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

Citation: *J. D. v. Canada Employment Insurance Commission*, 2018 SST 184

Tribunal File Number: AD-17-901

BETWEEN:

J. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 26, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant (Claimant) had been working in a managerial role but he quit his job after he was returned to his former customer service representative position. Although his hourly rate was the same in both roles, he could no longer be guaranteed the same number of hours, and he felt uncomfortable returning to work with co-workers that he had trained. He also lost an hourly bonus, along with other employees of the company.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) denied his claim for benefits on the basis that he had voluntarily left his employment without just cause and the General Division of the Social Security Tribunal upheld the Commission's decision on appeal. The General Division found that the managerial role, in what is termed the "One-Up" program, had been a temporary development opportunity and that the Claimant's return to his previous role did not represent a significant modification in the terms and conditions respecting wages or salary, or a significant change in work duties. The General Division acknowledged that there may have been some unresolved conflict in the workplace at the time the Claimant quit, but considered that the Claimant could have taken steps to resolve the conflict before deciding to leave.

[4] The Claimant is seeking leave to appeal on the basis that the General Division preferred the employer's hearsay statements over his own direct testimony and that he was not given the benefit of the doubt. The Claimant argues that this was an error of law and that it resulted in erroneous findings of fact.

[5] I cannot find that there is a reasonable chance of success on appeal. In my view, the Claimant's real issue is that he disagrees with the manner in which the General Division weighed the evidence and with its conclusion. The Claimant has failed to make an arguable case that the manner in which the General Division weighed the evidence amounted to an error of

law. Similarly, the Claimant has not pointed to any evidence that was overlooked or misunderstood by the General Division when it weighed the evidence.

ISSUES

[6] Is there an arguable case that the General Division made an error in law in preferring hearsay statements over direct testimony?

[7] Is there an arguable case that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it, in concluding that there had not been a significant modification in the terms or conditions of the Claimant's salary or wages?

[8] Is there an arguable case that the General Division erred in law in failing to consider all of the circumstances, including the circumstance set out in subparagraph 29(*c*)(ix) of the *Employment Insurance Act* (Act)?

[9] Is there an arguable case that the General Division erred in law in failing to consider labour relations principles?

[10] Is there an arguable case that the General Division erred in law by failing to give the Claimant the benefit of the doubt?

ANALYSIS

[11] The General Division is required to consider and weigh the evidence that was before it and to make findings of fact. It is also required to apply the law. The law would include the statutory provisions of the Act and *Employment Insurance Regulations* (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must apply the law to the facts to reach its conclusions on the issues that it must decide.

[12] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a General

Division decision only if the General Division has made certain types of errors, which are called "grounds of appeal."

[13] Subsection 58(1) of the *Department of Employment and Social Development Act* states that the only grounds of appeal are the following:

> 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; and
>
> 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.

[14] Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion and the result.

[15] At this stage, I must find that there is a reasonable chance of success on one or more grounds of appeal in order to grant leave and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1].

Issue 1: Is there an arguable case that the General Division made an error in law in preferring hearsay statements over direct testimony?

[16] I do not accept that there is an arguable case that the General Division erred in law by preferring evidence arising from an unsworn statement over direct testimony. The Claimant is correct that direct testimony is considered *generally* more reliable than unsworn hearsay statements but this only means that it is normally afforded more weight, all other things being equal. Evidentiary rules that might exclude hearsay evidence in a court of law do not apply to the Tribunal. There is no legal rule or principle that would require a trier of fact to always prefer direct testimony over hearsay statements.

---

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[17] In this case, the General Division explains that it preferred the employer's statements about the nature of the managerial position because the employer's characterization was more "reasonable," being supported in several particulars by the Claimant's own testimony (see paragraph 41). The General Division preferred the employer's statements in relation to bonus and compensation changes because they were considered objective and neutral in terms of the appeal outcome (paragraph 45).

[18] There is no arguable case that the General Division erred in law by giving more weight to some of the employer's statements than to the Claimant's testimony.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it, in concluding that there had not been a significant modification in the terms or conditions of the Claimant's salary or wages?

[19] There is no arguable case that the General Division erred in finding that there had not been a significant modification in the terms or conditions of the Claimant's salary or wages. The Claimant's argument that there had been a significant modification in the terms or conditions of salary derives from the fact that the Claimant was returned to his previous position answering the phones after serving for a time in a managerial/supervisory role. The Claimant argued before the General Division that one of his reasons for leaving his employment was that he was demoted. The result of this "demotion" was that he was guaranteed fewer hours which translated to less pay. He also argued that the employer stopped offering a one-dollar-per-hour bonus in January 2016, although this does not appear to be related to his change of position.

[20] The General Division ultimately found that there had been no demotion on the basis that the employer had never intended the Claimant's placement in the One-Up program to be a permanent placement. The Claimant now argues that the General Division ignored his own evidence that he had been in a managerial/supervisory role for 18 months, and that his evidence ought to have been accepted in preference to the employer's statement that the Claimant had been in the One-Up program for only two months.

