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

Citation: *W. D. v. Canada Employment Insurance Commission*, 2018 SST 1254

Tribunal File Number: AD-18-441

BETWEEN:

W. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed

OVERVIEW

[2] The Appellant, W. D. (Claimant), worked as a telecommunications technician but quit his job for a number of reasons. His call-out service area had been changed, resulting in increased commuting times and difficulties at home; he had outstanding issues of unpaid work and overtime with his employer; and he felt the employer was limiting his access to work and income. The Respondent, the Canada Employment Insurance Commission (Commission), denied his application because it did not accept that the Claimant's reasons were just cause for leaving. The Commission maintained this decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division agreed with the Commission that the Claimant did not have just cause, because he had reasonable alternatives to leaving, and it dismissed the Claimant's appeal. The Claimant now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division made an erroneous finding of fact that disregarded the significance of the Claimant's unpaid overtime, erred in law by failing to consider that there had been a change in job duties, and made another erroneous finding of fact that the Claimant's reduced income was the result of limitations he placed on the work that he would accept.

[4] I have made the decision the General Division should have made, and I find that the Claimant had just cause for leaving his employment because he had no reasonable alternative to leaving.

ISSUES

[5] Did the General Division find that the Claimant had not been entitled to overtime based on a failure to consider that the Claimant's job duties required him to work overtime?

[6] Did the General Division err in law by failing to have regard for whether the employer's practice of not paying overtime was contrary to law?

[7] Did the General Division err in law by failing to determine whether there had been a significant change in the Claimant's work duties?

[8] Did the General Division find that the Claimant limited his own work from April 2017, resulting in his reduced earnings, without regard for the call-out area changes imposed by the employer and other evidence that the employer restricted the jobs assigned to him?

ANALYSIS

General Principles

[9] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[10] However, the Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[11] 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; 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.

Issue 1: Did the General Division find that the Claimant had not been entitled to overtime based on a failure to consider that the Claimant's job duties required him to work overtime?

[12] The General Division determined that the Claimant did not have just cause to leave his employment for a failure of the employer to pay overtime because he did not request or obtain authorization before working overtime, in accordance with the Employee Handbook (Handbook). This necessarily implies that the General Division rejected that the Claimant had not been entitled to be paid for overtime work.

[13] Except in relation to the Claimant's argument that he was harassed, the General Division gave no further consideration to the Claimant's argument that his employer required him to work excess hours and did not pay him overtime and that this is one of the Claimant's reasons for his belief that he had no alternative but to quit.

[14] The General Division misunderstood the Handbook evidence in two respects: first, the Handbook stipulates that **hourly paid** employees will receive overtime pay in accordance with federal wage and hour laws.[1]

[15] First, the Handbook's overtime provisions appear to be addressed to hourly paid employees only. Therefore, it is not clear that the Handbook's "approval and authorization" requirement was intended to apply to overtime worked by piecework employees. The Claimant said that he was paid on a piecework basis (as noted by the General Division at paragraph 19 of its decision). He also testified that he understood that the managerial approval was required for employees paid by the hour, but that he could appreciate how such a pre-authorization requirement could be applied to jobs paid on an hourly basis.

[16] The Handbook also says that the employer "may schedule employees to work overtime hours" and that "when possible, [the employer] will try to give [the employee] advance warning of a mandatory overtime assignment."[2] In other words, the Handbook contemplates that such a person may be **required** to work overtime hours **without notice**.[3] This suggests that employees

[1] GD3-46.
[2] GD2-42.
[3] GD2-42.

may have to presume approval for overtime in the case of mandatory overtime, for those employees that the employer considered entitled to request overtime.

