



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *X v Canada Employment Insurance Commission and M. M.*, 2020 SST 500

Tribunal File Number: AD-20-517

BETWEEN:

**X**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**M. M.**

Added Party

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

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DECISION BY: Janet Lew

DATE OF DECISION: June 17, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The matter is returned to the General Division so it can decide on the matter again.

### OVERVIEW

[2] The Appellant, X (employer), is appealing the General Division's decision.

[3] The General Division found that the employer failed to prove that it dismissed the Added Party, M. M. (Claimant), from her job because of misconduct. In particular, the General Division found that the Claimant's conduct did not amount to misconduct under the *Employment Insurance Act*.

[4] The General Division found that the employer dismissed the Claimant because it felt that she had made a false and malicious report to the police. The General Division found that the Claimant had in fact gone to the police out of a genuine concern for her safety. She did this after learning that the employer had been tracking her using a GPS device.

[5] The employer argues that it dismissed the Claimant for other reasons. But, the General Division failed to consider these cumulative reasons. The employer also argues that the General Division based its decision on several errors of fact.

[6] The Respondent, the Canada Employment Insurance Commission (Commission), and the Claimant argue that the General Division did not make an error. They say that the General Division correctly established the causal link between the Claimant's actions and the dismissal. They argue that the General Division properly applied the law to the facts. They argue that the General Division's conclusion was intelligible and understandable.

[7] For the reasons that follow, I am allowing the appeal.

### ISSUES

[8] The two primary issues are as follows:

Issue 1: Did the General Division fail to consider the cumulative reasons for the Claimant's dismissal?

Issue 2: Did the General Division make credibility findings based on any factual errors, without regard for the material before it?

[9] The employer abandoned its argument that the General Division failed to observe principles of natural justice.

## **ANALYSIS**

**Issue 1: Did the General Division fail to consider the cumulative reasons for the Claimant's dismissal?**

[10] Yes. I find that the General Division failed to consider the cumulative reasons for the Claimant's dismissal.

### **The General Division Decision**

[11] The General Division found that the employer dismissed the Claimant because she had gone to the police. She reported that her employer was stalking and harassing her. The General Division found that the employer believed that the report was false and defamatory. It also found that the employer believed that the Claimant had made the police report out of malice. The employer believed that the Claimant's actions damaged the employment relationship beyond repair.

[12] The General Division considered the following:

- The employer's termination letter referred to the police report.
- At the General Division hearing, the employer confirmed that it had dismissed the Claimant because she filed a report with the police. She made several serious allegations against the employer. The employer found these allegations to be false and malicious. The employer found that the Claimant's actions damaged the employment relationship.
- The employer testified that it had yet to complete its investigation into the Claimant's timesheets and the GPS reports. The General Division found that the employer

“consistently”<sup>1</sup> denied dismissing the Claimant over any discrepancies between the GPS reports and her timesheets.

- The Claimant offered her own reasons why her employer dismissed her. She argued it was in retaliation for complaints she made against the employer. She had gone to WorkSafe BC and to the police earlier that year. She alleged that the employer did not properly investigate her complaints of sexual assault and harassment in the workplace.

### **The Employer’s Reasons for Dismissal**

[13] The employer acknowledges that the police report triggered the Claimant’s dismissal. However, the employer argues that there were several other reasons behind the dismissal. It argues that the General Division overlooked these. These reasons included concerns over the Claimant’s honesty and trustworthiness. They also included concerns over her failure to complete an essential element of her job.<sup>2</sup>

[14] The employer claims that the termination letter it gave to the Claimant on September 3, 2019, set out the cumulative reasons for the dismissal. The employer wrote the following in the termination letter:

Over the past few months your actions demonstrated an increasingly antagonistic and untrustworthy pattern of behavior [...]. Lately, your behaviour has been increasingly hostile towards [your supervisor] in particular.

Overall, there is no longer any trust left between us and your working relationship with [the employer] is no longer viable as a result.

[15] The employer listed its primary concerns.<sup>3</sup> They included:

- i. Concerns that the Claimant had not been “entirely truthful” when it investigated her complaints of sexual harassment;

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<sup>1</sup> General Division decision, at para 26.

<sup>2</sup> See employer’s submissions, at AD4-4, paras 4.

