Citation: *LW v Canada Employment Insurance Commission*, 2023 SST 44

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated March 21, 2022 (z)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	January 11, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	January 18, 2023
File number:	AD-22-273

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, L. W. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission) proved that the Claimant lost her job because of misconduct. The Claimant's employer dismissed the Claimant when she did not show up for work on time on March 1, 2021, after being off work for 7.5 months for medical reasons.

[3] The Claimant states that she had yet to receive medical clearance to be able to return to work. However, she did not provide a medical note before March 1, 2021 to her employer that would have extended her medical leave. The General Division found that the Claimant had been reckless in failing to inform her employer before March 1, 2021, that she would be unable to return to work that day and would be providing a medical note to support her ongoing absence from work.

[4] The Claimant argues that the General Division failed to appreciate the facts. She denies that she was reckless in not letting her employer know that she would be producing a medical note and would continue to need time off work.

[5] In particular, the Claimant argues that the General Division overlooked important facts. She says that these facts show that her employer was in fact aware that she was physically unable to return to work by March 1, 2021. So, she claims that, if the General Division had not overlooked these facts, it would have found that she had not acted recklessly and that there was no misconduct on her part.

[6] The Claimant asks the Appeal Division to allow the appeal and find that she was not disentitled from receiving Employment Insurance benefits.

[7] The Respondent, the Canada Employment Insurance Commission (Commission), denies that the General Division made any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issue

[8] The issue is as follows: Did the General Division overlook some of the evidence?

Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[1]

[10] For factual errors, the General Division had to have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the evidence before it.

Did the General Division overlook some of the evidence?

[11] The Claimant argues that the General Division overlooked some of the evidence. In particular, she argues that the General Division overlooked (1) her email of January 29, 2021 to the head of human resources, the spouse of the owner of the company for whom she worked, and (2) the fact that the head of human resources had asked her whether she would be applying for long-term disability benefits.

[12] The Claimant argues that this evidence establishes that she did not act recklessly. She argues that, if the General Division had not overlooked this evidence, it would have come to a different decision and allowed her appeal.

– **Claimant's e-mail of January 29, 2021**

[13] The Claimant emailed the head of human resources on January 29, 2021. She wrote:

[1] Section 58(1) of the *Department of Employment and Social Development Act*.

> I'm going to see a new specialist who is trying to get my arm, wrist and hand working better, stop the spasms and hopefully stop the pain??!!!!
>
> I also finally have an appointment with the body pain clinic, have been on the waiting list for months !! My appointment is February 12.
>
> I have attached the doctor's note as I'm not able to come back until some progress is made with the arm/hand injury especially, still hurts to use it at all, can't write properly or drive. Everything hurts so am hoping with all my heart that these two new treatments will be what gets me healed and able to live life again and not be in extreme pain 24/7??!!
>
> Hope you're all well and please say hi to everyone, miss you all[2]

[14] The General Division did not refer to this specific email. But a decision-maker does not have to refer to everything before it. There is a general presumption in law that a decision-maker considers all the evidence.

[15] But sometimes a decision-maker must address and analyze that evidence. In deciding whether evidence should be discussed, the Court says one must assess the strength of that evidence, the extent to which it supports the inferences sought to be drawn from it and the extent to which the matter it tends to prove are at issue in the proceedings.[3]

[16] In these circumstances, the presumption is set aside. As the Federal Court has held, courts will consider setting aside this presumption, "only when the probative value of the evidence that is not expressly discussed is such that it should have been discussed".[4]

[17] So, depending upon what that evidence is, a decision-maker might not be able to simply rely on the presumption. It might have to consider that evidence in its analysis.

[18] The Claimant says the General Division should have discussed the January 29, 2021 email evidence because it shows that her employer would have become aware of her ongoing medical issues that left her unable to return to work. So,

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[2] See Claimant's email of January 29, 2021, at GD 2A-25 and GD 3-59.
[3] See *Cammack v Martins Estate*, 2002 CanLII 11072 (ON SC).
[4] See *Singer v Canada (Attorney General)*, 2010 FC 607 at para 20.

the Claimant says that it was unnecessary for her to have to give her employer a medical note before March 1, 2021.

[19] The January 29, 2021 email must be considered in its context, against not only the Claimant's medical progress up to that point, but also any other communications that the Claimant might have had with her employer.

[20] About 7.5 months had passed since the Claimant last worked. She had already told her employer that she was continuing to experience pain. She had yet to resume her usual activities, including driving.

[21] The Claimant provided her employer with a medical note dated January 28, 2021.[5] Her doctor believed that the Claimant was unable to work for medical reasons, up to February 28, 2021.