[17] The Claimant stated that the employer did not pay him overtime, even though the jobs assigned to him could require him to work overtime to satisfy the employer's expectations. . He testified that he was expected to complete jobs on the same day they were assigned, regardless of how much time the job required.[4] Furthermore, there is evidence that the employer was aware, from at least December 27, 2016, of the Claimant's dissatisfaction that the employer did not pay him overtime,[5] but there is no evidence that the employer adjusted the Claimant's assignments or scheduling so that the Claimant did not require overtime hours to complete his work. When the Commission asked about this, the employer would not discuss whether the Claimant was paid overtime or had any entitlement to overtime.[6]

[18] To determine whether the Claimant's schedule imposed on him a requirement to work overtime, it was necessary for the General Division to consider the Claimant's evidence of his schedule and the hours he was required to work and did work. However, the General Division did not refer to the Claimant's testimony that the nature of his work was such as to **require** him to work overtime, and it misunderstood the significance of the Claimant's omitting to obtain specific authorization and approval. This likely affected the manner in which the General Division evaluated and weighed the "excessive overtime work or refusal to pay for overtime work" circumstance.[4] In written submissions to the Appeal Division, the Commission acknowledged that the General Division "may not have referred to testimony that the nature of the work required overtime which may be different than requesting overtime through management channels."[7]

[19] The second respect in which the General Division misunderstood the Handbook or the application of said Handbook concerns the employer's legal obligation to pay overtime based on federal labour law. The General Division justified its (implied) finding that the Claimant was not entitled to overtime in part on the fact that he was paid on a piecework basis. However, the obligation to comply with federal labour law applies regardless of whether an employee works

[4] GD3-43.
[5] GD3-92, GD3-99.
[6] GD3-150.
[7] AD2-3

on an hourly basis or on a piecework basis. The employer cannot contract out of its obligation to pay the Claimant in accordance with federal wage and hour laws, whether the Claimant was an "hourly paid employee" or not.

[20] The Claimant testified that he had read that he was still entitled to overtime if his work exceeded 8 hours a day or 40 hours a week, even though his work was paid on a piecework basis. In his application for benefits, the Claimant wrote that he had discussed his rights to overtime with a Labour Standards officer. He also alluded to the *Canada Labour Code* as providing some basis for his request to be paid for his overtime in an email request to his employer.[8] He claimed that "[t]he employment standards specifies [*sic*] that for piece rate workers, overtime is the total amount paid in the period where the overtime occurred divided by the total non-overtime hours worked in the same period times 1.5 for each overtime hour."

[21] The General Division acknowledged the Claimant's testimony about the overtime hours he worked, but it failed to analyze whether the Claimant was correct in his understanding of the law. As set out in section 64(1) of the DESD Act, the Tribunal has the authority to decide any question of law or fact that is necessary for the disposition of any application made under the DESD Act. It was therefore necessary for the General Division to determine, based on the Claimant's evidence of overtime hours worked, whether the employer was required to pay him for his overtime[9] according to the *Canada Labour Code*. The Commission accepted that there is a significant issue regarding an employer's legal obligation to pay even pieceworkers overtime.

[22] Despite the Commission's position that the decision was one of the reasonable outcomes, given all the circumstances, I accept that the General Division failed to have regard to the Claimant's evidence that his employer required him to work overtime and that the employer may have been required by law to pay him for it. The General Division therefore erroneously found that the Claimant "did not have just cause to leave his employment for a failure of his employer to pay overtime."[10]

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[8] GD2-89.
[9] GD3-39 (Item A-1-4).
[10] General Division decision, para 29.

[23] Therefore, I find the General Division erred in law under section 58(1)(c) of the DESD Act.

Issue 2: Did the General Division err in law by failing to have regard for whether the employer's practice of not paying overtime was contrary to law?

[24] A failure to pay overtime where required by law would also be a practice contrary to law under section 29(c)(xi) of the *Employment Insurance Act* (EI Act) and therefore a relevant circumstance. However, because this particular practice is specifically captured under section 29(c)(viii), which was one of the circumstances that the General Division took into consideration, I accept that the General Division considered section 29(c)(xi) of the EI Act implicitly in its assessment of reasonable alternatives.

Issue 3: Did the General Division err in law by failing to determine whether there had been a significant change in the Claimant's work duties?