<sup>3</sup> See employer’s termination letter dated September 3, 2019, to the Claimant, at GD2-10 to GD2-12.

- ii. Her complaint to Worksafe BC that the employer did not properly investigate her complaint;
- iii. Discrepancies between the Claimant's timesheets and the actual time she worked. It described these discrepancies as "time theft;"
- iv. Job inspection logs that were "sparse in number and with detail;"
- v. The Claimant's "aggressive and insubordinate" tone during a telephone conversation on August 29, 2019. The Claimant reported that she would be meeting with WorkSafe BC the next day when her employer expected her to report to work for the full day;
- vi. An email that the Claimant sent at about 11 p.m. on August 29, 2019, in which she cited a part of the *Workers Compensation Act*. She also had a "general medical note" saying that she would need to take time off work the next day;
- vii. A medical note that the Claimant provided on August 30, 2019, stating that she might need to take three weeks off work;
- viii. Being informed by the police on August 30, 2019, that the Claimant had made serious allegations against the employer. She alleged that the employer had been stalking and harassing the Claimant and her son.

[16] The employer maintains that the Claimant's allegations to the police were so outrageous that her reporting them rose to the level of misconduct. But, it also argues that the General Division should have considered these cumulative reasons for the dismissal.

### **Findings**

[17] The termination letter set out several reasons for the dismissal. But, the General Division did not accept the employer's claims that there were cumulative reasons for the dismissal.

[18] This was in part because the employer stated that it had yet to complete its investigation into the timesheets and the GPS reports. Indeed, the Claimant's supervisor told the Commission on November 28, 2019, that "they were still looking into the investigation and no decision was

made in regards to if in fact claimant was using the vehicle for personal use and stealing time from the company....”<sup>4</sup>

[19] The employer’s representative confirmed that the employer had yet to decide whether to dismiss the Claimant for time theft.<sup>5</sup>

[20] As well, during the hearing, the employer agreed that it dismissed the Claimant because of the police report.

[21] Yet, the employer’s evidence and submissions also indicated that it could no longer trust the Claimant. For instance, even before the dismissal, the employer deducted time from the Claimant’s paycheque. It did this because it had concluded that the Claimant had stolen time.

[22] The employer’s representative confirmed that the police report was the trigger for the Claimant’s dismissal. But, he also argued that, “the concerns about being honest and forthright with the company were part of it cumulatively.”<sup>6</sup> The employer’s representative had this to say:

That was the straw that broke the camel’s back. At that moment, this interview and the, these, the asking for the job inspection reports and everything were all happening within a few days of this. So, this was all moving very quickly, so the employer had concerns at the conclusion of the first investigation as to [the Claimant’s] willingness to be forthright with them and honest in all respects and then, based on the concerns at this stage of the time theft investigation, they were still concerned about her being forthright with them and honest with respect to her time and then suddenly, the police show up and say that she has made all these statements, which the employer believes to be entirely false and defamatory.

So, **considering all that together**, but weighted heavily by the last piece, the police report, the employer determined at that point that there simply was no trust left in the employment relationship that the damage had been done, particularly by reporting one of the co-owners to the police for things that the employer believed to be completely false, was misconduct that could not be tolerated to continue the employment relationship.<sup>7</sup>

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<sup>4</sup> See Supplementary Record of Claim dated November 28, 2019, at GD3-63 to GD3-64.

<sup>5</sup> At approximately 01:05:29 to 01:06:10 of the audio recording of the General Division hearing.

<sup>6</sup> At approximately 01:06:47 to 01:07:00 of the audio recording of the General Division hearing.

<sup>7</sup> At approximately 00:55:07 to 00:56:40 of the audio recording of the General Division hearing.

(My emphasis)

[23] In the notice of appeal, the employer referred to the time theft issue as a reason for the dismissal. It wrote:

So [the Claimant] lied about the issue and insisted she was in work at all times. [The Claimant's] whereabouts are irrefutable as the GPS shows where she was – at home and at the mall for hours during the work day. This **combined** with [the Claimant's] lies about her whereabouts and utter false claims to the police about harassment constitute gross misconduct and the situation where she could no longer continue in our employment through her own actions/behaviour and misconduct.<sup>8</sup>

(My emphasis)

[24] In submissions dated November 26, 2019, a co-owner of the company wrote, “As a result of this **cumulative** behaviour, [the employer] determined that there was a fundamental breakdown into the employment relationship and terminated [the Claimant's] employment for cause”<sup>9</sup> (My emphasis).

