



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MM v Canada Employment Insurance Commission and X*, 2021 SST 2

Tribunal File Number: AD-20-788

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: January 4, 2021

DECISION AND REASONS

DECISION

[1] The Tribunal allows the Claimant's appeal. The file returns to the General Division for reconsideration.

OVERVIEW

[2] The Appellant (Claimant) lost her employment in August 2019 and subsequently applied for Employment Insurance (EI) sickness benefits. The Respondent, the Canada Employment Insurance Commission (Commission), approved the Claimant's request for sickness benefits but informed her that she would not receive regular EI benefits since she had lost her employment because of her own misconduct.

[3] The Claimant requested the Commission reconsider the decision arguing that she did not lose her employment due to misconduct but that her termination was retaliation for complaints she had raised. After reviewing the initial decision, the Commission decided in the Claimant's favour, finding that the reasons she had lost her employment did not amount to misconduct. The Added Party (Employer) appealed this decision to the General Division of the Tribunal.

[4] The General Division found that the Claimant lost her job because she filed an unfounded police report against the Employer. Moreover, the General Division determined that the Claimant should have known that filing an unfounded police report would lead to her dismissal. It concluded that the Claimant lost her job because of her own misconduct.

[5] The Appeal Division granted the Claimant leave to appeal of the General Division's decision. She puts forward that the General Division failed to observe a principle of natural justice, erred in law in making its decision, and based its decision without regard for the material before it.

[6] I must decide whether the General Division failed to observe a principle of natural justice and whether it erred in fact or in law when it concluded that the Claimant had lost her employment because of her misconduct.

[7] I am allowing the Claimant's appeal on the ground that the General Division failed to observe a principal of natural justice. The file returns to the General Division for reconsideration.

ISSUES

[8] Did the General Division fail to respect a principle of natural justice by not giving the Claimant the opportunity to reply to the Employer's additional submissions?

[9] Did the General Division err in fact or in law in concluding that the Claimant had lost her employment because of her own misconduct?

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.¹

[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.²

[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

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

² *Idem*.

perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Issue 1: Did the General Division fail to respect a principle of natural justice by not giving the Claimant the opportunity to reply to the Employer's additional submissions?

[13] The Claimant submits that the General Division did not give her the opportunity to reply to the Employer's submissions. She also submits that the General Division based its decision on the Employer's submissions without given her the opportunity to respond. She argues that the General Division failed to observe a principle of natural justice by not given her the opportunity to reply to the Employer.

[14] The Commission submits that the General Division did not observe a principal of natural justice by not providing the Claimant an opportunity to respond to the Employer's additional submissions. It puts forward that since the Claimant did not get an opportunity to respond, the file is not complete. The Commission recommends to send the matter back to the General Division pursuant to section 59 (1) of the DESD Act for a reconsideration.

[15] The Employer disagrees with the Claimant and the Commission. It submits that there was no breach of any principles of natural justice by way of the General Division's failure to provide an opportunity to reply to the Employer's submissions. The Employer puts forward that the Claimant had many opportunities to present her side of the story. It submits that the Claimant proceeded to file more documents after receiving the additional submissions of the Employer. The Employer argues that the Claimant never contested the General Division choice of proceedings and did no ask the General Division for an opportunity to respond to anything submitted by the Employer.

[16] The General Division decision under appeal follows a successful Employer appeal to the Appeal Division of the first General Division decision dated February 10, 2020.³

³ Appeal Division decision dated June 17, 2020.

[17] The Appeal Division found that the first General Division decision had failed to consider the cumulative reasons for the Claimant's dismissal. In the remedy section, the Appeal Division stated that:

Gaps in the evidentiary record warrant returning this matter to the General Division so it can decide this matter again. [. . .] As well, the parties may not have had the chance to elicit evidence that may have been relevant.⁴

(Underlined by the undersigned)

[18] In order to decide this matter again, the General Division proceeded to consider the evidence on file submitted the first time before the General Division and to listen to the recording of the previous General Division hearing. The General Division also requested further submissions from the Employer. However, the General Division did not offer the Claimant an opportunity to reply to the Employer's submissions and proceeded to render its decision.⁵

[19] The concept of "natural justice" includes the right of a claimant to a fair hearing. A fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations.⁶

[20] So fundamentally important is this right, that there must not exist even the appearance of prejudice to the right of any claimant to make a full presentation before the General Division. The law requires that not only must justice be done, it must manifestly and undoubtedly be seen to be done. The mere suspicion that a claimant has been denied this right is justification in itself for an order returning the matter to the Tribunal's General Division.

[21] The Appeal Division has previously stated that the General Division must show caution when it allows evidence to be entered on file without giving the other party the

⁴ *Idem*, at paras 107–108.

⁵ RGD2-1 to RGD2-4.

⁶ *S. L. v Canada Employment Insurance Commission*, 2017 CanLII 40938.

opportunity to respond. Such a practice could give a prejudiced party a ground for appeal.⁷

[22] The Employer essentially submits that I should not allow this ground of appeal since the Claimant took a passive stance before the General Division by not contesting the General Division's choice of proceedings or by not requesting an opportunity to reply to the Employer's additional submissions.

[23] I might have found merits to the Employer's arguments if the Appeal Division had not returned the file to the General Division to fill in gaps in the evidentiary record because "the parties may not have had the chance to elicit evidence that may have been relevant".

[24] When I consider the reasons the Appeal Division returned the file to the General Division, I find that the Claimant had a reasonable expectation that the General Division would give her an opportunity to reply to the Employer's additional submissions before rendering its final decision.

[25] I find that the General Division could not proceed to obtain further evidence from the Employer without giving the Claimant an opportunity to reply in accordance with the Appeal Division decision. The present situation is clearly one where the evidence filed is new and likely to catch the opposing party off guard. This is especially true given that the General Division rendered its decision based on new allegations raised by the Employer.⁸

[26] I agree with the Employer that the General Division must conduct its proceedings informally and quickly in accordance with the Tribunal's regulations. However, its choice of proceedings must not prejudice a party. The General Division must always have a consideration for fairness and natural justice when conducting its proceedings in order to insure that both parties have the opportunity to fully present their case.

⁷ *Y. L. v Canada Employment Insurance Commission*, 2016, CanLII 59140.

⁸ GD8-120 to GD8-121, RGD3.

[27] For the above-mentioned reasons, I have no choice but to refer the matter back to the General Division for reconsideration.

Did the General Division err in fact or in law in concluding that the Claimant had lost her employment because of her own misconduct?

[28] In view of my conclusions regarding the breach of natural justice, I will not address this ground of appeal.

CONCLUSION

[29] The Tribunal allows the Claimant's appeal. The file returns to the General Division for reconsideration.

[30] Considering the complexity and the history of the present file, the Tribunal recommends that the General Division proceed with a new hearing by teleconference or videoconference in order to make sure that both parties have the opportunity to fully present their case. For further clarity, a new hearing does not prevent the General Division from reviewing materials that were available to, or generated by, the previous General Division members.⁹

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	December 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. M., Appellant Josée Lachance, Representative of the Respondent Preston I. Parsons, Representative

⁹ *R. M. v Minister of Employment and Social Development*, 2020 SST 743.

	of the Added Party
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