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

Citation: *JS v Canada Employment Insurance Commission and X*, 2021 SST 153

Tribunal File Number: AD-20-860

BETWEEN:

J. S.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

and

X

Added Party / Employer

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: April 14, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal. The General Division did not address inconsistencies in the evidence. It also overlooked some of the evidence. I am giving the decision that the General Division should have given. Neither the Respondent, Canada Employment Insurance Commission, nor the Employer, X, have established that the Claimant, J. S., lost her employment because of misconduct.

OVERVIEW

[2] The Claimant is appealing the General Division's decision. The General Division found that the Claimant lost her job at a fast food restaurant because of misconduct. Her Employer required her to attend a coaching session with its general manager.

[3] The general manager advised the Claimant that if she failed to attend the session, he would dismiss her. The Claimant arrived late for the session, so the Employer dismissed her for misconduct. Because of the misconduct, the Claimant could not rely on the hours from this employment for her Employment Insurance claim.

[4] The Claimant denies that there was any misconduct. She argues that the General Division made several errors that led it to conclude that there had been misconduct. The Commission agrees that the General Division made several errors. Both the Claimant and the Commission are asking me to allow the appeal and substitute my own decision. The Employer maintains that there was misconduct. The Employer argues that the appeal should be dismissed.

[5] I find that that neither the Commission nor the Employer have established that there was misconduct or that the Claimant lost her employment because of misconduct. The Claimant's claims that she arrived on time are just as plausible as the Employer's claims that the Claimant was late. Even so, it is not apparent that the Claimant knew or should have known that, even if she was late, that being late for the session could result in dismissal.

ISSUES

[6] The issues are:

1. Were there inconsistencies in the Employer's evidence? And, if so, did the General Division fail to address them?

2. Did the General Division overlook any important facts upon which it based its decision?

ANALYSIS

[7] Section 58(1) of the *Department of Employment and Social Development Act* lets the Appeal Division intervene in General Division decisions. But, the Appeal Division can intervene in only a limited set of circumstances. The section does not give the Appeal Division any power to conduct a new hearing or to collect any new evidence.

[8] The Appeal Division may intervene if there are errors in law. The Appeal Division may also intervene if the General Division based its decision on any errors of fact without regard for the material before it. The Appeal Division may also intervene if the General Division exceeded its jurisdiction, or if did not have a fair process.

The General Division failed to address inconsistencies in the evidence

[9] The General Division should have addressed inconsistencies in the Employer's evidence.

[10] The Claimant argues that there were inconsistencies in the general manager's evidence. The Claimant claims that the evidence shows that the general manager told the Commission that she did not show up for a coaching session. Then, at the General Division hearing, the general manager said something completely different. The general manager testified that the Claimant did show up, but was late. This evidence conflicted.

[11] The Claimant submits that if the General Division had considered the inconsistencies, it would have concluded that the general manager was not a credible witness. She claims that the

General Division might have then rejected her Employer's evidence and preferred her evidence instead.

[12] The Commission agrees with the Claimant that there was conflicting evidence before the General Division.

[13] The Commission argues that where there is conflicting evidence, the General Division has a duty to assess the credibility of that evidence before deciding what evidence it prefers. The Commission argues that the General Division simply cannot ignore some of the evidence. If the General Division is not going to rely on evidence or is going to give little to no weight to it, the Commission asserts that, at the very least, it must provide an explanation.

[14] The Commission contends that the General Division did not reconcile the inconsistencies in the Employer's evidence. For that reason, the Commission argues the General Division made a legal error.

[15] The Employer did not address the arguments of either the Claimant or the Commission regarding the inconsistencies. The Employer maintains that the Claimant was late. He says that he could not change his schedule to accommodate her. He had another commitment elsewhere. He maintains that there were misconduct.

[16] The General Division acknowledged the Commission's arguments that there were inconsistencies in the Employer's evidence.[1] Yet, the General Division did not draw any conclusions, one way or the other, about whether there were inconsistencies in the Employer's evidence.