[25] The General Division accepted that the employer had permanently changed the Claimant's call-out area suddenly and in a manner that was poorly communicated, with the result that the Claimant's home community was no longer within his new call-out area. The Claimant testified that he was a single parent with a young daughter and a teenage son with psychological problems. The Claimant also testified that the additional commuting time created difficulties in ensuring that his children were cared for and stated that he was unable to make alternate arrangements for his children on a permanent basis. None of this evidence was disputed.

[26] The Claimant lived in a town to the northwest of a major city. In late March 2017, he was reassigned to work in the northeastern area of the city, including at least one satellite community directly to the east of the city. This resulted in up to a two-hour commute each way and added up to four unpaid hours to his workday. On April 10, 2017, and before the Claimant was aware that his employer had taken a decision to stop servicing the "fringe areas,"[11] including the area around and including the Claimant's town, the Claimant requested that he be returned to his former call-out area. He was told that his former operating area, including the town where he lived, was no longer being serviced as of April 1, 2017. On his further request, the employer

[11] GD3-132.

agreed to temporarily restrict his travel radius to keep him in the northwest quadrant of the city,[12] but he was warned that he might have a reduced workload.

[27] In its later analysis of whether the Claimant had reduced hours and earnings, the General Division accepted that the Claimant's earnings were reduced, but it attributed this to the Claimant's choice to limit his work by requesting that he be limited to a certain operating area, namely the operating area closest to his home.

[28] It is apparent that the Claimant's request that his employer limit his call-out area is essentially a request that employer not change the terms of his employment so as to require substantial unpaid travel and long days away from his family. The General Division found that the changes in the Claimant's operating area were "a necessity," a finding that may be applicable to the question of whether the employer's actions amounted to harassment, but one that is not relevant to the question of whether the Claimant had experienced a significant change in work duties.

[29] The General Division found that the Claimant's operating area had been changed and that the Claimant's reduced hours were the result of his refusal to accept the call-out area reassignment that the employer imposed. It apparently also accepted that the reassignments produced an increase in the Claimant's commuting time and did not reject the Claimant's evidence as to his resulting difficulties with caring for his children, although it did not accept that he was **prevented** from properly caring for his children or that he had no child-care options. Nonetheless, I accept that the General Division findings tend to the conclusion that the reassignment represented a significant change in work duties.

[30] Section 29(c) of the EI Act requires consideration of **all** the circumstances, including section 29(c)(ix): "significant change in work duties." The General Division failed to make such a finding. This is an error of law under section 58(1)(b) of the DESD Act.

[12] GD3-131.

Issue 4: Did the General Division find that the Claimant limited his own work from April 2017 resulting in his reduced earnings, without regard for the call-out area changes that the employer imposed and other evidence that the employer restricted the jobs assigned to him?

[31] At the General Division, the Commission accepted that the issue of reduced hours and earnings was an area of concern but argued that this was not an intentional action on the part of the employer. The Tribunal agreed that the Claimant's earnings were "trending to the low side from April 2017 onward"[13] but found that the Claimant's reduced hours and earnings were not intentional.[14] It also found that the Claimant was limiting his own work.[15]

[32] Once again, the employer's intentions are relevant only to the Claimant's suggestion that there was harassment or undue pressure to resign. For the purpose of determining whether there has been a significant modification in the terms and conditions respecting wages or salary, the General Division needs to concern itself only with the effect of employment changes on the claimant. It is not relevant whether the employer had no choice but to reassign operating areas or whether it instead sought to force the Claimant to quit by limiting his access to work.

[33] As to the General Division's finding that the Claimant was limiting his work beginning in April 2017, this finding ignored the Claimant's evidence. The General Division acknowledged that the Claimant had testified that he was still getting called out to jobs outside the area, but it found that the evidence supported that he was refusing jobs and that it was the Claimant, and not the employer, who was limiting the Claimant's work.

