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

Citation: *M. H. v. Canada Employment Insurance Commission*, 2017 SSTADEI 447

Tribunal File Number: AD-17-283

BETWEEN:

**M. H.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: December 5, 2017

DATE OF DECISION: December 28, 2017

Canada

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

**M. H.**, Appellant

**Dana MacDonald**, Representative for the Appellant

**Carole Robillard**, Representative for the Respondent, the Canada Employment Insurance Commission

## INTRODUCTION

[1] On February 27, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had voluntarily left his employment without just cause as per subsection 29( c) of the *Employment Insurance Act* (the "Act"). An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on April 3, 2017, and leave to appeal was granted on May 30, 2017.

[2] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the appellant or other parties are represented.

c) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## ISSUE

[3] Did the General Division fail to observe a principle of natural justice, or err in fact or law?

## THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the following are the only grounds of appeal:

> **(a)** the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> **(b)** the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> **(c)** the General Division 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.

**SUBMISSIONS**

[5] The Appellant submits that the General Division was biased because it

a. Considered additional documentary evidence of the Appellant to be irrelevant and excluded it from consideration;

b. Described his letters to the President and a senior manager of the company as insulting and disrespectful without proof;

c. Noted that the employer "misstated the evidence" in respect of the grounds on which the discipline was imposed, rather than finding the employer's statement to have been "fraudulent";

d. Accepted the employer's characterization of the Appellant's discipline as a low-level punishment;

e. Found the Appellant's mental health to be "not relevant" to the discipline he received.

[6] The Appellant submits that the General Division made an error of law in relation to the employer's failure to investigate harassment as required by the Ontario *Occupational Health and Safety Act*.

[7] The Appellant submits that the General Division based its decision on erroneous findings of fact as follows:

a. The General Division found that the Appellant's state of mind was not relevant to the discipline he received;

b. It referred to the Human Rights Commission rather than the Human Rights Tribunal;

c. It said that the Appellant spoke to a nurse about his asthma when, in fact, he spoke to the Environment, Health and Safety Administrator;

d. It said that the Appellant "denied he was loud";

e. It misunderstood the stages of discipline at the Appellant's employer;

f. It said that he provided little information about what occurred in the disciplinary meetings;

g. It ignored the "suspicious timing" of the onset of the Appellant's harassment following the Appellant's work refusal for his asthma condition.

[8] The Respondent submits that there is nothing in the General Division's decision to suggest that it was biased against the claimant in any way, or that it did not act impartially; nor is there any evidence to show there was a breach of natural justice present in this case.

[9] The Respondent argues that the General Division addressed itself to each factor in 29(*c*) that the claimant alleged to be applicable. This is evidenced in the findings/analysis (paragraphs 52 to 100, AD1-25 to AD1-38) wherein the Tribunal member addressed each factor and, ultimately, found that the claimant's reasons for voluntarily leaving his employment did not constitute just cause, pursuant to subparagraphs

- 29(*c*)(i) of the Act "harassment" (paragraphs 58 to 73);
- 29(*c*)(iii) of the Act "discrimination on the basis of disability (asthma) and failure to accommodate" (paragraphs 74 to 79);
- 29(*c*)(iv) of the Act "danger to health and safety" (paragraph 80);
- 29(*c*)(x) of the Act "antagonism with a supervisor if the claimant is not primarily responsible for the antagonism" (paragraphs 81 to 88);

- 29(*c*)(ix) of the Act "significant changes in work duties" (paragraphs 89 to 92);
- 29(*c*)(xi) of the Act; "practices of an employer that are contrary to law" (paragraphs 93 to 97), and;
- 29(*c*)(vi) of the Act "reasonable assurance of another employment in the immediate future" (paragraphs 98 to 99).

[10] The Respondent argues that the General Division's findings fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and the Act.

[11] The Respondent suggests that even if the Appellant brings himself within one of the enumerated circumstances under paragraph 29(*c*) of the Act, the onus is still on the claimant to demonstrate that he had no other reasonable alternatives to leaving when he did.

[12] The Respondent argues that an employee's dissatisfaction with his working conditions does not constitute just cause for leaving employment unless the employee can show that the conditions were so intolerable as to leave him with no option but to quit. The Respondent also argues that remaining in employment until a new job is secured is generally a reasonable alternative to taking a unilateral decision to quit a job.