[17] The General Division did not address the Commission's representations. And, it did not decide either whether there were inconsistencies in the Employer's evidence.

[18] I find that the Employer gave contradictory evidence. The Employer prepared an incident report about a week after the scheduled session. The general manager wrote that the Claimant, "failed to appear on her first and second coaching session despite of [*sic*] reminders provided to

[1] General Division decision, at para. 42. See also Representations of the Commission to the Social Security Tribunal-Employment Insurance Section, at GD4-1

her."[2] In its Notice of Appeal, the Employer wrote that the Claimant "failed to reach [*sic*] for the 2nd session."[3] On another occasion, the general manager stated that the Claimant was late.[4] And, as the General Division noted, the general manager testified at the hearing that the Claimant was late.[5]

[19] This conflicting evidence was significant. It could have reflected on the general manager's credibility. It is difficult to understand why the General Division necessarily found the Employer more credible. After all, there was conflicting evidence from the Employer too.

[20] The conflicting evidence was significant because it directly related to the Claimant's dismissal. The Employer dismissed the Claimant for her alleged misconduct. The Employer told the Claimant that, "it [was] mandatory for [her] to attend the session and the result of not doing so will be your termination."[6]

[21] However, the Employer never warned the Claimant what would happen if she were late. Without an explicit warning, arguably, the Claimant could not have guessed that her Employer would dismiss her if she were late. If the Claimant did not and could not have known the consequences of her action, there may not have been misconduct.

[22] Possibly, the Employer doubted whether it could dismiss the Claimant for misconduct if she was only late, as opposed to being a no-show. The Claimant suggested that the Employer was motivated to dismiss her. If so, this might explain why the Employer initially told the Commission that she did not attend the coaching session, without mentioning that she was merely late.

[23] Because of the significance of this conflicting evidence, the General Division should have addressed it.

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[2] Incident Report dated August 21, 2019, at GD3-48.
[3] Notice of Appeal, filed October 23, 2020, at GD2-5. The employer also testified in an employment standards complaint that the Claimant did not show at the appointed time. As a result, the employer left the workplace at 5:40 p.m. for another meeting (GD3-52).
[4] Supplementary Record of Claim, dated September 15, 2020 at GD3-33.
[5] General Division decision, at para. 27.
[6] Email from Employer to Claimant, August 11, 2019, at GD9-1.

The General Division failed to consider some of the evidence

[24] There were important facts that the General Division overlooked.

[25] The Claimant claims that the evidence showed that she told her Employer that she was not going to make it on time for 5:30 p.m. She claims that her general manager told her he would wait an extra 10 minutes.[7] She claims that this reasonably explains why the general manager was still at the restaurant after 5:30 p.m. She says the General Division should have considered the fact that the general manager stayed until 5:40 p.m.

[26] The Commission also agrees with the Claimant that the General Division failed to consider all of the evidence before it.

[27] The general manager did not address the arguments of the Claimant or Commission that the General Division overlooked any of the evidence. However, the general manager argues that the evidence shows that he never received a telephone call from the Claimant after 5 p.m.

[28] The general manager claims that he would have waited for the Claimant if she had indeed called. He also argues that it is irrelevant whether the Claimant arrived when he was still on the premises. He claims that there was misconduct as long as the Claimant was late by even one minute. He expected her to be on time because he had texted her saying he would not wait "a single minute more."

[29] The General Division rejected the Claimant's evidence that:

1. she had called her Employer to say that she would be unable to make it to the session by 5:30 p.m. , and
2. the general manager agreed to stay an extra 10 minutes, to 5:40 p.m.

The General Division found that it was clear the general manager would not wait. After all, he had texted the Claimant, writing, "I will wait till 530 but not a single minute more."[8]

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[7] Supplementary Record of Claim, dated October 2, 2020, at GD3-58.
[8] Exchange of text messages between the general manager and Claimant on August 13, 2019, at GD6-21.