[34] The General Division did not refer to the Claimant's unequivocal denial that he had chosen to limit the number of jobs assigned to him by identifying a preferred sector in which he wished to work. There is no dispute that the Claimant requested that he be restricted to this sector, among other proposals,[16] and that the employer expressed a willingness to restrict him to the northwest quadrant of the city, an area that would have included his preferred sector. However, the Claimant testified that this had nothing to do with his decreased hours or earnings. He said that the biggest change in his work assignments occurred when he returned to work after

[13] General Division decision, para 41.
[14] General Division decision, para 42.
[15] General Division decision, para 47.
[16] GD3-112.

his suspension in December 2016. The Claimant testified that he was assigned two jobs per day on his return to work. This didn't change when he was reassigned to the northeast of the city, and it didn't change when he asked to be restricted[17] to the sector nearest to his home,[18] which was not the area he worked in before his reassignment, except for one period towards the end of his employment when he had days in which he was assigned one job or none.[19] The Claimant said he had been "geo-locked" to particular call-out sectors several times in the past and that he had always been given between five and seven jobs per day, even when geo-locked.

[35] As the General Division noted, the Claimant testified that he wasn't actually geo-locked after he and his employer agreed that he could temporarily work in the northwest quadrant of the city, but that he still had to drive to the other end of the city for jobs. This was supported by a prior consistent statement to the Commission in which the Claimant said that even after the employer "lock[ed] him in to work in the Crowchild area," he still worked in areas other than Crowchild that required him to commute for hours and that he had been willing to make changes to his work area if he were given time to rearrange his work life.[20]

[36] Furthermore, the employer's statement that the Claimant refused work—in an area 45 minutes further from his home than the center of his preferred sector—in the adjoining sector on April 30, 2017,[21] suggests that the employer did not limit the Claimant to one particular call-out sector as it claims,[22] although he may have been limited to the northwest quadrant temporarily or inconsistently. The General Division considered that the Claimant's refusal of a job in the adjoining sector supported its finding that he refused work, but it does not reference the Claimant's statement that the reason the April 30, 2017, job was reassigned was because he was not able to physically get to the location on time,[23] as opposed to voluntarily refusing work. It also failed to acknowledge that this same "refusal" corroborates the Claimant's evidence that his employer was assigning him work outside of his preferred sector, contrary to the employer's claim that it had restricted his call-outs to that sector.

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[17] Recording of the General Division hearing at 00:35:15.
[18] Recording of the General Division hearing at 00:33:50.
[19] Recording of the General Division hearing at 00:35:60.
[20] GD3-155.
[21] GD3-153.
[22] GD3-150.
[23] GD3-47.

[37] The General Division does not state the evidence on which it relied to find that the Claimant was limiting his work. In the General Division decision, there are only two apparent possibilities identified in the decision.[24] The first possibility is the evidence of the employer's offer to the Claimant of a temporary limit to his travel radius with a warning that this might cause a reduced workload. The second possibility is the correspondence around the April 30, 2017, job that was described above.

[38] The employer's offer and associated statements to the Commission signal an intention to limit the Claimant's call-out area, but the employer's evidence is inconsistent regarding what limits it actually agreed to apply or did apply. The Claimant's testimony disputed the characterization of the events of April 30, 2017, as a refusal and challenged the conclusion that the employer restricted the Claimant to his preferred sector.

[39] The General Division made no reference to the Claimant's direct testimony of where he was actually assigned, despite his stated preference, or to the Claimant's repeated assertions that the limitations on his work predated his reassignment and did not change no matter where he worked in 2017. Much of the Claimant's testimony was corroborated by his own previous consistent statements, but the General Division likewise did not refer to those statements. The General Division gave no reason for preferring the employer's stated intentions and hearsay statements to the Claimant's direct and consistent evidence.

[40] Therefore, I find the General Division erred. Its finding that the Claimant's workload was reduced because he limited the area in which he would work was made without regard for the material before it.

[41] Even if I had accepted that the General Division's finding had regard to all the evidence and that the Claimant's reduced earnings in April 2017 and afterwards were a consequence of the availability of work in the call-out sector to which the Claimant restricted himself, the finding might still be said to be perverse or capricious.