[25] And, in a letter dated January 14, 2020, the Claimant's supervisor wrote, “the reasons for termination were documented in the Termination letter.”<sup>10</sup>

[26] Clearly, the police report triggered the dismissal. But, the evidence also suggests that there were other contributing factors to the dismissal. This included the time theft issue. The time theft and other issues, on their own, would not have led to the Claimant's dismissal. But, according to the employer, these other considerations contributed to the overall breakdown in trust and then to the dismissal.

[27] The General Division misapprehended the employer's arguments. This was despite the employer's notice of appeal, evidence, and written arguments. The General Division focused on whether the police report alone constituted misconduct. It did this without considering whether the reasons set out in the termination letter, and, in particular, whether the breakdown in the trust

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<sup>8</sup> See notice of appeal, at GD2-3 to GD2-6.

<sup>9</sup> See employer's memo, “Discriminatory Action Complaint File No. 2019D358,” at GD7-4 to GD7-8.

<sup>10</sup> Employer's letter dated January 14, 2020, at GD7-3.

relationship led to the Claimant's dismissal. The General Division should have considered the employer's argument that there were cumulative reasons for the dismissal.

**Issue 2: Did the General Division make credibility findings based on any factual errors, without regard for the material before it?**

[28] Yes. I find that the General Division based its decision on factual errors regarding credibility, without regard for the material before it.

**The General Division Decision**

[29] The General Division found the Claimant credible. It found that she had been genuinely concerned for her safety when she filed a police report stating that her employer was stalking and harassing her. The General Division found the Claimant and her claims credible for several reasons.

[30] The General Division determined that the employer's investigation into the time theft issue was improper. It conducted its investigation in secret,<sup>11</sup> without letting the Claimant know that it was investigating her.<sup>12</sup> It also collected details about her movements outside of work hours.<sup>13</sup>

[31] As a result, when the Claimant learned about the scope of her employer's investigation, she was of course concerned for her safety. Until their meeting on August 28, 2019, the Claimant did not have any reason to suspect that her employer was using the company vehicle's GPS tracking device to monitor her movements. For all she knew, the employer wanted her to use the company vehicle for insurance purposes.

[32] On top of that, the Claimant also saw a strange vehicle parked outside her home later that same day. The occupant took photographs of her and her son. This compounded her fear.

[33] The General Division found that the Claimant had a panic attack after she learned about the employer's investigation. The General Division found that the Claimant had a history of

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<sup>11</sup> General Division decision, at para 33.

<sup>12</sup> *Ibid*, at para 38

<sup>13</sup> *Ibid*, at para 42.



panic attacks. It concluded that she had to have been genuinely distressed about her employer's conduct.

[34] Given this, the General Division found that the Claimant was genuinely concerned for her safety. She could not have been acting maliciously if she was concerned for her safety.

### **The Claimant's Concerns for her Safety**

[35] The Claimant claims that her fears arose out of the August 29, 2019, telephone call with her supervisor.<sup>14</sup> She claims that was when she learned that her employer had been using a GPS device to monitor her movements. She claims that he also threatened her.

[36] Later that day, the Claimant also noticed a strange vehicle parked outside her home. This added to her fears.

[37] The Claimant also alleges that her supervisor sent an email at 3 a.m. on August 30, 2019, to remind her of his warning earlier that day. This heightened her fears.

[38] The Claimant also alleged that her employer followed her and her son outside of business hours, on evenings and weekends. She also alleges that her employer phoned her outside of business hours.

[39] The Claimant also brought up another concern that seems to have contributed to her fears that her employer was stalking her. The nephew of one of the co-owners enrolled at her child's daycare the month after she raised her sexual assault concerns. The supervisor learned of this allegation at the General Division hearing. He testified, "It would be purely coincidence if that was the case."<sup>15</sup> The General Division did not make any findings regarding this allegation.

[40] If the Claimant believed that her employer followed her and her son outside of business hours, and if her employer threatened her, then this would have added credibility to the Claimant's claim that she went to the police out of concerns for her safety.

