



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *TD v Canada Employment Insurance Commission and X*, 2020 SST 846

Tribunal File Number: AD-20-708

BETWEEN:

**T. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**X**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 1, 2020

## **DECISION AND REASONS**

### **DECISION**

[1] The Tribunal dismisses the appeal.

### **OVERVIEW**

[2] The Appellant (Claimant) made an initial claim for employment insurance benefits. The Respondent, the Canada Insurance Commission of Canada (Commission), accepted his claim and began to pay him benefits. When the Added party (Employer) learned that the Claimant was receiving benefits, it asked the Commission to reconsider this decision.

[3] After speaking with the Employer, the Commission determined that the Claimant had committed a fraud and that he had lost his job because of his own misconduct. The Commission disqualified the Claimant from receiving benefits and required him to repay the benefits he had already been paid. The Claimant appealed the Commission decision to the General Division of the Tribunal.

[4] The General Division found that the Claimant used a customer's credit to purchase a ticket to Punta Cana for himself. Moreover, it determined that the Claimant should have known that using a customer's credit for his own use would breach the relationship of trust with his Employer and that his dismissal was a real possibility. The General Division concluded that the Claimant lost his job because of his own misconduct.

[5] The Tribunal granted leave to appeal to the Claimant. He submits that the General Division erred in law in its application of the burden of proof in relation to the issue of misconduct.

[6] The Tribunal must decide whether the General Division erred in law in its application of the burden of proof in relation to the issue of misconduct.

[7] The Tribunal dismisses the appeal.

## **ISSUES**

[8] Did the General Division make an error in law in concluding that the Commission and the Employer had met the burden of proof in the absence of any supporting evidence of fraud?

[9] Did the General Division make an error in law by imposing upon the Claimant the burden of proof by requesting that he provide supporting evidence when it did not request such evidence from the Employer?

## **ANALYSIS**

### **Appeal Division's mandate**

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.<sup>1</sup>

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.<sup>2</sup>

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

## **PRELIMINARY MATTERS**

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<sup>1</sup> *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.

<sup>2</sup> *Idem*.

[13] In view of the Claimant's grounds of appeal, I proceeded to listen to the entire recording of the General Division hearing. In accordance with section 58(1) of the DESD Act, I only considered the evidence presented before the General Division.

**Issue no 1: Did the General Division make an error in law in concluding that the Commission and the Employer had met the burden of proof in the absence of any supporting evidence of fraud?**

[14] The General Division had to decide whether the Claimant had lost his employment because of his own misconduct in accordance with sections 29 and 30 of the *Employment Insurance Act*.

[15] The onus is on the Employer and the Commission to prove on a balance of probabilities that the Claimant lost his employment because of his own misconduct. To do this, the General Division has to be convinced that it is more likely than not, that the Claimant engaged in the acts that led to the dismissal.

[16] In deciding the issue of misconduct, the General Division must take into consideration all of the evidence, both the evidence in the appeal docket and the evidence presented at the hearing.

[17] The Claimant submits that the Employer, who did not appear at the hearing, did not file any evidence in support of the alleged fraud. He submits that the General Division erred in law when it concluded that the Employer and the Commission had met the burden of proof in the absence of any supporting evidence of fraud.

[18] It is important to reiterate that the General Division is not bound by the strict rules of evidence applicable in criminal or civil courts and that it may receive and accept hearsay evidence.<sup>3</sup> Hearsay evidence is any statement, either written or oral, which was made before the hearing, but is presented to the General Division to prove the truth of that statement.

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<sup>3</sup> *G. L. v Canada Employment Insurance Commission*, 2020 SST 30 (CanLII), *M. G. v Canada Employment Insurance Commission*, 2020 SST 150 (CanLII).

[19] Therefore, the absence of the employer at a hearing is not a determining factor and does not necessarily result in the General Division having to reject the evidence already submitted by the employer. The Claimant has the opportunity to challenge the employer's evidence communicated prior to the hearing.