[42] I consider it significant that the Claimant requested the geographic restriction **in response** to the employer's reassignment of his call-out area. The General Division acknowledged the

[24] General Division decision, para. 46

Claimant's evidence that described the manner in which the reassignment affected him,[25] but it did not consider the significance of the changed work duties in terms of the Claimant's decision to request that he be assigned work only in the nearest call-out area. To the extent that the Claimant's preferred call-out sector might present fewer opportunities for work and to the extent that the Claimant was actually restricted to work within that sector, the evidence on which the General Division relied could have as easily supported a finding that the first or most direct cause of the reduced hours was the employer's withdrawal of service to areas that generated work that was near the Claimant's home.

[43] However, the General Division did not consider the evidence of a causal relationship between the changed work duties and the Claimant's reduced income and did not factor it into its finding that the Claimant's actions were responsible for his reduced income. Therefore, the finding that the Claimant had reduced income because he limited his own work, such that a reasonable alternative to leaving would be to **not** limit his work, is perverse or capricious, or failed to consider the reasons that he limited his work.

[44] For the reasons above, I find that the General Division erred in law under section 58(1)(c) of the DESD Act.

CONCLUSION

[45] The appeal is allowed.

REMEDY

[46] Having allowed the appeal, I have the authority under section 59 of the DESD Act to give the decision the General Division should have given; to refer the matter back to the General Division for reconsideration; or to confirm, rescind, or vary the General Division decision in whole or in part.

[47] I consider the record to be complete, so I will give the decision the General Division should have given.

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[25] General Division decision, paras 12 and 38.

[48] According to section 29(c) of the EI Act, a claimant will be found to have just cause for voluntarily leaving an employment if the claimant has no reasonable alternative to leaving, having regard for all the circumstances.

[49] I have already found that the General Division failed to find whether the Claimant had a significant change in work duties. I have also found the General Division findings that there was insufficient evidence that the Claimant had not been paid overtime to which he was entitled and that the Claimant chose to accept reduced earnings were both findings that were perverse or capricious or failed to consider the material that was before the General Division. These are the findings that I will need to revisit to make the decision the General Division should have made.

Significant change in work duties

[50] The Claimant left his employment on June 23, 2017, about 2 ½ months after learning that this reassignment was to be permanent in mid-April. I find that the reassignment of the Claimant's call-out area resulted in significantly increased commuting time This, in turn, resulted in long days and interfered with his ability to care for his family, such that the Claimant had to request some restrictions on how far he could be required to travel.

[51] While the employer appeared willing to allow the Claimant to work temporarily within a more geographically restricted area that was closer to his home than the area to which he was assigned in March 2017, I find that the Claimant continued to be assigned, and to accept, work that required him to commute significantly greater distances than before the elimination of his former service area.

[52] The General Division found that the Claimant could have continued to work for his employer while looking for alternative employment and accepting an increased commute time. In the Claimant's application for benefits, he stated that he had looked for another job with another employer before leaving. He explained:

> I have made great efforts to find another job by sending countless resumes via the Internet and even by courier mail. I have tried looking at other types of jobs not related my field, even part-time or temporary jobs

> but I have only had a few interviews and no commitments by the seekers. Most of my free time is job searching.[26]

[53] The Claimant testified at the General Division about his job search efforts. He cited two positions and employers to whom he recalled applying in February 2017. He also stated that he had applied for jobs in May and April, described two additional positions in Calgary, and mentioned that he had applied to other employers in British Columbia. It was not clear from his testimony whether these additional applications were in February, May, or April.

[54] The Claimant said that he usually parked somewhere between his morning call-out job and his afternoon/evening call-out job and that he did use some of that time to look for work and to send resumes. He told the Appeal Division that his review of job alerts and his applications were done **electronically** while he was waiting. He also said he was desperate about his finances and depressed.

[55] I accept the Claimant's evidence that he was actively seeking alternate employment from at least February 2017 until he quit. I also accept that, in the period from January to June 23, the Claimant continued to work for his employer despite significantly reduced paid hours and, from the end of March to June 23, he worked with reduced paid hours **as well as** additional commuting time and work-scheduling that could require him to work long hours regardless of the reduced number of paid hours.