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<sup>14</sup> The employer brought up the GPS tracking during the August 28, 2019, meeting, but the Claimant claims that she first learned of the GPS tracking during the August 29, 2019, phone call.

<sup>15</sup> At approximately 01:24:18 of the audio recording of the General Division hearing.

[41] The employer denies the Claimant's allegations.

### **The Scope of the Employer's Investigation**

[42] The employer insists that there was nothing improper about its investigation and monitoring of the Claimant. It argues that she therefore could not have credibly believed that her employer was stalking or harassing her.

[43] The employer argues that it had a legitimate business interest in ensuring that the Claimant was working during business hours. The employer notes that the GPS device tracked the location of the company vehicle. It did not track the Claimant in real time. It received daily trip reports the following day.<sup>16</sup>

[44] The employer denies that it tracked the Claimant and her child outside of business hours. There was no reason for it to have ever done this. It was interested only in monitoring the Claimant during business hours to determine whether she was actually working during that time. The employer admits that there was an after-hours reference in the GPS reports of the vehicle's location. However, the employer claims that reference relates to another employee. (From time to time, other employees shared the company vehicle.)

[45] The employer argues that it could not have informed the Claimant of its investigation into time theft. That would have compromised the investigation.

[46] The employer also says that it provided few details about the scope of its investigation, other than, "legitimate details about the company vehicle" and "some details of the findings to counter the employee's assertions that she had done nothing wrong [in regards to the time theft issue]."<sup>17</sup>

[47] This contrasts sharply with the Claimant's evidence. The Claimant had the impression that the employer was closely monitoring her every move. The Claimant wrote that her

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<sup>16</sup> See letter dated November 25, 2019, from Nero Global Tracking, at GD7-9.

<sup>17</sup> See employer's submissions, at AD4-4, paras 15.

supervisor told her that he had been watching her and her son. He had also been monitoring her son's social media.<sup>18</sup>

[48] The Claimant testified that she first learned that the GPS device "had been engaged"<sup>19</sup> from her August 29, 2019, phone conversation with her supervisor. He allegedly told her that he

knew when [she left her] house, he knew when [she dropped her] child off at daycare, when [she] stopped, when [she goes], what [she does ...] that he had been watching [her], and not only watching [her] on GPS, watching [her] at work, watching [her] at home, and that if [she] continued to make any other acts against him or any other reports to WorkSafe that there would be hell to pay.<sup>20</sup>

[49] The employer and the Claimant had met the day before to discuss the employer's concerns regarding the Claimant's timesheets. The issue about the employer's investigation came up during this meeting on August 28, 2019.

#### **August 28, 2019, Meeting Between the Claimant and the Employer**

[50] The employer recorded its August 28, 2019, meeting with the Claimant. It transcribed the recording of this meeting.<sup>21</sup> The employer discussed its concerns that there appeared to be discrepancies between the hours that the Claimant booked on her timesheets and the employer's own records.

[51] The employer provided the Claimant with a copy of her timesheet.<sup>22</sup>

[52] The employer received GPS daily sheets that chronicled the vehicle's usage from the day before. The employer compared the data from these daily sheets to the Claimant's timesheets.

[53] The employer provided the Claimant with a copy of its response to the Claimant's timesheet.<sup>23</sup> The response covers the Claimant's hours for the last two weeks of August 2019. It does not show any time after work, on evenings or on weekends. It does not refer to any specific

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<sup>18</sup> See request for reconsideration, at GD3-40.

<sup>19</sup> At approximately 00:59:03 to 01:00:03 of audio recording of General Division hearing.

<sup>20</sup> *Ibid.*

<sup>21</sup> See employer's transcription of meeting of August 28, 2019, at GD8-59 to GD8-62.

<sup>22</sup> See "Sheet 1," Claimant's email of August 27, 2019, to employer's payroll department, covering the period from August 12, 2019, to August 23, 2019, at GD8-63.

<sup>23</sup> See "Sheet 2," employer's responses to Claimant's timesheets, at GD8-64.

addresses or locations, other than to describe them as “unknown locations in Vancouver nowhere near any sites during the day” or “various unrelated locations in Richmond during work hours.”

