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

Citation: *E. R. v Canada Employment Insurance Commission*, 2020 SST 573

Tribunal File Number: AD-19-541

BETWEEN:

E. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 30, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, E. R. (Claimant), is appealing the General Division's decision.

[3] The General Division concluded that the Claimant was dismissed from her job as a quality control agent at a food processing company in January 2019 because of misconduct. The General Division found that she had falsified a document. Falsifying a document suggested that she had inspected food products when she had not. The General Division found that this amounted to misconduct. The General Division concluded that because of her misconduct, the Claimant was disqualified from receiving Employment Insurance regular benefits.

[4] The Claimant claims that she was following orders. She denies that she had any knowledge that her actions could lead to dismissal. She also denies that there was any misconduct on her part. She argues that the General Division based its decision on several factual errors without regard for the material before it.

[5] I have to decide whether the General Division made any errors under section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[6] I find that the General Division did not make any factual errors about whether the Claimant received warnings for falsifying documents. However, I find that the General Division did not give sufficient reasons when it concluded that the Claimant knew or should have known that her conduct could lead to dismissal. It is not clear from its analysis whether it appropriately considered the issue. This represents an error. I have varied the General Division's decision on this point to address this issue more fully, but it does not change the outcome.

ISSUES

[7] The issues are:

> Issue 1: Did the General Division make a factual error when it found that the Claimant "stated she had several warnings?"
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> Issue 2: Did the General Division make a factual error when it found that the Claimant had in fact received several warnings?
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> Issue 3: Did the General Division fail to consider whether the Claimant knew or should have known that dismissal was a possibility?

ANALYSIS

[8] Under section 58(1) of the Act, the Appeal Division can intervene in the General Division's decision in very limited circumstances. The Appeal Division can intervene only if there has been a breach of natural justice, an error of law or if it based its decision on an error of fact that was made in a perverse or capricious manner or without regard for the material before it.

[9] The Claimant argues that the General Division made factual errors about whether she committed any misconduct. However, it is not enough for a factual error to exist. The General Division had to have made it in a perverse or capricious manner or without regard for the material before it. And, the General Division had to have based its overall decision on that erroneous finding of fact.

[10] The Claimant denies that she engaged in any misconduct. Misconduct arises where there is conduct that is conscious, deliberate or intentional. In other words, misconduct exists when claimants knew or should have known that their conduct would affect the performance of their employment duties, and they knew that dismissal was therefore a real possibility.

[11] The Claimant acknowledges that she amended two food inspection reports at work. She says that she amended the two reports because her supervisor instructed her to do it. She also claims that she was under duress; if she did not do it, she feared she would lose her job. She did not think there would be any consequences because she was just following orders. The Claimant

claims that because she was following orders, it never occurred to her that her employer would dismiss her.

[12] On top of that, the Claimant claims that her employer never warned her that she could face dismissal for this particular type of conduct. Her employer made her undergo training or retraining several times for other matters, but that was routine and standard whenever there were minor adjustments or the employer introduced new processes or innovations.

[13] Plus, retraining did not lead to any warnings. For instance, on October 18, 2018, the Claimant received retraining on verifying paperwork. She acknowledged that she had to, "objectively review to make sure that all information [was] complete, correct and accurate"[1] before she recorded the verification. There were no warnings on any of the retraining records.

[14] The Claimant did not expect her employer would dismiss her. She believed that her employer would adhere to its discipline policy.[2] A union disciplinary representative described the policy.[3] Under the policy, the employer had to issue a verbal warning first, then a written warning, and then a one-day and then a five-day suspension before it could dismiss any employees for misconduct.

[15] The Claimant says that she did not know or expect that she could face dismissal[4] because she claims that she did not receive a prior written warning or have to serve a suspension. So, even though the Claimant admits that her employer gave her a verbal warning in January 14, 2019,[5] she did not know she could face dismissal for falsifying a document because she did not get a prior written warning or a suspension. Because she did not know that she faced dismissal, the Claimant argues that her conduct does not amount to misconduct.