[56] The employer altered the Claimant's work duties against his wishes, with the result that the Claimant was required to work an increased number of unpaid hours and his child-care arrangements were complicated. Therefore, I find that the employer's change to the Claimant's call-out area resulted in a significant change in work duties for the Claimant.

[57] In such circumstances, I find that the Claimant's continued employment under these conditions, indefinitely or until replacement work is found, is not a reasonable alternative to quitting.

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[26] GD3-17

Significant modification in the terms and conditions respecting wages or salary

[58] I also find that the effect of this change in work duties was to make it more difficult for the Claimant to access work; to increase the proportion of his work that was unpaid, namely his commute; and to cause him to choose between limiting access to certain work assignments and caring for his children.

[59] The General Division said that a reasonable alternative to leaving would be to not limit his work hours in order to increase his income. I have found that the reduction in his work hours was not related to his request to be geographically restricted and that any limits placed on his hours related rather to management decisions that the employer made. Even if the Claimant's request to be restricted to a particular area resulted in less work that was available to him, I would still find that the modifications to his work duties were responsible for his reduced income. The change in work duties imposed by the employer effectively resulted in a significant modification in the terms and conditions respecting wages or salary.

[60] Therefore, I find that "not limiting his work hours" is not a reasonable alternative to leaving his employment.

Excessive hours or unpaid overtime

[61] The Claimant documented a history of unpaid overtime, presenting charts of unpaid overtime and timesheets from the beginning of August 2012 to the end of 2016. I have already referred to his statements to the General Division in which he testified to long days involving unpaid travel, even when he was being assigned only two jobs in a day. The Claimant also documented his efforts to have management address the excessive hours and unpaid overtime and to obtain assistance through employment standards, in addition to the civil action he filed in January 2017,[27] which was still pending at the time of the General Division hearing.

[62] The General Division disregarded the unpaid overtime factor on the basis that the Claimant's work was piecework and because the Claimant had not sought authorization before

[27] GD3-152.

working overtime. The General Division made no clear determination that the Claimant was not entitled to any unpaid overtime, but the implication was clear.

[63] I find that the Claimant was required by his employment to complete jobs that were assigned to him, regardless of how late in the day the job might be scheduled to start or how long the job took to complete, and that there were occasions when this required him to work overtime.

[64] I also find that the piecework nature of his work does not disqualify him from entitlement to overtime under the labour legislation of Alberta. The Alberta *Employment Standards Code* (Code) reads as follows:

> 21. Overtime hours in respect of a work week are
>
> > (a) the total of an employee's hours of work in excess of 8 on each work day in the work week, or
> > (b) an employee's hours of work in excess of 44 hours in the work week,
>
> whichever is greater, and, if the hours in clauses (a) and (b) are the same, the overtime hours are those common hours.
>
> 22(1) An employer must pay an employee overtime pay for overtime hours at an overtime rate that is at least 1.5 times the employee's wage rate.
>
> 24(1) If an employee is paid entirely on commission or **other incentive-based remuneration**, then, for the purpose of calculating overtime pay, the employee's wage rate is deemed to be the minimum wage prescribed by the regulations. [emphasis added]

[65] According to my reading of the Code, the Claimant would be entitled to be paid overtime calculated at 1 ½ times the Alberta minimum wage for each hour of work in excess of 8 hours per day, or each hour of work in excess of a 44-hour work week, whichever is the greater. Despite the Claimant's repeated claims for overtime pay, there is no evidence of the employer denying that the Claimant worked overtime hours; there is only an assertion that hours are not eligible for overtime if they are not pre-approved.[28] The employer indicated that the Claimant's basic schedule changed from 5 days at 8 hours per day to 4 days at 10 hours per day,[29] but the

[28] GD3-116.
[29] GD3-45, GD3-116.

available evidence does not allow me to determine whether this qualifies as a "work averaging agreement" under section 23.1(1) of the Code, in such a way as to affect how the overtime might be calculated.