[54] The notes indicate that, on August 15, 19, 20, and 23, 2019, the Claimant went home during the day. On August 16, 2019, she was at unknown locations in Vancouver, nowhere near any sites during the day for two hours. On August 21, 2019, she was at various unrelated locations in Richmond during afternoon work hours.<sup>24</sup>

[55] The employer wrote on its responses, “actual from GPS + Observations.” The employer observed when the Claimant started and finished working, and how much time she took for lunch.

[56] According to the transcript of the August 28, 2019, meeting, there was no discussion about the Claimant after work hours. The notes do not indicate that the employer ever suggested that it followed the Claimant or any members of her family after hours.

[57] After the meeting, the Claimant provided a further breakdown of her timesheets for the period from August 12, 2019 to August 23, 2019. The employer made further notes.

[58] It is also apparent that the employer asked the Claimant to provide site inspection reports. It also asked the construction manager to compile feedback from its foreman regarding the frequency of the Claimant’s site inspections/visits over the past three months.<sup>25</sup>

### **August 29, 2019, Phone Conversation Between the Claimant and the Employer**

[59] The employer argues that nothing arose from the August 29, 2019, telephone call that could have led the Claimant to believe that her employer was stalking, harassing, or threatening her.

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<sup>24</sup> See “Sheet 2,” employer’s responses to Claimant’s timesheets, at GD8-64.

<sup>25</sup> See email dated September 5, 2019, regarding site inspections, at GD8-67 to GD8-68.

[60] The Claimant's supervisor took notes of its 3:53 p.m. August 29, 2019, phone conversation with the Claimant.<sup>26</sup> The supervisor prepared these notes the next morning.

[61] The Claimant called to enquire about her paycheque that the employer withheld. The employer indicated that it had tried to resolve what it saw as discrepancies in the Claimant's timesheet. It is clear from the employer's notes that the employer intended to deduct the disputed hours and that the Claimant felt that this was unwarranted.

[62] The supervisor wrote:

... [the Claimant] said, 'You put a GPS in the car without telling me'. To which I explained that it was our right to track our vehicle and that that as she had given significant concern for her whereabouts and was not seen on sites or in the office for days we had no option but to do so.

[...]

[The Claimant] continued saying that no way had she been missing or overbooking hours. I then explained that the big problem was that we know she has been yet she continues to lie and deny everything. I explained that we had been v happy with her work but then she started lying... I explained that we have top class GPS tracking and observations made that are irrefutable. I mentioned one example- last Wednesday Aug 21 she had left the office at 1pm and gone to McDonalds, [the Claimant] interjected and said that anyone could have been driving her car as the yard guys regularly do and it could have been [D.] in the yard. I said- so you mean a yard guy went to McDonalds in your car, then drove to your house, then to Richmond and then back to your house? [The Claimant] had no response [*sic*].

[63] The supervisor's notes of the August 29, 2019, phone call suggest that there was no discussion about the Claimant's location after work hours. The employer states that he discussed the GPS tracking to respond to the Claimant's denials that she had billed extra time to the company. He brought up the example of August 21, 2019. He noticed that the Claimant claimed time that did not match the GPS daily sheet for that day

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<sup>26</sup> See email dated August 30, 2019, at GD8-70 to GD8-71.

[64] The Claimant advised that she would be taking a few hours off the following day, “to talk to them about this issue.” The employer advised her that it was not giving her permission to take time off and that she would have to do this on her own time.

**Claimant’s Email of 22:55 on August 29, 2019**

[65] The Claimant wrote to both owners of the company that she would be absent from work the next day. She wrote that this was because of a personal disorder related to her WorkSafe BC claim.<sup>27</sup>

[66] The Claimant explained that she sent the email to her supervisors “after [she] had suffered a mental health incident [...] as a result of [one of her supervisor’s] threats against [her] and [her] family if [she] ever talked to WSBC or filed any further complaints against the employer.”<sup>28</sup>

[67] The Claimant did not mention that she had asked for permission to see her doctor or to follow-up with WorkSafe BC about any concerns.

**Employer’s Email of 2:03 a.m. on August 30, 2019**

[68] The Claimant’s supervisor testified that he responded to the Claimant shortly after getting up. He confirmed their telephone discussion that she would be taking time off to see WorkSafe BC in relation to “the topic of us bringing up [the Claimant’s] missing hours.”<sup>29</sup> The supervisor confirmed that he was not giving his permission for her to take time off and that she would have to use her own time outside of work hours.<sup>30</sup> He also confirmed that he would have her paycheque available the next morning. There was no sign, one way or the other, whether the employer would be deducting any hours from her paycheque.