[21] However, it does not appear that the General Division either ignored or misunderstood the evidence. It alludes to both the employer's statement (paragraph 14) and the Claimant's testimony (paragraphs 26 and 40) as to the length of time that the Claimant had been in the program.

[22] The General Division does not specify whether it accepted the Claimant's testimony or the employer's statements on this particular point. However, the General Division does state more generally that it gives more weight to the information from the employer than to the Claimant's evidence that he was promoted to the position of manager. Ultimately, the General Division prefers the employer's characterization of the Claimant's management role as a temporary developmental opportunity having regard to other factors in evidence sourced from both the Claimant and the employer.

[23] One such factor is the Claimant's own testimony that he had been selected to participate in what was informally called the One-Up program (despite his present contention that "the 'one-up' was not even talked about or recognized in the workplace"). According to the employer's statement to the Commission (GD3-25), this was a program offered by the employer for employee development.

[24] The General Division also relies on the fact that the placement did not come with any increase in pay rate, that there had been no formal job offer for the role, and that the Claimant had stated to the employer that he did not want to go back to his role answering calls because he would consider it a demotion (paragraph 41).

[25] The principal factual issue before the General Division was whether the Claimant's placement was a temporary role or a permanent promotion. The General Division reached its decision with regard to a number of factors. While the length of time that the Claimant held the managerial/supervisory role may well be one relevant factor, given the other evidence before the General Division, I do not find it to be of such significance as to require the General Division to articulate a finding as to the length of time the Claimant was in a managerial-type role. The General Division is not required to reference each and every piece of evidence and it is not my role to interfere with the manner in which the General Division has assessed the evidence, unless the General Division bases its decision on a finding of fact that is made in a

perverse or capricious manner or without regard to the material before it. The General Division appears to have appreciated the differing accounts of the time in which the Claimant participated in the One-Up program, but it did not base its decision on the time the length of time that the Claimant was in the program: Its finding that the Claimant was "selected to participate in a program that took him away from his regular duties for a finite period" is supported on other grounds. I am not satisfied that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[26] Having accepted that the Claimant's eventual reversion to his original duties and schedule was contemplated at the time he entered into the One-Up program, it was open to the General Division to find that the Claimant's return to his regular position was not a significant modification to the terms of wages or salary.

[27] The Claimant also argued that the evidence was "clear and unequivocal" as to the "arbitrary removal" of the one-dollar-per-hour bonus from employees starting in January 2016. I will assume that the Claimant is suggesting his evidence was ignored or misunderstood in some fashion.

[28] There is no dispute that the bonus had been removed. However, the removal of the bonus appears to have extended to employees other than the Claimant and to have had no association with his development opportunity or its conclusion. The employer stated that there had been a change in compensation structure in January 2016 but that there had been no specific decrease in actual wages. The General Division chose to prefer the employer's statements in evidence because it judged the employer to be "objective and neutral" in terms of the appeal outcome (paragraph 45). The General Division appears to have understood and considered all the evidence related to the loss of bonus pay, and the General Division's finding that the loss of bonus pay did not represent a significant modification to terms and conditions of wages or salary was supported by evidence.

[29] Therefore, the Claimant has not raised an arguable case that the General Division erred in finding that there had not been a significant modification to the terms of his wages or salary in respect of this bonus.

Issue 3: Is there an arguable case that the General Division erred in law in failing to consider "all of the circumstances" including the circumstance set out in subparagraph 29(*c*)(ix) of the Act?

[30] There is no arguable case that the General Division erred in law in failing to consider the circumstance in subparagraph 29(*c*)(ix)—a significant change in work duties. Paragraph 29(*c*) states that just cause exists where a claimant has no reasonable alternative to leaving having regard to all of the circumstances. The non-exhaustive list of circumstances that follows includes a significant change in work duties.

[31] The Claimant argues that his demotion from "Training Manager" to phone operator was a significant change in work duties. The Claimant had described his expanded duties in the managerial role in connection with his reconsideration request (GD3-29) and he had told the Commission that he felt uncomfortable working with peers that he had helped to train (GD3-24). In addition, the General Division notes the Claimant's discomfort with returning to his regular position on the phone at paragraph 43. I am satisfied that the Claimant had raised his concern with a change in work duties at the General Division.

[32] However, the General Division reasons do not address the particular circumstance set out in subparagraph 29(*c*)(ix)—a significant change in work duties. The reasons focused on the impact any change of work duties would have on wages or salary, the circumstance described in subparagraph 29(*c*)(vii).

[33] Nevertheless, the General Division canvassed the circumstances of the Claimant's "demotion" when it considered its effect on wages and salary. The Claimant has argued those same circumstances in support of his claim to a significant change in work duties. However, there was no evidence before the General Division that the Claimant's work duties, on return to the phones, were significantly altered from what they had been before he entered the One-Up program. Therefore, the General Division's factual finding that the Claimant had not been demoted but that he had reverted to his original role after a temporary placement necessarily implies that he had no significant change in work duties. The General Division's finding that the Claimant had not been demoted means that he suffered no consequences attributable to that demotion, whether changes in wages or changes in work duties.

[34] Therefore, I do not accept that there is an arguable case that the General Division failed to consider "all the circumstances."