[30] The General Division accepted the general manager's evidence that he had told the Claimant he would not wait "a single minute more" for her. The General Division also accepted his evidence that he never received a phone call from her.

[31] Yet, the evidence shows that the general manager waited until 5:35 p.m. in the restaurant and then another five minutes in his vehicle for the Claimant.[9] His text message to the Claimant confirms that he left at 5:40 p.m.[10]

[32] The General Division was aware of the general manager's evidence that he left at 5:40 p.m.[11] Despite this, the General Division did not address the fact that the general manager waited after 5:30 p.m. for the Claimant, even though it was contrary to his earlier message that he would not wait "a single minute more."

[33] The General Division should have considered the fact that the general manager did not leave until another 10 minutes after 5:30 p.m. This fact seems to support the Claimant's claim that, when she contacted the Employer to advise that she would be late, he agreed to wait an extra 10 minutes for her.

[34] The General Division found that it was reckless for the Claimant not to have contacted her general manager to advise that she was going to be late. If the General Division had considered the fact that the general manager ended up waiting after initially saying he would not wait beyond 5:30 p.m., then the General Division might have accepted the Claimant's evidence. The Claimant had testified that she had contacted her general manager. She called to advise that she would be running late and needed extra time to get to the session. As the Claimant argues, this could have explained why the general manager stayed past 5:30 p.m.

[35] If the General Division had accepted the Claimant's evidence that she called the general manager, then it may not have found that she had acted so recklessly that it was almost wilful. If it found that she did not act recklessly, it might not have concluded that there was misconduct.

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[9] General Division decision, at para. 27.
[10] General manager's text message, at GD6-22.
[11] General Division decision, at paras. 27 and 36.

[36] I find that the General Division based its decision on an important factual error without having regard for all the material before it, over the fact that the Employer stayed past 5:30 p.m.

REMEDY

[37] The General Division made an error of law. It also based its decision on an important factual error. So, now I have to consider the appropriate remedy. I have several options.[12] I can substitute my own decision, refer the matter back to the General Division for reconsideration, with directions, or confirm, rescind or vary the General Division's decision in whole or in part.

[38] The Claimant is asking for a "fresh pair of eyes" to examine her appeal. The Commission is asking me to rescind the General Division's decision, while the Employer is asking me to dismiss the appeal.

[39] I would only dismiss the appeal if, after reviewing all of the evidence, I were to come to the same conclusion as the General Division and find that there was misconduct.

[40] For misconduct to exist, the conduct of a claimant has to be wilful. In other words, a claimant's acts that led to the dismissal had to have been conscious, deliberate, or intentional. This includes conduct that is so reckless that it is almost wilful.

[41] The Commission says it is not clear-cut whether there was misconduct. The Commission submits that this is a case of "he said", "she said." That is, the evidence from both parties is equally balanced regarding whether the Claimant arrived for the coaching session within the allowed timeframe. If it is unclear whether the Claimant arrived for the coaching session on time, then one cannot necessarily conclude that there was misconduct.

[42] The Claimant and the Employer disagree over when the Claimant should have arrived to be on time, i.e. within the "allowed timeframe." The evidence on the "allowed timeframe," is so conflicting. So, it is impossible to conclude whether the Claimant was late or if she arrived within the allowed timeframe.

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[12] Section 59 of the *Department of Employment and Social Development Act*.

[43] On one hand, the general manager states that there was no way he would have agreed to meet after 5:30 p.m. because he had another meeting soon after that. He was firm on meeting no later than 5:30 p.m. Yet, the general manager also testified that he left the premises at 5:40 p.m. On the other hand, the Claimant insists that the Employer agreed to her request to move the meeting time to 5:40 p.m. So, there is conflicting evidence over whether the Employer expected the Claimant to arrive by 5:30 p.m. or whether, as the Claimant alleges, the Employer gave her to 5:40 p.m.