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[1] See Retraining Record, dated October 22, 2018, at GD3-78.
[2] See union disciplinary representative's letter dated May 6, 2019, addressed "To whom it may concern," at GD2-38 to GD2-40. The Claimant states that this "last chance" warning was unjustified because she was vindicated for the incident that had led to her suspension.
[3] See union disciplinary representative's letter dated May 6, 2019, at GD2-038 to GD2-40.
[4] See Request for Reconsideration dated March 26, 2019, at GD3-104.
[5] See Claimant's chronology, at GD3-125.

Issue 1: Did the General Division make a factual error when it found that the Claimant "stated she had several warnings?"

[16] The Claimant argues that the General Division member made a factual error at paragraph 14. The General Division wrote that the Claimant stated she had several warnings. The Claimant denies that she would have ever said that she got several warnings. She claims that she received only one "verbal treat [*sic*]."[6]

[17] The General Division noted at paragraphs 37, 42, and 50 that the Claimant stated that she never received any warning letters from her employer. The General Division was aware of the Claimant's evidence that she did not receive any warning letters.

[18] So, even if the General Division had misstated the Claimant's evidence that she had several warnings, the General Division found that the Claimant testified that she had not received any warnings from her employer. The General Division appeared to have accepted that this was the thrust of the Claimant's argument.

[19] Ultimately, the General Division found the Claimant's evidence that she had not received any warnings inconsistent with the employer's evidence that it had given her several warnings. As the trier of fact, the General Division was entitled to prefer the employer's evidence to the Claimant's evidence, as long as there was a reasonable or evidentiary basis to support the employer's claims.

Issue 2: Did the General Division make a factual error when it found that the Claimant had in fact received several warnings?

[20] The Claimant argues that the General Division made a factual error when it found that she had received several warnings. The Claimant argues that she did not receive several warnings. Other than a verbal warning, she denies that she received any written warnings. She denies that she knew or could have known that dismissal was a possibility.

[21] The Claimant also argues that the General Division made another factual error when it found that her employer gave her letters of expectation in September 2018, November 2018, and

[6] See Claimant's additional information for the appeal, at AD1B-8.

January 2019. Of these, the Claimant says that she received only the November 2018 letter of expectation.[7]

[22] If in fact the Claimant had received warnings that falsifying documents could lead to dismissal, this would tend to suggest that the Claimant knew or should have known that falsifying documents could lead to dismissal.

[23] At paragraph 63, the General Division noted that there was evidence from the employer that it had given several warnings to the Claimant.

[24] The Claimant's employer wrote a termination letter.[8] The employer wrote, "Following several discussions, warnings and disciplines, regarding your consistent poor performance we have come to the decision to terminate your employment for cause, effective immediately." The employer did not describe what these warnings looked like or when it gave these warnings to the Claimant.

[25] The Claimant did not consider the November 2018 letter of expectation a warning. The employer wrote in the November 2018 letter that it was going to discuss the Claimant's work performance and what it expected from her. The employer expected improvement, but it did not say that it might dismiss the Claimant if her performance did not improve. The Claimant claims that she did not know that her employer could dismiss her. She understood that the letter of expectation did not warn her that she could face dismissal.

[26] The General Division noted the employer's evidence that it had issued three separate letters of expectation. The General Division noted that the employer provided a copy of the November 2018 letter of expectation. But, it did not make any findings—one way or the other—as to whether the employer had issued one letter or several letters of expectation, or whether a letter of expectation constituted a warning.

[27] The General Division found that the Claimant had received several warnings, but it did not list or describe these warnings. For instance, the General Division did not say whether it considered the letter of expectation a written warning.

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[7] See Letter of Expectation dated November 29, 2018, at GD3-99.
[8] See letter of termination dated January 22, 2019, at GD3-95 to GD3-96 (and at GD3-106 to GD3-107).

[28] The Commission argues that the General Division did not have to list all of the employer's different warnings that it gave to the Claimant. However, the number and nature of those warnings is central to the Claimant's arguments that she did not know or could not have known that she faced dismissal because she did not get any written warnings. She maintains that the General Division was wrong to say that she had received several warnings.