[20] The General Division must then assess all the evidence presented by the parties. If the General Division decides that evidence should be dismissed or assigned little or no weight, it must explain the reasons for the decision. It must also explain why it considers that one party is more credible than the other.<sup>4</sup>

[21] The evidence before the General Division shows that the Employer received a call from a customer who noticed an irregularity on its own tracking system of company travel expenses. The tracking showed that a customer's employee who had no plans or reason to travel to Punta Cana had a ticket booked in his name for the weekend.

[22] The Employer conducted an internal investigation and noticed that the Claimant had booked a ticket to Punta Cana using the customer's travel credit then had called the airline company to ask that the ticket mention his name. The customer would not have seen the name change because their system tracked only ticket numbers. The Employer noted that the Claimant had taken time off that coincided with the travel dates on the ticket. The Employer further received a confirmation from the airline company that it had scanned the ticket and the Claimant's passport at the airport.

[23] The General Division considered that the Claimant initially testified that the ticket could have been a test booking. He later testified that he had bought a ticket to Punta Cana for himself on a whim the night before, thinking that he would go away to relax for a day or two over the long weekend. The General Division also considered that the Claimant testified that he did go to the airport the morning of the flight and had his passport and ticket scanned at the gate, but that he had changed his mind at the last minute and did not go on the trip.

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<sup>4</sup> *Bellefleur v Canada (Attorney General)*, 2008 FCA 13, *Parks v Canada (Attorney General)*, A-321-97.

[24] The General Division found that, although the Employer did not provide the Commission with any documentation in support of its claim against the Claimant, the Employer's explanation of the situation was clear and detailed. It found that the Employer's version of events was consistent throughout its discussions with the Commission and confirmed by more than one representative of the Employer.

[25] The General Division was unconvinced by the Claimant's different explanations. It clearly did not find the Claimant credible when he testified that he had personally bought a ticket to Punta Cana on a whim the night before the flight because his girlfriend insisted that they go away and relax for the weekend considering that he had scheduled time off that coincided with the travel dates on the customer's ticket.

[26] After reviewing all the evidence presented by the parties, the General Division found that it is more likely than not, that the Claimant engaged in a fraud. It determined that the Claimant booked a ticket to Punta Cana using the customer's travel credit. The General Division also determined that the Claimant should have known that using a customer's credit for his own use would breach the relationship of trust with his Employer and that his dismissal was a real possibility. The General Division further found that the Claimant lost his job for that reason and not because of his medical leave. It concluded that the Claimant lost his job because of his own misconduct.

[27] As stated during the appeal hearing, I do not have the authority to retry a case or to substitute my discretion for that of the General Division. The Appeal Division's jurisdiction is limited by section 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it or its decision was unreasonable, the Tribunal must dismiss the appeal.

[28] The jurisprudence has also established that outside of particularly evident circumstances, the question of credibility must be left to the General Division. The Tribunal will intervene only if it is clear that the evidence before it does not support the General Division's conclusion on that issue.

[29] I find that this ground of appeal invoked by the Claimant has no merits. The decision of the General Division is based on the material before it and complies with the law and the decided cases. I also find no reason to intervene on the issue of credibility as determined by the General Division.

**Issue no 2: Did the General Division make an error in law by imposing upon the Claimant the burden of proof by requesting that he provide supporting evidence when it did not request any such evidence from the Employer?**

[30] The Claimant submits that the General Division erred in law by imposing upon him the burden of proof by requesting that he provide supporting evidence when it did not request such evidence from the Employer.

[31] I find that the General Division did not impose upon the Claimant the burden of proof. It did not request that the Claimant provide supporting evidence.

[32] The Claimant testified that he purchased the ticket to Punta Cana with his personal credit card.<sup>5</sup> The General Division then explained to the Claimant that he could file all the evidence he wanted in support of his position.<sup>6</sup> The Claimant chose not to provide evidence related to his credit card purchase. The General Division therefore rendered its decision based on the evidence before it.

[33] I find that this ground of appeal invoked by the Claimant has no merits.

**CONCLUSION**

[34] For the above-mentioned reasons, the Tribunal dismisses the appeal.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	September 24, 2020
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<sup>5</sup> 19:25 into the recording of the General Division hearing.

<sup>6</sup> 20:50 and 1:03:36 into the recording of the General Division hearing.

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. D., Appellant  Melanie Allen, representative for the Respondent  D. B., representative for the Added party