[13] The Respondent submits that the General Division considered all of the evidence before it and that it did not misunderstand or misinterpret the evidence; nor did it misapply the legal test for voluntary leaving under the Act. The Respondent contends that the decision is "entirely reasonable based on the facts" and that it is transparent and intelligible.

## ANALYSIS

### Standard of Review

[14] The Respondent's reference to the reasonableness of the General Division decision and its comment respecting the application of standards of review for umpires, suggests that it considers a standard of review analysis to be appropriate. However, the Respondent does not specifically argue that I should apply the standards of review, or that reasonableness is the appropriate standard.

[15] I recognize that the grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, there has been some recent case law from the Federal Court of Appeal that has not required that the standards of review be applied, and I do not consider it to be necessary.

[16] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference. Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[17] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[18] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not provide that a review should be conducted in accordance with the standards of review.

[19] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[20] I agree with the Court in *Jean* where it referred to one of the grounds of appeal set out in subsection 58(1) of the DESD Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standard of review.

**Merits of the Appeal**

Bias: Refusal of evidence

[21] One of the Appellant's more serious challenges to the General Division decision is that the General Division member was biased. Natural justice requires an impartial decision-maker.

[22] According to the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 SCR 484, the impartiality of the decision-maker is determined based on whether their impugned conduct gives rise to a reasonable apprehension of bias. The Court elaborated as follows:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person conclude, viewing the matter realistically and practically, and having thought the matter through. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and also apprised of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.

[23] The Appellant outlines several reasons why he believes that the General Division member was biased. The first is that the General Division refused to consider the additional documentary evidence (Documents) that the Appellant submitted after the January 5, 2017, hearing, but before the decision was issued on February 27, 2017.

[24] I accept that the General Division has an obligation to consider the Appellant's request to submit additional evidence, at any time prior to the issuance of its decision, and even if the hearing itself has come to a close (see *Murray v. Canada [Attorney General]*, 2011 FC 542 ). However, this does not mean that the General Division must accept post-hearing evidence: The actual decision to admit or reject the evidence is still a discretionary one.

[25] The exercise of that discretion includes a review of such factors as whether the evidence could have been obtained with reasonable diligence for use at trial, whether it would have an important influence on the result of the case and whether the evidence is apparently credible (*Vermette v. Canadian Broadcasting Corporation* [1994] C.H.R.D. No. 14 [Q.L.]).

[26] In this case, the General Division refused the evidence but it did not refuse to exercise its discretion. It is evident that the General Division member did consider the request and review the new evidence. The General Division rejected the evidence because it did not consider it to be relevant, not because the Appellant submitted the evidence late. It is always open to the General Division to exclude evidence on the basis of relevance, no matter when that evidence may be submitted.

[27] The Appellant disagrees that the Documents are not relevant and considers the General Division member's failure to accept those Documents to be evidence of its bias.

[28] The question before the General Division was whether the Appellant had no reasonable alternative to quitting having regard to all the circumstances. As reasonable alternatives, the General Division suggested that the Appellant could have asked for sick leave if he had supportive medical evidence and then sought alternate employment while off, or he could have continued to work until he obtained another job, or he could have attempted to resolve the discipline issue internally and diplomatically.

[29] The Documents were comprised of a 2015 T4 slip from the employer, a pay slip from a post-termination employer, a letter from a charity respecting his volunteering activities, and a job posting from his employer after he left their employ. The T4 is introduced by the Appellant as evidence of his good wage and to explain why it took him so long to leave the job. The pay slip is introduced to establish the loss of income suffered as a result of the Appellant's decision to leave. The charity letter attests to his good character, mental stability and commitment to safety. The job posting is intended to suggest that the employer will go to greater lengths to accommodate potential employees than to accommodate the Appellant.

[30] The Appellant has failed to show that any of the Documents are relevant to the issues before the General Division, or to its determination. None of the Documents support the existence of circumstances that individually or together would rule out the existence of any reasonable alternative to leaving. I find no error of fact or law in the General Division's rejection of the Documents.

Bias: Description of letter to President and Senior Manager

[31] The Appellant also argues that the General Division described his letters as insulting and disrespectful, without proof. The Appellant considers this to be further evidence of bias.