[29] The letter of expectation did not clearly warn the Claimant that she could face dismissal. However, it is clear that the employer did warn her that it could take further action against her if she did not improve her performance.

[30] There are copies of written warnings in the hearing file, but the Claimant alleges that these written warnings did not exist until after it had already dismissed the Claimant. She denies that she ever received these written warnings. The employee warning records are either blank or illegible. The General Division did not refer to the employer's Employee Warning Records. It did not make any specific findings about the employer's Employee Warnings Records.[9]

[31] There are deviation records that show the employer disciplined the Claimant. (Some deviations led to retraining.[10]) But, the deviation records do not show how the employer disciplined the Claimant. The deviation records also do not show that the employer gave any kind of future warnings to the Claimant.[11]

[32] The Claimant received the document, "Correction of information on a form" from her employer. The form stated that it was "strictly forbidden to falsify information on a control form."[12] The form illustrated what was unacceptable and what was acceptable reporting of information on a control form. But, it did not warn that any falsification of documents could lead to discipline or dismissal.

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[9] See Employee Warning Records, at GD3-145 and at GD15-17 to GD15-19.
[10] See Deviation Records, e.g. for July 30, 2018, at GD3-54; August 2, 2018, at GD3-53; August 21, 2018, at GD3-52; September 5, 2018, at GD3-49; September 24, 2018, at GD3-45; and for October 11, 2018, at GD3-44.
[11] See Deviation Records, e.g. for November 5, 2018, at GD3-41; November 23, 2018, at GD3-39; November 28, 2018, at GD3-37; and January 8, 2019, at GD3-57 and GD3-120.
[12] See Correction of information on a form, reviewed on July 25, 2017, at GD2-37 and GD3-89.

[33] The Claimant received a disciplinary action form dated January 15, 2019.[13] Under "Consequences of Further Infractions," the employer noted that it had suspended the Claimant. It had suspended her for the rest of her shift on January 10, 2019, and for the next shift on January 11, 2019. The employer asked her to return to work on January 14, 2019. She was to return after a meeting to discuss her reflections on an incident. As well, they would discuss how she would improve in future.

[34] In the same form, under the heading, "Plan for Improvement," the employer wrote, "We explained [to the Claimant] that any further falsification or lies would not be tolerated and that they could lead to termination."

[35] The employer issued a disciplinary action form. It did this because the Claimant had falsified an inspection report. The Claimant claims that she falsified the inspection report to cover for another employee's wrongdoing. She claims that her employer cleared her of any wrongdoing.

[36] Even if her employer cleared her of wrongdoing, she had received the warning and had served a suspension. So, the Claimant had to have been aware that her employer considered falsification of documents a serious matter that could lead to termination.

[37] The Claimant received another disciplinary action form, this one dated January 21, 2019.[14] The quality assurance coordinator noted that the Claimant had rewritten paperwork for an inspection form for January 15, 2019. The Claimant wrote that she had done checks. However, it had not been possible for her to do these checks. The employer wrote, "We previously explained that any further falsification or lies would not be tolerated and that they could lead to termination, therefore we do not recommend any further improvement plan." The manager recommended termination.

[38] The employer dismissed the Claimant from her job on January 22, 2019.[15] The employer terminated the Claimant's employment due to "consistent poor performance."

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[13] See Performance Management – Disciplinary Action Form, dated January 15, 2019, at GD3-98 and GD3-143.
[14] See Performance Management – Disciplinary Action Form, dated January 21, 2019, at GD3-97 and GD3-144.
[15] See termination letter dated January 22, 2018, at GD3-95 to GD3-96 and at GD3-106 to GD3-107.

[39] Internal correspondence dated March 14, 2019, suggests that there were other times when the Claimant falsified a record. The employer noted that it had not written a deviation for that incident.[16]

[40] The Claimant claims that she did not consider anything from her employer a written warning that she could lose her job. It is unclear what the General Division considered were warnings to the Claimant. It is also unclear whether "several warnings" included the verbal warning. By any definition, warnings signal some unpleasant situation ahead or in future.