Issue 4: Is there an arguable case that the General Division erred in law in failing to consider labour relations law or principles?

[35] There is no arguable case that the General Division erred in failing to consider labour relations law or principles. The Claimant stated that the employer fired his co-worker girlfriend and that this affected his relationship with the employer, resulting in his demotion and his eventual resignation. He suggests that the historical/current jurisprudence recognizes this as a form of constructive dismissal and that the General Division erred in law in not considering these circumstances as "just cause." The Claimant argues that the removal of the bonus structure and the unrealized promised salary increase also contributed to his constructive dismissal.

[36] The legal test for Employment Insurance purposes is "just cause" as defined in paragraph 29(*c*) of the Act. One of the circumstances that must be taken into consideration in determining whether a claimant has no reasonable alternative to leaving is "antagonism with a supervisor if the claimant is not primarily responsible for the antagonism" (subparagraph 29(*c*)(x)), if such antagonism is found to exist.

[37] The historical/current jurisprudence relating to wrongful dismissal, constructive dismissal or other labour relations claims is not applicable, except to the extent that the circumstances supporting any such claim may also impact a claimant's reasonable alternatives to leaving his employment.

[38] The General Division acknowledges the Claimant's concern with his deteriorating relationship with his employer, noting that there may have been "some unresolved conflict." However, it holds that the Claimant could have taken steps to resolve the conflict with the employer before leaving his employment. In support of its conclusion, the General Division references Federal Court of Appeal decisions that have held that there is generally an obligation

on a claimant to attempt to resolve workplace conflicts with an employer or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job.[2]

[39] To be successful on appeal, the Claimant would have to establish that he had no reasonable alternative but to leave. The General Division makes no specific finding as to the manner in which the firing of the Claimant's girlfriend may have affected his relationship with the employer. However, the General Division's decision is not based on whether the Claimant's concerns were legitimate or well-founded, but on the Claimant's failure to attempt to resolve these concerns with his employer before resigning (paragraph 46). Similarly, the General Division considers the availability of other reasonable alternatives to leaving in relation to the Claimant's discomfort with returning to his old position (paragraph 43), and his concern about missing opportunities for promotion (paragraph 42).

[40] The General Division applies the test in paragraph 29(*c*) and references appropriate jurisprudence. The Claimant has not raised an arguable case that the General Division erred in law in failing to consider that the Claimant was "constructively dismissed" or in failing to consider this equivalent to "just cause." Constructive dismissal might justify severance in the labour law context but, under the Act, the Claimant must exhaust all reasonable alternatives to leaving having regard to all the circumstances.

[41] I find that the Claimant has not raised an arguable case that the General Division erred in finding that there had not been a significant change in the Claimant's work duties.

Issue 5: Is there an arguable case that the General Division erred in law by failing to give the Claimant the benefit of the doubt?

[42] There is no arguable case that the General Division erred in failing to give the Claimant the benefit of the doubt under subsection 49(2) of the Act. Subsection 49(2) provides that the Commission shall give the claimant the benefit of the doubt on circumstances or conditions that have the effect of disqualifying the Claimant from benefits, but only if the evidence on each side of the issue is equally balanced.

---

[2] In support of this proposition, the General Division cited *Canada (Attorney General) v. White*, 2011 FCA 190; *Canada (Attorney General) v. Hernandez*, 2007 FCA 320; *Canada (Attorney General) v. Murugaiah*, 2008 FCA 10.

[43] In this case, the Claimant was disqualified as a result of a finding that he left his employment without just cause. In order for the Claimant to have been found to have just cause, the General Division would have had to find that he had no reasonable alternative to leaving. Therefore, subsection 49(2) would be addressed to those circumstances or conditions that would be taken into account in determining whether the Claimant had no reasonable alternative to leaving.

[44] I note that the onus remains on the Claimant to establish the existence of circumstances that deprived him of reasonable alternatives, and that the "benefit of the doubt" as defined in subsection 49(2) can be applied only where the evidence on either side of the issue is equally balanced.

[45] There is no suggestion in the decision that the General Division considers the evidence to be equally balanced in respect of its findings on the circumstances. Indeed, the General Division makes its determinations based on its assessment of the relative weight of the evidence, such as the evidence from both the Claimant and the employer statements on various circumstances (see paragraphs 41–46). In reaching determinations after considering evidence, or in assigning more weight to some evidence than to other evidence, it is clear that the General Division does not consider the evidence to be equally balanced. If the evidence is not evenly balanced, subsection 49(2) has no application and it would not be necessary for the General Division to reference it.

[46] The Claimant has not raised an arguable case that the General Division erred in failing to give him the benefit of the doubt.

Is there any other error apparent on the face of the record that would suggest an arguable case?

[47] I have reviewed the documentary evidence that was before the General Division as well as the audio recording from the hearing, and I have not discovered evidence that was ignored or misunderstood, nor was there any apparent breach of natural justice or error of jurisdiction.

[48] No error of law is apparent, whether on the face of the record or otherwise.

[49] I find that the Claimant does not have a reasonable chance of success on appeal.

CONCLUSION

[50] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division