[69] The Claimant claims that she asked for permission to take time off so that she could see her doctor and so that she could follow up with WorkSafe BC. She wanted to see WorkSafe BC because she felt her employer was making up a story that she was “not working.” She also felt

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<sup>27</sup> See Claimant’s email dated August 29, 2019, at GD3-21 and GD8-73.

<sup>28</sup> See Claimant’s handwritten notes beside copy of email text, at GD3-21.

<sup>29</sup> See Employer’s email of August 30, 2019, at GD8-73.

<sup>30</sup> See supervisor’s email dated August 30, 2019, at GD8-73.

the employer was withholding her pay because she had raised safety concerns and had reported a sexual assault.<sup>31</sup>

**Employer’s Email of 7:59 a.m. on August 30, 2019**

[70] The Claimant’s supervisor wrote to the Claimant at 7:59 a.m. on August 30, 2019. He confirmed that there was a paycheque and that the employer had withheld 17 hours of pay. The supervisor wrote, “Also we would like to sit down with you hopefully on Tuesday if you feel better and go over the 17 hours that we didn’t pay you and see if we are mistaken anywhere. If we are we will pay any of those hours, no problem.”<sup>32</sup>

[71] The supervisor also asked the Claimant to leave the site inspections with the office.

**Claimant’s Medical Note of August 30, 2019**

[72] On August 30, 2019, the Claimant submitted a medical note from her family physician. The note reads, “Patient unable to work due to medical/emotional condition until further notice. She will be re-assessed within 3 weeks.”<sup>33</sup>

**Claimant’s Report to the Police on August 30, 2019**

[73] The Claimant set up a meeting with the police on August 30, 2019. She filed a report that her employer had been stalking, harassing, and threatening her.<sup>34</sup>

[74] If the Claimant genuinely believed that the employer stalked, harassed, and threatened her, then it would have been reasonable for her to develop concerns for her safety and for her to go to the police.

[75] The police went to the employer’s office. According to the employer, the police told it that the Claimant had complained about her supervisor. He had been harassing the Claimant and son with phone calls outside of work hours. He had also followed her on evenings and weekends.

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<sup>31</sup> See Claimant’s handwritten notes regarding employer’s email, at GD3-22.

<sup>32</sup> See employer’s email of 7:59 a.m. on August 30, 2019, at GD3-23.

<sup>33</sup> See family physician’s medical note dated August 30, 2019, at GD 8-72.

<sup>34</sup> See Claimant’s notes of police file information, at GD3-24.

## Findings

### Claimant's allegations that her employer stalked, harassed, and threatened her

[76] The employer argues that the General Division made an error in finding that any of the Claimant's complaints were legitimate.

[77] The employer denies that it ever stalked, harassed, or threatened the Claimant or her child, either on August 29, 2019, or at any other time. The supervisor also denied that he had anyone watch the Claimant on the employer's behalf.

[78] The employer argues that the Claimant should have produced phone records. They would substantiate her allegations that her supervisor or anyone from the company phoned her after hours. If she could not produce them, then this would deflate her allegations. (The Claimant's supervisor stated that he could also produce his phone records. He has not produced them either. I acknowledge that he likely would not know what timeframe such records should cover.)

[79] The General Division wrote:

The Employer denies telling the Claimant that he knew when she was dropping her child off at daycare. However, the Employer's own notes show that he knew the address of the Claimant's babysitter. I find it likely that the Employer told the Claimant that he knew when she took her child to daycare during the phone call on August 29, 2019.<sup>35</sup>

[...]

The Employer collected details about the Claimant's movement outside of work hours. The Employer's investigation included details about the Claimant's child. I find it credible that the depth and detailed nature of the Employer's investigation frightened the Claimant.

[80] The General Division found the employer's investigation intrusive. One example of this was that the employer knew when the Claimant was at her child's babysitter's. However, it is questionable whether the evidence establishes that the Claimant even had a babysitter for her child. The Claimant never alleged that she had a babysitter, or that her employer was aware of a babysitter's address. The employer's note about a babysitter had a question mark. This suggested

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<sup>35</sup> General Division decision, para. 40.



that the employer was merely speculating as to why the Claimant stopped at an address just before going to work.