[41] Apart from the verbal warning that the Claimant acknowledges that she received, I find that most of the documents in the employer's file did not include warnings to the Claimant:

- The Employee Warning Records[17] are blank or illegible. It is not clear whether they even show the employer cited the Claimant for any poor performance or misconduct, or whether it issued any warnings,
- The deviation records[18] suggest the employer might have disciplined the Claimant. But there are no warnings of any future discipline, and,
- The Correction of information form[19] clearly forbids employees from falsifying information. However, the form did not contain any warnings.

[42] From the employer's perspective, it appears that it was concerned over the Claimant's performance. But, the letter of expectation and the disciplinary action form are the only obvious written warnings from the employer. The disciplinary action form coincided with the Claimant's suspension.

[43] I have identified three obvious warnings. They include the verbal warning, the letter of expectation, and the disciplinary action form. The suspension occurred at about the same time

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[16] See email of Lyna Joseph dated March 14, 2019, at GD3-93.
[17] See Employee Warning Records, at GD3-145 and at GD15-17 to GD15-19.
[18] See Deviation Records, e.g. for July 30, 2018, at GD3-54; August 2, 2018, at GD3-53; August 21, 2018, at GD3-52; September 5, 2018, at GD3-49; September 24, 2018, at GD3-45; and for October 11, 2018, at GD3-44. See also Deviation Records where the employer appears to have disciplined the Claimant, e.g. for November 5, 2018, at GD3-41; November 23, 2018, at GD3-39; November 28, 2018, at GD3-37; and January 8, 2019, at GD3-57 and GD3-120.
[19] See Correction of information on a form, reviewed on July 25, 2017, at GD2-37 and GD3-89.

that the employer produced the disciplinary action form. The suspension itself may have also served as a warning.

[44] Taken together, the verbal warning and two written warnings could represent "several warnings." I find therefore that the General Division did not make a factual error when it found that the Claimant's employer had issued several warnings to the Claimant.

[45] The Claimant's employer may have issued these warnings. But, this does not necessarily prove that the Claimant knew dismissal was a possibility if she falsified documents. Conversely, it does not prove otherwise.

[46] I will now turn to the issue of whether the Claimant knew or should have known that her actions could lead to dismissal.

Issue 3: Did the General Division fail to consider whether the Claimant knew or should have known that dismissal was a possibility?

[47] The Claimant denies that she could have known that her employer could dismiss her. As I noted above, she did not think dismissal was a possibility because she was following orders when she falsified documents. And, she denies that she received any warnings that she could face dismissal if she falsified documents.

[48] The Claimant suggests that the General Division did not consider whether she knew or should have known that dismissal was a possibility.

[49] The Commission argues that the General Division did consider this issue, at paragraphs 74 and 75.

> [74] I considered the claimant's argument that she made a mistake and I do sympathize with her. The notion of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. A lapse of judgment is of no relevance to whether her conduct constitutes misconduct.
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> [75] I find that the evidence is undisputed. The claimant admits to rewriting the document and she did it on her own free will. I find that the claimant's actions were wilful and deliberate and that she knew or ought to have known her actions could lead to her dismissal.

[50] The General Division may have considered whether the Claimant knew or should have known that dismissal was a possibility. If it did, it offered little analysis on this issue. Nothing in either of these two paragraphs explains how the General Division could conclude that the Claimant knew or should have known that her actions could lead to her dismissal. The General Division failed to give adequate reasons to explain its decision.

[51] The shortcomings in the General Division's decision allows me to examine the evidence to decide this issue. Section 59 of the Act enables me to make findings of fact. The section also lets me vary or make the decision that the General Division should have made. Doing so means I do not have to refer the matter back to the General Division for reassessment.[20]

[52] As the Federal Court of Appeal held, the exercise of this power accords with paragraph 3(1)(a) of the *Social Security Tribunal Regulations*.[21] The paragraph requires the Social Security Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[53] I see no reason why I cannot give the decision that the General Division should have given. There is a complete evidentiary record, even if the Claimant disputes what some of that evidence represents.