[66] Nonetheless, I am satisfied that the Claimant's work was scheduled in such a way that he was regularly assigned jobs that required him to work overtime, that he was not paid overtime, and that the Claimant's actions to seek a remedy to this problem before quitting were reasonable, albeit unsuccessful.

Consideration of all the circumstances

[67] The Claimant testified to a general reduction in pay at this employer over time, starting in July 2016 with a 30% reduction. However, he stated that the biggest change occurred after his suspension and return to work.[30] The Record of Employment supports this point; it identifies an average of 48 hours of insurable employment per bi-weekly pay period in the 13 pay periods ending on November 5, 2016. The employer stated that the Claimant's suspension ran from November 9 to December 27, 2016. In the following and final 14 pay periods, the Claimant averaged only 22 hours of insurable employment per pay period.

[68] At the same time his hours and earnings were roughly halved, the Claimant had been placed in a Performance Improvement Program (PIP) for what he believed to be a three-month period. According to the employer, the continuing demands of the PIP would have continued to impact the Claimant's ability to accept jobs, even after the Claimant's suspension was lifted.[31] The employer stated that the Claimant was in the PIP until he quit.[32]

[69] I accept the Claimant's testimony that he continued to be limited by the employer to two jobs per week.[33] The General Division did not suggest that the Claimant's credibility was at issue, and I find his evidence to be generally credible. Although the employer suggested that there was less work in the call-out sector that the Claimant had requested, it did not specifically dispute that it had restricted the number of jobs to which the Claimant was dispatched daily.

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[30] Recording of the General Division hearing at 00:26:50.
[31] GD3-45.
[32] GD3-152.
[33] General Division decision at para 42.

Furthermore, the Claimant's evidence is consistent with the employer's own statement that the Claimant's ability to take on work would be impacted by the PIP right up to the point he quit.

[70] I also accept that the initial reassignment of his call-out area from the area immediately surrounding and including his home town had the effect of lengthening his days overall and reducing the number of jobs he could do in a day, even if the employer were to have offered him more jobs in a day than two.

[71] While there is evidence that the employer intended to temporarily reduce his travel radius to keep him in the northwest quadrant,[34] the employer did not insist that it fully respected this arrangement. For his part, the Claimant testified that the employer did not respect the arrangement to limit him to either his preferred sector or the northwest quadrant of the city.

[72] I accept that employer did not respect the Claimant's request to work in the sector of the city nearest to him after service to the area around his home was discontinued—or did not do so consistently—and that he was still given assignments in areas of the city that involved significant travel. The Claimant testified that he continued to be assigned areas on the other side of the city,[35] that he was in the "east side" of the city most of the time,[36] and that he had a commute of between 60 and 90 minutes to get to his early job, which typically began at 8:00 a.m., and return from his last job, which started between 3:00 p.m. and 5:00 p.m.[37]

[73] This meant that the Claimant had many long days with downtime in the middle of the day. Although he could sometimes go home during this downtime, doing so would effectively double his commuting time and it would not change the fact that he still had less time at home in the evening when both his children were home.

[74] I have also found that the Claimant was actively looking for work before he quit his job. The Claimant testified that he typically waited in the city between his jobs and that he often used this time to email about jobs or respond to emails. The Claimant's evidence in both his application and his testimony was that he had been actively looking for work before he left his

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[34] GD3-131.
[35] Recording of the General Division hearing at 00:35:52.
[36] Recording of the General Division hearing at 00:37:22.
[37] Recording of the General Division hearing at 00:26:50.

job but that he was unsuccessful. The Claimant felt trapped in his job and unable to quit, and he was diligently seeking work. Ultimately, he did quit without having found alternate employment

[75] I find that the Claimant's request to be assigned work in the nearest sector of the city was not a significant factor in his reduced workload. The employer offered the Claimant a temporary restriction to the northwest quadrant of the city, not a restriction to his preferred sector, and there is evidence of an assignment in the adjacent sector that the employer says the Claimant refused. I therefore do not accept the employer's assertion that he was restricted to the one preferred sector or that "there wasn't a lot of work in the area." To the extent the employer considered a restriction to any call-out area, I find that the area in question was the entire northwest quadrant of the city. I find it incredible that the employer could not offer the Claimant more than two jobs per day in the entire northeast quadrant of this major city.