[32] The Appellant admitted writing a letter to the President in which he criticized a policy as "stupid," intimated that the company was following a secret policy manual, accused the management of incompetence, and dictated to the President that he would accept nothing less than the total clearing of his record. He later wrote to a senior manager that the president "seems incapable of dealing with the matter honourably and of delegating responsibility" (GD6-35). He also says he "stand[s] by the fact that the investigation was handled unprofessionally and unfairly" and he "stand[s] by the fact that [the President's] people were incompetent" (GD6-21). The Appellant appears to believe that descriptors such as these are not insulting if they are true— and that they are true if he considers them to be true.

[33] The Appellant demands proof that the tone of his letters was insulting and disrespectful. The proof is the letter itself, or the contents of that letter as confirmed by the Appellant. I appreciate that "insulting" and "disrespectful" are subjective terms, but I cannot

find that the General Division has mischaracterized the content of the Appellant's letters to the President and to a senior manager, or that the terms of its description gives rise to any reasonable apprehension of bias.

Other circumstances giving rise to a reasonable apprehension of bias

[34] In its finding that the employer's February 10, 2016, letter "misstated the grounds on which discipline was imposed," the General Division relied on the letter's inconsistency with the Appellant's evidence and other statements. However, the evidence before the General Division did not support that the statement was made fraudulently and the General Division was not required to accept the Appellant's characterization of the statement as fraudulent.

[35] The General Division was engaged in the process of considering and weighing the evidence before it. It employed a more neutral term to indicate that it was not accepting the version of events described in the February 10, 2016, letter. That the General Division did not adopt the language of the Appellant does not suggest that it was biased.

[36] The Appellant also argues that the General Division's understanding that a written reprimand was the second stage, or its understanding that this was done instead of a first stage verbal warning, suggests that the General Division was biased. I have some difficulty comprehending this argument.

[37] It is apparent to me that the General Division correctly apprehends the progression of the Appellant's discipline. It understands that "[…] the Appellant was suspended without pay for four hours, then was back at work the next day (and taken off the inspection job), and continuing over the work days until the January 7, 2016, meeting at which the written reprimand was imposed" (paragraph 66). The General Division may have misunderstood the manner in which the employer's policy classifies discipline into different levels, but I fail to see how this is evidence of bias or how it could have influenced the result. Whether or not the employer's actions exactly tracked the steps outlined in its own progressive discipline policy may be relevant to a labour relations action. It is not relevant to whether the Appellant had just cause for voluntarily leaving his employment.

[38] The Appellant also perceives bias in the General Division's statement that his state of mind was "not relevant" to the discipline he received. This is a reference to paragraph 95 of the General Division decision. From the context, it is clear that the General Division is commenting that the Appellant was not disciplined for any act that required proof of intent (his "state of mind"). In other words, he was disciplined because his actions were considered unacceptable, not because he had some ill intent or malicious motive for his actions.

[39] Having regard to all of the Appellant's concerns as to the General Division member's impartiality, I find that the Appellant has failed to establish that he is reasonable in holding any apprehension of bias, or that any of the General Division's actions or findings would give rise to a reasonable apprehension of bias in a reasonable and informed person with knowledge of all the relevant circumstances.

**Error of Law**

[40] When questioned, the Appellant was unable to say in what sense the General Division made an error of law in its decision. At AD1B-7, the Appellant says only that the employer did not investigate the harassment against him as required by section 32 of the Ontario *Occupational Health and Safety Act*.

[41] The General Division addressed whether the employer acted contrary to law, in the context of its consideration of various circumstances that would have an effect on the Appellant's reasonable alternatives to leaving. However, the lawfulness of the employer's actions has nothing to do with whether the General Division made an error of law in its decision.

[42] The General Division employed the correct legal test, and correctly applied it to the facts in accordance with established jurisprudence. I have not discovered any error of law.

**Erroneous Finding of Fact**

[43] In order to disturb a General Division decision for an erroneous finding of fact, I must find that the General Division based its decision on that finding, and that the finding was made in a perverse or capricious manner or without regard to the material before it.

[44] The Appellant has identified a number of findings that it considers erroneous and which were described in a summary of his submissions at paragraph 9 above.