[54] The Commission argues that all of the evidence, taken together, can lead to only one conclusion. The Claimant had to have known that her conduct would affect the performance of her employment duties. She had to have known that dismissal was therefore a real possibility.

[55] The Commissions points to the written procedures and guidelines. They stressed the importance of accurate reporting. False or inaccurate food inspection reports lead to increased costs to the employer. They could also endanger public health and safety. For this reason, the employer provided training and retraining on procedures.

[56] The Commission also points to the numerous deviations, the verbal warning, and the 2-day suspension in January 2019.

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[20] *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para. 17.
[21] *Ibid*.

[57] The Commission cited *Canada (Attorney General) v Maher*.[22] The Federal Court of Appeal described misconduct. The Court of Appeal said that it was important to consider the nature of Mr. Maher's breach "in light of [his] entire file." The Court of Appeal said the Umpire (the predecessor to the Appeal Division) should have asked itself whether Mr. Maher, "in light of his employment file as a whole had conducted himself so carelessly that he could not have been unaware that his absence could result in his dismissal."

[58] The Commission argues that it is irrelevant if the employer did not strictly adhere to its own progressive discipline policy. The Commission argues that the nature of the Claimant's employment history was bad. It argues that she had to have known that falsifying documents could lead to dismissal.

[59] The Claimant's employer was obviously concerned about false information on food inspection reports. False inspection reports could impair the employer's reputation and business. Worse, false information could also endanger public health and safety. Indeed, the employer stressed the importance of providing accurate information. The "Correction of information on a form," stated that it was "strictly forbidden to falsify an [*sic*] information on a control form."[23]

[60] The employer had issued a letter of expectation in late November 2018. In it, the employer expressed concern that the Claimant was not prioritizing food safety protocols. The employer wrote,

> I, myself, taking the time to make sure you understood, have not seen the gradual improvement that is expected after the conversations and various trainings that have been done. Things like making sure that the information on paperwork being verified is complete and accurate are being overlooked … a few examples that are of concern. When I have addressed these with you, your response has been that it has been overlooked or that it was just that the paperwork was filled out wrong. …
>
> We are asking you to work on improving your understanding of the processes and standards and knowledge of expectations for the future or further action will be taken.[24]

[61] The employer issued a verbal and written warning over previous falsification of records. The Claimant also had to serve a suspension. The Claimant states that she was cleared of any

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[22] *Canada (Attorney General) v Maher*, 2014 FCA 22 at para. 6. See also AD2-7 to AD2-12.
[23] See Correction of information on a form, reviewed on July 25, 2017, at GD2-37 and GD3-89.
[24] See Letter of Expectation dated November 29, 2018, at GD3-99.

wrongdoing over a mid-January 2019 incident. But, the warnings and suspension should have served as a warning. Falsifying information was a serious matter. The employer would not tolerate it and doing so could lead to dismissal.

[62] There was also the backdrop of the deviation records and the Correction of information form. With this, the Claimant knew or had to have known that ongoing falsification of food inspection reports or records would have an effect. It would affect the performance of her employment duties and it could lead to dismissal.

CONCLUSION

[63] The General Division concluded that the Claimant knew or should have known that falsifying reports could result in dismissal. It did not provide sufficient reasons to explain how it came to this conclusion. Nevertheless, I find that the evidence shows that the Claimant either knew or should have known that her actions could result in dismissal from her employment.

[64] The appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:[25]	
METHOD OF PROCEEDING:	On the Record
APPEARANCES:	E. R., Appellant Angèle Fricker, Representative for the Respondent

[25] The hearing of this appeal was initially scheduled for January 31, 2020. However, the Claimant did not attend the hearing at the scheduled location as she was out of province at that time. She contacted the Social Security Tribunal during the hearing, but other facilities were unavailable to accommodate the Claimant. The Claimant subsequently requested that the appeal proceed on the record.