[76] The changes to the Claimant's call-out area required him to work significantly longer work days, much of it unpaid driving or downtime. This had the further effect of interfering with his ability to care for his children. The Claimant also has a long-standing dispute over unpaid overtime both past and current in a substantial amount, which appears to have some merit but which the employer was unwilling to acknowledge or remedy.

[77] The Claimant was also suspended for seven weeks, much of it without pay and over the Christmas season, which has contributed to his financial distress. The Claimant attempted to continue working for six months in 2017, while his employer limited him to two jobs per day, with the result that his actual work hours and his income were halved. He felt trapped in his job and unable to quit, but he was diligently seeking work. Ultimately, he did quit without having found alternate employment.

[78] Having regard for all the circumstances, I find that the Claimant had no reasonable alternative to quitting his employment. I appreciate that his unresolved issues around unpaid overtime was one of the main reasons he left his employment, but he was also subject to a significant period of suspension/retraining without pay, significant limitations placed on his jobs and hours that reduced his pay to an average of $470.00 per week in 2017—by my calculations—and an increased commuting time related to a change in the area to which he was assigned. The increased commuting time played into the number of job assignments he could

potentially have accepted, but it also required more unpaid time, particularly driving to jobs. The Claimant was not satisfied that he could be home to ensure the care and safety of his children and it is unlikely that his income would have supported paid child-minding for his children.

[79] Taken together, the Claimant's unresolved issues of excessive hours and unpaid overtime, the decrease in work and pay, and change in work area were circumstances that were unsustainable, particularly in light of the Claimant's situation at home. The General Division's reliance on *Canada (Attorney General) v Tremblay*[38] depended on its finding that the Claimant was responsible for limiting his income. In *Tremblay*, the claimant quit because of dissatisfaction with pay. The issue here is not the same: the Claimant's employer reduced his income by placing limits on the number of jobs the Claimant could access, to the point that he would have had difficulty supporting himself on what he was paid.

[80] The General Division also relied on *Canada (Attorney General) v Yeo,*[39] which involved a claimant who left his employment because it interfered with the care of his children. In *Yeo*, the claimant shared custody with his ex-wife, having the children in his care for only one weekday and weekends. The claimant's concern in that case was that his job interfered with dropping his children off at school in the morning and picking them up in the evening to take them to after-school activities.

[81] There are several factors that distinguish the situation in *Yeo* from the Claimant's situation. The Claimant's substantial pay reduction is the first factor. In addition, the Claimant is solely responsible on **every** working day for the care of his school-age children—one of whom has known psychosocial issues, and he was actively searching for alternative employment before quitting. The Claimant is concerned for the physical and psychological well-being of the Claimant's children whenever they are home, for which the Claimant is solely responsible. In my view, this is qualitatively different from being available to drive children to activities.

[82] Leaving aside the distinction between a father's support for his children and the supervisory capacity of a paid childminder, the Claimant's reduced income is such that he could not reasonably be expected to afford extra child care in the evenings and still meet household

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[38] *Canada (Attorney General) v Tremblay, A-50-94.*
[39] *Canada (Attorney General) v Yeo,* 2011 FCA 26.

expenses for himself and two children. Supposing the Claimant has a workday in which he must commute home 1 ½ hours from a job that did not start until 5:00 p.m. and that took 2 ½ hours to complete, the Claimant would not be home until 9:00 p.m. This may not occur every day, but it would seem difficult for the Claimant to anticipate his schedule or to arrange in advance for care on an as-needed basis only.

[83] The Claimant made efforts to find alternate work while he was still employed, but he was unsuccessful and eventually quit. Having regard for all the circumstances, I find that he had no reasonable alternative to leaving his employment. The Claimant had just cause for leaving his employment.

Stephen Bergen
Member, Appeal Division

HEARD ON:	November 1, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	W. D., Appellant Carol Robillard, Representative for the Appellant