW had ended.

[33] The General Division referred to the employer's letter of October 17, 2018.[18] His supervisor wrote that OESH had closed its file because his documented restrictions did not preclude him from doing his full work duties. His supervisor also wrote, "… if there is a change to your restrictions, pelase [*sic*] provide updated medical documentation and your file would be reopened."

[34] I do not see any evidence on file that the employer or OESH reopened the GRTW. There is no documentary evidence after October 17, 2018, that the employer discussed re-opening a GRTW for the Claimant. The employer's correspondence of November 1, 2018 and November 6, 2018, deal with the Claimant's request for leave. There is no mention of any GRTW.

[18] Employer's email letter dated October 17, 2018, at GD3-74.

[35] Even if the Claimant had been on a GRTW, I do not see any evidence that any GRTW schedule ever gave the Claimant the chance to set his own terms and conditions of his employment. There is no indication that the employer extended the scope of any GRTWs to allow the Claimant to miss work to attend medical appointments, without providing supporting medical documentation. For instance, the GRTW schedule set out his abilities.[19] It also set out a return to work proposal, but it did not suggest that he should be able to take time off without his employer's authorization. The GRTW schedule suggested that he would be expected to attend work and perform his duties within his limitations.

[36] I am not satisfied that there is an arguable case that the General Division made a factual error that the Claimant was under a GRTW or that his GRTW file would be re-opened. More importantly, even if there was an active GRTW file for the Claimant, it did not safeguard him from dismissal where there was misconduct.

November Leave Request – Paragraphs 3, 22a, and 25

[37] The Claimant cites erroneous findings in the following paragraphs:

- At paragraph 3, where the General Division wrote that he had visited his doctor in late October to schedule an evaluation with an orthopaedic specialist. The General Division also wrote that his employer refused his request for time off.

- At paragraph 22, where the General Division found that the Commission had proven that there was misconduct because the Claimant did not receive his employer's approval for a leave of absence starting in early November. The employer refused the leave because of operational requirements and because the Claimant did not have a medical certificate.

- At paragraph 25, where the General Division did not find the Claimant's argument that he asked for time off to be very credible. The General Division found the Claimant's letter dated October 29, 2018, contradicted his statement that he did not ask for time off.

[19] See GRTW schedule, at GD3-72 to GD3-73.

[38] The Claimant argues that the General Division made an erroneous finding regarding his leave request history.

[39] The Claimant denies that in late October 2018, he requested any time off. The Claimant states that an earlier request he made was "an open and shut case" and occurred before "the discovery of [his] newfound disability, on Oct 15."[20]

[40] The Claimant states that he submitted a formal, written request for a leave of absence. His employer denied this request. He denies that he made any further leave requests.

[41] The Claimant states that the "presence or status of any leave request … cannot have influenced or neutralized the independent operation of [his] GRTW review."[21]

[42] I see from the Claimant's chronology and statement of facts that he informed his supervisor on October 30, 2018, of his need to be absent on November 5, 2018, to attend a medical appointment.[22] On November 1, 2018, the employer denied the Claimant's request and advised him that any absence without satisfactory medical information would be an unexcused absence and could result in termination of his employment.[23]

[43] It was important for the Claimant to secure his employer's approval for a leave. If he did not get approval, his employer would consider his absence an unauthorized leave. The employer would then consider disciplinary action. Nothing turned on when the Claimant asked for his employer's approval for a leave of absence, the status of any GRTW, or how many times he asked for a leave of absence. What was relevant for the General Division was whether the Claimant sought and secured his employer's approval. For this reason, I am not satisfied that there is an arguable case that the General Division based its decision on erroneous findings about when the Claimant asked his employer for a leave of absence.

[20] Application to the Appeal Division – Employment Insurance, at AD1-7.
[21] See AD1-8.
[22] See Statement of Facts, at GD3-67 and letter to supervisor, dated October 29, 2018, at GD3-76.
[23] See manager's email dated November 1, 2018, at GD3-43 and GD3-77.

November Return Ultimatum – Paragraphs 3, 12, 22f, and 33

[44] The Claimant cites erroneous findings in the following paragraphs:

- At paragraph 3, where the General Division wrote that the Claimant says that his employer sent him an email that if he did not return to work, it would dismiss him.
- At paragraph 12, where the General Division wrote that the Claimant says that the real reason he lost his job was because his employer rationalized his termination under false premises. His employer circumvented its own protocols for safeguarding the health of employees resuming work under medical guidance.
- At paragraph 22f, where the General Division wrote that the Claimant emailed his employer's OESH department on November 7, 2018, with new confidential information.
- At paragraph 33, where the General Division wrote that the Claimant chose to go to his medical appointment on the assumption that his employer would place him back on a GRTW. The General Division found that the Claimant's actions were wilful and deliberate.