[81] Properly, the General Division should have put this evidence about the babysitter to the employer, particularly if it was going to make adverse findings against the employer.

[82] If anything, the employer pinpointed the date and address to show that the Claimant was not working. After all, the Claimant's timesheets claimed that she was working at that time. The General Division overlooked the significance of the addresses and times that appeared in the investigation reports.

[83] More importantly, I do not see any evidence of any details about the Claimant's child in the employer's investigation materials. There simply is no evidence to support the General Division's finding that the employer had any details about the Claimant's child. Similarly, there is no evidence that the employer even identified the child at anytime during its investigation.

[84] The GPS daily trip reports would have necessarily shown any trips that the Claimant made using the company vehicle. These would have included trips for personal reasons, whether during or after business hours. They would have also included trips that the Claimant made with her child.

[85] The Claimant alleges that her employer threatened her during the August 29, 2019, phone call. She alleges that the employer followed up with a threatening email at 3:00 a.m. on August 30, 2020. The Claimant testified that, "And then he emailed me on, at 3 in the morning on the 30th [of August], reminding me that he had warned me against going to WorkSafe or the doctor or anyone else."<sup>36</sup> The Claimant then began crying during the General Division proceedings. Clearly, the Claimant found the employer's email threatening.<sup>37</sup>

[86] The employer wanted to address the Claimant's assertions that its August 30, 2019, email was threatening. The employer argued that there was nothing threatening about it.<sup>38</sup> Even so, it

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<sup>36</sup> At approximately 1:03:05 of the audio recording of the General Division hearing.

<sup>37</sup> At approximately 1:03:22 of the audio recording of the General Division hearing.

<sup>38</sup> At approximately 1:31:00 to 1:31:57 of the audio recording of the General Division hearing.

does not appear that the General Division gave the employer the opportunity to make these arguments.

[87] The General Division did not but should have considered the employer's August 30, 2019, email. It was the last communication between the Claimant and her employer, before she gave a statement to the police. The General Division should have determined whether the email supported the Claimant's testimony that she found the email threatening.

[88] The employer filed a statutory declaration.<sup>39</sup> The statutory declaration addresses the allegations that a co-owner's nephew enrolled at the same daycare as the Claimant's son. The statutory declaration is relevant. It touches on the reasonableness of the Claimant's perceptions and the rationality of her fears. However, the Appeal Division generally does not accept new evidence. In this case, I see no reason to consider this evidence. The General Division did not make any specific findings about the nephew's enrollment at the daycare.

Employer's claim that the Claimant's report to the police was false and malicious

[89] The employer submits that the General Division made an error when it found that the Claimant was credible and that she made the police report out of "genuine concern"<sup>40</sup> for her safety. The General Division found that there was no misconduct on the Claimant's part because she was concerned for her safety when she made the report. The General Division found "it credible that the depth and detailed nature of the employer's investigation frightened the Claimant."<sup>41</sup>

[90] The employer argues that the Claimant went to the police out of malice, rather than out of genuine concern for her safety. The employer argues that the Claimant did not have any basis to accuse it of stalking or harassment. After all, it had conducted a lawful and legitimate investigation into whether the Claimant misused company time.

[91] The employer argues that the Claimant's actions constitute misconduct because she knowingly gave a false statement to the police. The employer argues that the General Division

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<sup>39</sup> See Statutory Declaration, sworn May 8, 2020, at AD4-13 to AD4-14.

<sup>40</sup> General Division decision, at para. 44.

<sup>41</sup> *Ibid*, at para. 42.

ignored critical evidence. It argues that the evidence would have shown that the Claimant was not a credible or reliable witness. It also argues that evidence would have shown that she made the police report for an improper purpose.

[92] First, the Claimant only learned about the details of the GPS reports during the course of these proceedings. The employer argues that, because the Claimant was unaware of the details of the GPS reports, she could not have been frightened or concerned when she contacted the police.