[45] I am not going to review each and every one of the claimed errors of fact. I have discussed the claimed errors at paragraphs 9(a) and 9(e) in relation to bias, and they are inconsequential. Paragraphs 9(b) and 9(c) are likewise irrelevant to the General Division's final determination.

[46] In response to paragraph 9(d), whether the Appellant had "never denied he was loud" has little to do with whether he had reasonable alternatives to quitting. It could only be relevant if his credibility had been impacted. I understand that the Appellant maintains that he did not deny he was loud (although his statement at GD6-14 suggests that he denies yelling and he states at AD9- 9 that "it is reasonable to be 'loud' in a conversation in a deafeningly 'loud' factory where everybody is required to wear ear protection.") However, it is clear that the General Division understood that the work environment was loud and that the workers, including the Appellant, were wearing earplugs (paragraph 28) such that, if he denied he was loud, he would be understood to be denying that he was louder than necessary. His evidence was not rejected on this point, nor do I see any evidence that his credibility was affected generally.

[47] The General Division's reference to a lack of details concerning disciplinary meetings is restricted to the context. The General Division first refers to the lack of detail of what occurred at the Appellant's first meeting with his supervisors on December 16, 2015, at paragraph 65 in relation to the claimed circumstances of harassment (subparagraph 29[*c*][i]). The General Division says that "[i] n the absence of details, the Tribunal cannot conclude that the actions of the employer on [December 16, 2015] constitute harassment or discrimination." Having reviewed the description of what transpired at the first meeting (from GD6-14, and highlighted again at AD1B-10), I agree with the General Division that there is a lack of detail as to any claimed harassment or discrimination.

[48] With regard to the General Division's reference to a lack of detail at paragraph 84, the General Division describes this lack of detail as it relates to the existence of "antagonism with a supervisor if the claimant is not primarily responsible for the antagonism" from

subparagraph 29(*c*)(x) of the Act. The General Division acknowledges that the Appellant provided dates and broad characterizations of the process and people involved but states again that he provides "almost no information about what happened at those meetings, *on which to base a finding of who is responsible for the conflict*" [my emphasis]. I agree with the General Division that there is a lack of detail as to what was discussed at the meeting or meetings, as those discussions relate to the Appellant's claimed antagonism with his supervisor or who is responsible for that antagonism.

[49] I do not find that the General Division has ignored or misunderstood the Appellant's evidence as to the events of the disciplinary meetings. Rather, I find that the "lack of detail" referenced by the General Division was in relation to the Appellant's efforts to establish the particular circumstances described above.

[50] As to the relationship between his asthma, his refusal to work, and his discipline issues, the General Division addressed this at paragraph 78, finding that the employer worked to accommodate the Appellant's asthma. The Appellant is suspicious that these factors are related because he began to have trouble with supervisors/management shortly after he had completed a refusal to work (based on his asthma). The Appellant may be suspicious, but he did not substantiate those suspicions with evidence on which the General Division might have found discrimination.

[51] Furthermore, at the time he quit, his refusal to work had been accepted and he had been transferred off the line where he would be exposed to welding fumes as he had requested. This had also addressed his issue with the employer's change of process and the practice of binning deficient parts that precipitated the Appellant's initial dissatisfaction. Thus, if his employer had discriminated against him in any fashion, it appears to have been addressed by the time the Appellant quit. At his Appeal Division hearing, the Appellant could not say in what manner his employer was refusing to accommodate him at the time he left his employment. He said only that he felt he was being punished for having raised the issue of not being accommodated.

[52] As noted above, the Appellant has identified some factual errors or possible factual errors, but I find that none were of significance such that the decision would have been

different had the General Division understood those facts correctly. I do not find that the General Division based its decision on any of the errors claimed by the Appellant, or that it otherwise found the facts that it did in a perverse or capricious manner or without regard to the material before it.

[53] The General Division considered the correct legal test and correctly applied it to the facts. The Appellant has failed to establish that the General Division made any error in its assessment of the circumstances, or in its consideration of reasonable alternatives to voluntarily leaving. I find no reason to disturb the General Division decision that the Appellant voluntarily left his employment without just cause.

## CONCLUSION

[54] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division