Paragraph 3

[45] The Claimant argues that the General Division erred in finding that his employer's email[24] stated that it would dismiss him. He argues that, at most, his employer said that it *could* dismiss him. The Claimant points to his employer's email at page GD3-78, which reads, "If you do not return to work tomorrow morning (Nov. 7) by 9:00 a.m. …, we will review your employment and you may be terminated." In effect, the Claimant denies that he knew or should have known that dismissal was a real possibility. And, if he did not know or could not have known that dismissal was a real possibility, then he could not have engaged in any misconduct.

[46] Paragraph 3 represents part of the General Division's summary of the evidence and its findings. I agree with the Claimant that the General Division's summary of the employer's email

[24] See letter of human resources director, dated November 6, 2018, at GD2-14, GD3-44, and GD3-78.

misstated the facts. However, the General Division's findings were more detailed and explicit in its analysis. It referred to the employer's email that the Claimant "may be terminated" if he failed to show for work. (The General Division used the expression "could be terminated" interchangeably with "may be terminated" but I find they mean the same thing.)

[47] At paragraph 13, for instance, the General Division found that the employer's email showed that the employer had advised the Claimant that if he did not return to work on November 7, 2018, "he could be terminated." And, at paragraph 14, the General Division found that the employer's emails clearly show that if he did not come to work as scheduled, he could be terminated.

[48] At paragraph 22e, the General Division found that the employer sent the Claimant an email saying if he did not attend working the next day, they would review his employment and "he may be terminated." These findings are consistent with the evidence.

[49] Finally, at paragraph 31, the General Division noted again that the employer's evidence consisted of an email to the Claimant that if he failed to come to work on November 7, 2018, "he could be terminated."

[50] The General Division defined misconduct at paragraphs 15 and 16. Misconduct existed if the Claimant "knew or ought to have known that his conduct impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility."[25] The General Division determined that the Commission had proven misconduct, in part because the employer sent the Claimant the email on November 6, 2018, saying that if he did not attend work the next day, they would review his employment and "he may be terminated." Clearly, the General Division determined that the Claimant had to have known that, while termination was not certain if he did not show up for work, at the very least, it was a possibility.

[51] While the General Division misstated the evidence in its overview at paragraph 3, it is clear that the General Division was aware of and considered the employer's email to the Claimant that he "may be terminated."

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[25] General Division decision, at para. 16.

Paragraphs 12, 22f, and 33

[52] The Claimant argues that his employer's November 6, 2018 email[26] pre-dated his submission to OESH. His submissions to OESH included his specialist's report from Yale Medicine. The specialist wrote that the Claimant "should be given the ability to limit his ambulation as needed … and that he [might] need to limit his ambulation in the future."[27]

[53] The Claimant argues that once he made his submissions to OESH, his employer had a duty to follow through on the new medical information. He argues that this required his employer to seek his input and to consult his physician.

[54] In other words, the Claimant suggests that he could not have foreseen that dismissal was a possibility. After all, his employer had written in its November 6, 2018 email that it would "review [his employment]."[28] This suggested to him that it would review any new medical information.

[55] The Claimant thought his employer did not have any authority to dismiss him when there was new medical information that it should have reviewed. He argues that OESH was required to review his medical records with him. He also argues that his employer should have reviewed his employment, along with his file with OESH. This review would have included a review of what he describes as his "unprocessed medicals."[29]

[56] From the Claimant's perspective, as long as he produced new medical information, his employer had to review and consider this medical information, and provide the appropriate accommodations for him. The Claimant seems to be suggesting that his employer had to overlook or forgive his absence from work, as long as he produced new medical information that verified his medical condition and limitations.

[57] The Claimant relies on the employer's email statement, "If you do not return to work tomorrow morning …, we will review your employment and you may be terminated." He says

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[26] See letter of human resources director, dated November 6, 2018, at GD2-14, GD3-44, and GD3-78.
[27] See APRN's letter dated November 5, 2018, at AD1-79.
[28] See letter of human resources director, dated November 6, 2018, at GD2-14, GD3-44, and GD3-78.
[29] See Application to Appeal Division - Employment Insurance, at AD1-8.

that when the employer wrote that it would review his employment, it meant that it would review everything on his file, including any new medical information that he might have to offer.

[58] While the employer may well have intended that it would review everything in the Claimant's employment file, I do not see any indication that, in this particular email, it was also inviting any new medical information from the Claimant. It is clear that, at this point, the employer was concerned about the Claimant's absence from work, not whether the Claimant had any new medical information that showed the need for workplace accommodations.

[59] I do not see any evidence or indication that the employer was under any ongoing duty to review any new medical information from the Claimant and to maintain the Claimant's employment, even after it had determined that there was misconduct. For this reason, I am not satisfied that there is an arguable case that the General Division made any erroneous findings of fact that the employer prematurely dismissed the Claimant without reviewing new medical information.

CONCLUSION

[60] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	A. R., Self-represented