[93] Second, the Claimant was always aware that the company vehicle had GPS tracking capability. She knew that the employer had used it in the past to monitor and ensure legitimate use of the vehicle by other employees. After all, she testified that she knew that the employer conducted extensive surveillance on its employees: “I knew from previous employment cases with [the two co-owners of the company] that they had gone to employees’ homes, that they had photographs of employees at home, and were not above following employees outside of work.”<sup>42</sup>

[94] Third, the employer states that it considered only the GPS reports that showed the vehicle’s movement (and therefore the Claimant’s location) during work hours. The employer denies that it followed the Claimant and her child, as the GPS device was incapable of real-time reporting. The employer was unaware of the Claimant’s movements until the following day. And, it was only aware of the Claimant’s movements if she used the company vehicle. The employer maintains that it conducted its investigation lawfully and properly. It denies that its investigation could have alarmed the Claimant.

[95] Fourth and finally, although the Claimant reported to the police that her supervisor contacted her on evenings and weekends, she failed to provide any supporting evidence. She did not produce any phone call logs to prove that these calls ever occurred. The employer denies that it ever made any contact with the Claimant after business hours. (I note that both parties communicated with the other by email at close to 11 p.m. on August 29, 2019, and at 2:03 a.m. on August 30, 2019).

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<sup>42</sup> At approximately 01:00:17 to 01:00:29 of the audio recording of the General Division hearing.

[96] Despite the Claimant's arguments and the evidence, the General Division focused on whether there was a credible basis for the Claimant to go to the police, without addressing whether the Claimant's statement to the police itself was false and malicious.

[97] The Claimant may well have had a legitimate fear and basis to go to the police. But, if as the employer alleges, the Claimant's complaints were baseless and unfounded, or if the Claimant had exaggerated or misrepresented the facts, then that could well have supported the employer's claim that the Claimant's report to the police was false and malicious.

[98] The General Division should have examined the statement that the Claimant gave to the police. It should have examined whether that statement was overall consistent with the evidence.

[99] Neither party had a copy of the statement that the Claimant gave to the police. Nevertheless, there was some evidence of what the Claimant might have reported to the police.

[100] The termination letter outlines the Claimant's allegations against her employer. The Claimant alleged that her supervisor harassed her and her son with phone calls outside of work hours. She also alleged that her supervisor followed her on evenings and weekends. The employer denied that any of this occurred. The employer believed that the Claimant's allegations were false and malicious. Yet, the General Division did not examine any of these allegations.

[101] If the General Division had determined that the Claimant had made these specific allegations, and if it had found that they were without any merit, then that could have supported the employer's claims that the Claimant's report to the police was false and malicious.

[102] The employer argued that it had dismissed the Claimant, in part, because she had made a false, defamatory, and malicious report. This required the General Division to examine whether the Claimant's statement itself was false and malicious, but it did not do so.

## **REMEDY**

[103] The General Division did not address two of the employer's primary arguments: (1) that there were cumulative reasons for the Claimant's dismissal, and (2) that the Claimant's report to the police was false and malicious.

[104] The General Division understood that the employer dismissed the Claimant because she had gone to the police. As a result, it focused on this issue during the hearing, likely without having provided either party a sufficient opportunity to address the other reasons the employer cited for the dismissal.

[105] The employer argued that it dismissed the Claimant, in part, because her report to the police was false and malicious. The General Division examined whether the Claimant could have been genuinely concerned for her safety, such that it would have been reasonable for her to go to the police. However, it did not fully determine what the Claimant might have reported and whether her report to the police was truthful or exaggerated.

[106] For these reasons, I am allowing the appeal.

[107] Gaps in the evidentiary record warrant returning this matter to the General Division so it can decide this matter again.

[108] As well, the parties may not have had the chance to elicit evidence that may have been relevant. The General Division member was uninterested in hearing any evidence that related to anything that occurred after the Claimant's dismissal. However, some of that evidence could have been relevant to the issue of whether the Claimant held a genuine concern for her safety. For instance, the Claimant allegedly went to the employer's workplace after her dismissal. This prompted the employer to obtain a "cease and desist" letter. This evidence could have addressed the issue of whether the Claimant genuinely feared for her safety.

[109] The appropriate remedy in this case is to return this matter to the General Division.

**CONCLUSION**

[110] The appeal is allowed. The matter is returned to the General Division so it can decide the matter again.

Janet Lew  
Member, Appeal Division

HEARD ON:	May 27, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Preston Parsons (counsel), Representative for the Appellant  Josée Lachance, Representative for the Respondent  M. M., Added Party