[22] The Claimant's employer acknowledged that it had received the Claimant's email and note. The employer wrote to the Claimant at 9:17 AM:

> I received your email and doctor's note.
>
> We are just wondering what your plan is—are you planning on coming back to work or have you applied for long-term disability?

[23] The Claimant responded to her employer at 9:32 AM on February 1, 2021:

> Good morning!
>
> My hope is to come back to work. I haven't applied for long term disability.

[24] The employer told the Commission that the Claimant indicated in her February 1, 2021 email that she was not applying for long-term disability and "was planning on returning to work."[6]

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[5] See medical note dated January 28, 2021, at GD 2-25.
[6] See Supplementary Record of Claim dated June 22, 2021, at GD 3-69.

[25] Although the Claimant did not state when she hoped to be able to return to work, the employer understood from the Claimant's email on February 1, 2021 that she hoped to return to work on March 1, 2021, after her medical note lapsed.[7]

[26] In other words, the employer interpreted the February 1, 2021 email to mean that it could expect the Claimant to return to work after February 28, 2021, unless she were to produce another medical note. As the employer explained, the last medical report it had received indicated that the Claimant would be off work until February 28, 2021.[8]

[27] The General Division did not refer to nor discuss the contents of the Claimant's January 29, 2021 email. Even so, I find that it does not represent an error. The email confirmed that the Claimant had ongoing medical issues. But it does not prove or establish that the Claimant was going to be off work for an extended period.

[28] The General Division did not have to discuss the January 29, 2021 email because of the subsequent emails the Claimant had with her employer three days later. The later emails formed the basis for the employer's expectations.

[29] On February 1, 2021, the Claimant emailed her employer, saying she hoped to return to work. She confirmed that she was not applying for long-term disability benefits.

[30] It was from this later exchange of email that the employer formed its understanding and expectation that the Claimant would be returning to work at some point. Whether rightly or wrongly, the employer's understanding and expectation would be further shaped by the absence of any further communications or medical records up to March 1, 2021.

– **Long-term disability**

[31] The Claimant says the General Division overlooked the fact that her employer asked whether she had applied for long-term disability. The Claimant says that her employer's question about long-term disability shows that her employer was aware of

[7] See Supplementary Record of Claim dated , at GD 3-32.
[8] See employer's termination letter dated March 1, 2021, at GD 3-44.

the severity of her medical issues and, more importantly, was aware that she would be away from work for a long period of time.

[32] The General Division referred to this evidence[9] but did not make any findings as to what the employer's question about long-term disability benefits meant, in terms of the Claimant's return to work.

[33] As I noted above, a decision-maker does not have to refer to everything before it, unless it is important and could affect the outcome.

[34] Here, I find that the evidence about the disability benefits did not have such probative value that the General Division had to refer to and analyze it.

[35] The Claimant responded to her employer's question about whether she was going to apply for long-term disability benefits. She answered that she hoped to return to work. She also answered that she had not applied for long-term disability benefits.[10]

[36] The employer took the Claimant's response to mean that, if she was not going to be applying for long-term disability benefits, that she would not continue to be off work for much longer. So, even though the employer at first thought the Claimant might be interested in applying for long-term disability benefits, it learned she would not be applying for them after all.

[37] If anything, the Claimant's response that she would not be applying for long-term disability benefits could have led the employer to believe that the Claimant's medical condition was not going to be as prolonged as it might have initially believed. The employer's understanding was confirmed when it did not receive a medical note or any confirmation from the Claimant that she would need to continue her medical leave of absence.

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[99] See General Division decision, at para 20.
[10] See General Division decision at para 39.

Other issues

– The Claimant's specialist appointment in April 2021

[38] The Claimant suggests that the General Division overlooked the fact that she had verbally informed the owner of the company in mid-February 2021 that she had a specialist appointment in April 2021. She also claims that she told her employer that she was continuing to experience extreme pain and limitations and was unfit to return to work. In other words, she would not be returning to work anytime soon, until after she saw the specialist and hopefully saw some improvement in her condition.

[39] This information was vital because it showed that her employer was aware that she would continue to be off work after February 28, 2021.

[40] The General Division referred to this evidence. The General Division noted that the Claimant stated that she spoke with her employer in February 2021 that she would be seeing a specialist in April 2021, and that she would update her employer again after that appointment.[11]

[41] However, the General Division noted that the Claimant's evidence contrasted with the employer's statements to the Commission. The employer told the Commission that it had last heard from the Claimant on February 1, 2021, and that it did not hear from her again until March 1, 2021.

[42] The General Division noted that the head of human resources representing the employer told the Commission that, if the Claimant had spoken to her husband about not being able to return to work, he would have told her. The head of human resources also said that if the Claimant was not going to be at work by March 1, 2021, she should and would have contacted her, as the head of human resources.

