



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Z. Y. v Canada Employment Insurance Commission*, 2020 SST 362

Tribunal File Number: AD-20-31

BETWEEN:

**Z. Y.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: April 23, 2020

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is allowed. The matter is returned to the General Division to reconsider its decision.

### **OVERVIEW**

[2] The Appellant, Z. Y. (Claimant), was dismissed from his job for refusing to perform a task that the employer asked him to do, which the employer said was insubordination. The Commission accepted the employer's reasons for firing him and disqualified the Claimant from receiving benefits because he lost his job as a result of his own misconduct. The Commission maintained this decision when asked to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, arguing that he did not refuse to do the work and that the employer had just wanted to get rid of him. The General Division dismissed the Claimant's appeal, finding that the reason for the Claimant's dismissal was his refusal to do an electrical task asked of him, and that this refusal is considered misconduct under the law. The Claimant is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division made an important error of fact in failing to consider any evidence of the employer's conduct. It also made failed to observe a principle of natural justice by interfering with the Claimant's ability to present evidence of he employer's conduct.

### **PRELIMINARY MATTERS**

[5] The Claimant failed to appear for his teleconference Appeal Division hearing. The February 24, 2020 Notice of Hearing identified the hearing time and date as 10:00 am MST on April 23, 2020 hearing date. The Notice of Hearing was delivered to the Claimant on February 26, 2020 and the proof of service is in the file. In addition, the Tribunal called the Claimant on April 16, 2020 to remind him of the hearing and its time and date. I am satisfied that the Claimant had notice of the hearing.

[6] I exercised my discretion in accordance with section 12(1) of the *Social Security Tribunal Regulations* to proceed in the absence of the Claimant. I appreciate that there may be many reasons why the Claimant could not join the teleconference call as a result of the COVID19 virus pandemic, and I have considered this. However, given the Commission's position and my decision, I am satisfied that the Claimant will not be prejudiced significantly if I proceed in his absence.

### **WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?**

[7] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:<sup>1</sup>

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

### **ISSUES**

[8] Did the General Division make an important error of fact by failing to consider evidence of the employer's conduct and how that affected the actions of the Claimant?

[9] Did the General Division fail to observe a principle of natural justice by interfering with the Claimant's ability to be heard?

### **ANALYSIS**

#### **Evidence of the employer's conduct**

[10] The General Division acknowledged that the Claimant had raised multiple issues related to what the Claimant considered to be his mistreatment at the hands of his employer, which the

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<sup>1</sup> This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Claimant characterized as harassment and discrimination.<sup>2</sup> The General Division stated that such arguments are not relevant to the question of the Claimant's misconduct.<sup>3</sup>

[11] However, the Federal Court recently held that evidence of employer conduct may not be dismissed out of hand if it may have led to the Claimant's misconduct.<sup>4</sup> Therefore, the General Division should have at least considered any evidence of the employer's conduct that may have caused or contributed to the conduct that the employer considered to be insubordination.

[12] The Commission conceded that the General Division made an important error of fact when it found the Claimant's conduct to be misconduct within the meaning of the Employment Insurance Act without considering the evidence of the employer's conduct. I agree.

### **Natural Justice**

[13] Natural justice is concerned with procedural fairness, such as ensuring that parties have an adequate opportunity to be heard.

[14] The Claimant apparently believed that it was important that the General Division hear evidence of how his employer had harassed him or discriminated against him.<sup>5</sup> In its decision, the General Division said that it responded to the Claimant in this manner: "I redirected the Claimant several times in his testimony explaining to him that I was not here to judge the actions of the employer, but to look at the conduct of the Claimant."

[15] There is no audio recording of the General Division hearing and the Claimant did not appear to explain what happened in the hearing, so I can only decide whether the General Division prejudiced the Claimant's ability to be heard based on what I find in the decision. The Commission took no position on the question of whether the General Division made a natural justice error, but I am satisfied that the General Division member interfered with the Claimant's right to be heard by redirecting him when he attempted to testify about the employer's conduct. I find that the General Division failed to observe a principle of natural justice.

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<sup>2</sup> General Division decision, para 9.

<sup>3</sup> General Division decision, para 10.

<sup>4</sup> *Astolfi v. Canada (Attorney General)*, 220 FC 30.

<sup>5</sup> *Supra*, note 2.

[16] Having found that the General Division made an important error of fact and a natural justice error, I must now turn to the appropriate remedy.

## **REMEDY**

### **Nature of remedy**

[17] I have the authority to change the General Division decision or make the decision that the General Division should have made.<sup>6</sup> I could also send the matter back to the General Division to reconsider its decision.

[18] The Commission's position is that the matter should be returned to the General Division to be reconsidered. The Claimant did not appear to state his position on remedy.

[19] In my view, this matter must be returned to the General Division for reconsideration. It is clear that the record is not complete. Without an audio recording of the hearing, I cannot assess the Claimant's testimony. Therefore, I cannot understand the nature and extent of the employer's conduct or determine what effect this had on the Claimant's own conduct. In addition, the Appeal Division cannot hear or consider evidence that was not before the General Division.<sup>7</sup> That means that I would not be able to hear whatever evidence the Claimant might have presented if he had not been redirected by the General Division member.

## **CONCLUSION**

[20] The appeal is allowed. The matter is returned to the General Division for reconsideration.

[21] A member of the General Division other than the member that heard the appeal in the first instance, is directed to hold an oral hearing if this is the Claimant's preference, and so far as it is practicable in the circumstances.

Stephen Bergen  
Member, Appeal Division

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<sup>6</sup> My authority is set out in section 59 of the DESD Act.

<sup>7</sup> *Parchment v. Canada (Attorney General)*, 2017 FC 354.

HEARD ON:	April 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Josee Lachance, Representative for the Respondent