[44] The General Division concluded that the Claimant had acted so recklessly that it was wilful. The General Division found that the Claimant was reckless because she failed to make sure she was on time. The problem with this conclusion, however, is that it assumes that the Claimant had to arrive by 5:30 p.m. Yet, the evidence is divided on this point. ."

[45] And, as the Commission previously argued, "the element of wilfulness is missing in that final incident."[13] The Claimant testified that she knew her Employer would dismiss her if she did not appear for the coaching session. She tried to make sure that she was on time, but she got caught in traffic.[14] The Commission says that the Claimant's delay was not wilful because she did not have any control over traffic.

[46] I cannot conclude that the Claimant was reckless simply because she might have been late. There was no evidence regarding, for instance, how much time it took to travel from the Claimant's starting point and how much time she allowed for travel. There was no evidence either about whether any extraordinary circumstances caused the Claimant to be late. This represented missing information that might have been necessary to decide whether the Claimant had been reckless. When such information is missing, it usually warrants returning a matter to the General Division for a reconsideration.

[47] But, with the conflicting and irreconcilable evidence over the "allowed timeframe," there is no advantage or any utility in returning this matter to the General Division. The conflicting

[13] Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4-9.
[14] Supplementary Record of Claim, dated October 2, 2020, at GD3-58 to GD3-59.

evidence would still exist. Returning this matter to the General Division would not overcome the concerns with the evidence.

[48] Plus, there are other concerns with the evidence of both parties. The Claimant and the general manager are unreliable historians.

[49] Both parties changed their stories on other issues. The General Division noted the inconsistencies in the Claimant's evidence. The general manager's story about whether the Claimant even showed up for the session has changed over time. There is nothing to suggest that any testimony either gives now would be more compelling.

[50] Both witnesses failed to elicit evidence that could have bolstered their claims. For instance, the Claimant says she called the general manager. She could have easily printed out a phone log to verify this, but she did not. She states that these records are no longer available. So, having another hearing would not necessarily let the parties produce any new evidence that could address some of the critical issues.

[51] There is also the issue about whether the Claimant was aware of what the consequences might be if she were late. For misconduct to exist, a claimant must not only have known or should have known that their conduct could get in the way of carrying out their duties towards their employer, but also must have known or should have known that dismissal was a real possibility. The Employer's text to the Claimant did not set out any consequences if she were going to be late.[15] So, the Claimant could not have known that dismissal was a real possibility if she were to be late.

[52] As the Commission notes, the onus of proof lies with the employer and the Commission. They have to prove that a claimant lost their employment because of misconduct. The Commission argues that neither the Employer nor the Commission have been able to establish that there was misconduct.

[53] With this in mind, the Commission contends that neither the Employer nor the Commission have met the required burden of proof to prove that the Claimant lost her

[15] Email from Employer to Claimant, August 11, 2019, at GD9-1.

employment because of misconduct. The Commission argues that, as a result, the Claimant's loss of employment cannot constitute misconduct. And, the hours of insurable employment from her employment should be included in the calculation of a claim for benefits.

[54] The Claimant's claims are just as plausible as the general manager's denials. The Claimant claims that she arrived on time, that she was not reckless, and that she did not know she faced dismissal even if she were late. The general manager denies that he received a phone call from the Claimant or that he moved the meeting time to 5:40 p.m. Ultimately, this means that neither the Commission nor the Employer have proven that there was misconduct.

CONCLUSION

[55] I am allowing the appeal. Neither the Commission nor the Employer have established that there was misconduct. The Claimant may rely on the hours of insurable employment from her employment for her Employment Insurance claim.

Janet Lew
Member, Appeal Division

HEARD ON:	March 23, 2021
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	J. S., Appellant S. Prud'homme, Representative for the Respondent (via written submissions) Waseem Mobashar, Representative for the Added party (via teleconference)