[43] The General Division was aware of the Claimant's evidence that she had contacted her employer in mid-February 2021 and told them that she had a specialist's

[11] See General Division decision at paras 29, 38, and 41.

appointment in April 2021. But the General Division rejected this evidence. The General Division preferred the employer's evidence over the Claimant's evidence.

[44] The General Division was entitled to prefer the employer's evidence, as long as it reasonably explained why it did. Here, the General Division explained why it preferred the employer's evidence.

[45] The General Division found that typically the Claimant sent all her emails with attached medical notes to the head of human resources. It found that the Claimant recognized that she had to correspond with the head of human resources about her medical absence from work.

[46] The General Division found that it was uncharacteristic for the Claimant not to update the head of human resources by email. So, the General Division concluded that it was unlikely that the Claimant verbally told to her employer in mid-February 2021 that she would be getting a medical extension after February 28, 2021.

[47] I find that the General Division did not overlook the Claimant's evidence that she had told her employer about an upcoming specialist appointment in April 2021. The General Division simply did not accept this evidence.

– **Whether the Claimant had been reckless**

[48] The Claimant argues that the General Division made an erroneous finding of fact when it determined that she had acted recklessly by failing to let her employer know that she would not be returning to work on March 1, 2021 and that she would be producing a medical note.

[49] The Claimant denies that she was reckless. She says it was outside her control that she had been unable to get a medical note on time to give to her employer. Her doctor had yet to produce the note because she had been waiting to consult with the specialist. Her doctor told the Claimant to hold off on seeing her just yet. Then, the receptionist gave the doctor the wrong information about contacting the Claimant.

[50] The Claimant also states that her employer was aware that she had ongoing medical issues.

[51] However, as the General Division recognized, the fact that the Claimant had yet to get a medical note by February 28, 2021 does not mean that there was no reason she could not have alerted her employer to the fact that she would not be returning to work on March 1, 2021.

[52] There was no evidence that suggested the Claimant was unable to write to her employer—as she had done numerous times in the past—to let it know that she would be unable to work because of medical reasons.

[53] The evidence suggests that the Claimant may have relied on the employer's conduct. For instance, her employer had in the past reached out to her to enquire if she would be returning to work.[12] And on another occasion, it had seemingly accepted a late medical note from the Claimant.[13] But the Claimant did not refer to any of this evidence at any time after her employer dismissed her. So, it does not appear to have been a factor in considering whether the Claimant had acted recklessly.

[54] Indeed, the Claimant acknowledged that there was some urgency to obtaining the medical note from her family doctor. She did not want to jeopardize anything. She had sensed that there was a change in her employer's tone, so she wanted to make sure that she produced a medical note by the end of February 2021.

[55] Recognizing that there was a change in tone from her employer, the Claimant should have written to her employer. The General Division did not make an erroneous finding when it determined that she had acted recklessly.

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[12] See employer's email of August 25, 202, at GD 2A-16.
[13] See Claimant's email of January 29, 2021, at GD 3-59 and doctor's note, at GD 3-67.

– **Wrongful dismissal**

[56] The Claimant argues that her employer wrongfully dismissed her. She says her employer was aware that she was on a medical leave of absence when it dismissed her. She suggests that the General Division should have addressed this issue.

[57] The General Division appropriately determined that it did not have the authority to decide whether the employer's dismissal was justified or appropriate.

[58] In a case called *Caron*,[14] the respondent's employer dismissed him, after it had issued six disciplinary notices for absenteeism. The Federal Court of Appeal found that the Board of Referees (the predecessor to the General Division) was "somewhat confused about the legitimacy of the dismissal by the employer…"[15] The Court found that this confusion censured the employer's conduct.

[59] In that case, the Board of Referees limited the retroactivity for disciplinary action because of the collective agreement. The Board of Referees found the employer could only go so far back in terms of disciplining the respondent. But the Court said the issue was irrelevant to the misconduct issue.

[60] In referring to another case, the Court noted that, "[t]here are available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits."[16]

[61] There may be other remedies available to the Claimant for wrongful dismissal (and, if so, she would need to quickly act on them) but the General Division did not make an error when it did not address the issue and focused instead on whether there was misconduct under the *Employment Insurance Act*.

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[14] See *Canada (Attorney General) v Caron*, 2009 FCA 141.
[15] See *Caron*, at para 4.
[16] See *Caron*, at para 4, referring to *Attorney General of Canada v McNamara*, 2007 FCA 107, at para 23.

Conclusion

[62] The General Division did not overlook important evidence. The appeal is dismissed.

Janet Lew
Member, Appeal Division