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

Citation: *L. A. v. Canada Employment Insurance Commission*, 2018 SST 1253

Tribunal File Number: AD-18-459

BETWEEN:

L. A.

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, L. A. (Claimant), is a paramedic who left her job as a result of multiple concerns, and who then applied for Employment Insurance benefits. Her claim was initially accepted, but her employer requested a reconsideration. As a result, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant did not have just cause for leaving her employment and that the claim should not have been accepted. The Claimant appealed to the General Division of the Social Security Tribunal, where her appeal was dismissed. She now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division erred in law by not having regard to all the circumstances and, in particular; her claims of excessive hours, and unpaid overtime, and her claim of harassment. The General Division also misunderstood or ignored her testimony regarding her efforts to verify the credentials of other employees.

[4] I am referring the matter back to the General Division for reconsideration.

ISSUES

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice by failing to adequately advise the Claimant about the appeal process?

[6] Is there an arguable case that the General Division erred in law in its application of the legal test for “just cause”:

a) by failing to have regard to all the circumstances;

b) by considering the Claimant’s departure to be voluntary;

c) by defining “no reasonable alternative” without regard to the statute or judicial interpretation;

d) by making a finding of fact for which there was no evidence;

e) by not giving the Claimant the benefit of the doubt that she had not voluntarily left or that she had just cause for leaving; or

f) by failing to provide adequate reasons for how it assessed the Claimant’s various employment circumstances?

[7] Is there an arguable case that the General Division based its decision on an erroneous finding of fact by failing to have proper regard for the following evidence:

a) the employer’s refusal to pay earned overtime;

b) the employment atmosphere and the Claimant’s reaction to that atmosphere;

c) working conditions that are a danger to health and safety; and

d) the effect of the Claimant’s miscarriage?

ANALYSIS

General Principles

[8] 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 that is 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.

[9] 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).

[10] The grounds of appeal are as follows:

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: Is there an arguable case that the General Division failed to observe a principle of natural justice by failing to adequately advise the Claimant about the appeal process?

[11] The Claimant argued that she was not aware that she could file additional documents or bring witnesses to her General Division hearing and that this breached her natural justice right to be heard.

[12] The Claimant did not suggest that she requested additional time to file documents post-hearing and was denied or that she asked the General Division member if she could have witnesses testify or requested an adjournment in order to produce witnesses. There is also no suggestion that the Claimant requested any information on the hearing process by calling the Tribunal in advance of the hearing.

[13] The Social Security Tribunal publishes an information brochure entitled *How to File an Employment Insurance Appeal at the General Division*, which is accessible and downloadable via its website[1]. The website also posts a toll-free number individuals can call to have the Tribunal send them the brochure. The brochure includes information on submitting documents before the hearing and warns that the Tribunal member will need to decide whether to accept documents presented at the hearing. The brochure also discusses bringing witnesses to the hearing.

[14] As an impartial adjudicator, the General Division member must maintain a certain distance from the parties and the positions of the parties. It is not the General Division's role to advise the parties as to what kind of evidence they should bring to support their case or how to

[1] at https://www1.canada.ca/en/sst/publications.html

present that evidence. As a matter of practice, the General Division member normally explains the hearing process to the parties before hearing from them so that they know how to conduct themselves. I cannot verify whether this was done in this case because there is no audio recording of the hearing available, but the Claimant did not assert she was wholly ignorant of the process—only that she did not know what evidence she could present.

[15] I do not find that the General Division failed to observe any principle of natural justice by not explicitly drawing to the Claimant's attention her ability to file documentary evidence or call witnesses. The Claimant had the ability to obtain this information online, by calling Tribunal staff, or even by questioning the General Division member as to the process for bringing and submitting evidence. I find no error under section 58(1)(a) of the DESD Act.

Issue 2: Is there an arguable case that the General Division erred in law in its application of the legal test for "just cause"?

Having regard to all the circumstances

[16] The General Division stated that it must consider all the circumstances to determine whether just cause for voluntarily leaving an employment exists, and it also stated that it must consider whether the Claimant had no reasonable alternative to leaving under section 29(c) of the *Employment Insurance Act* (EI Act). It notes that it must consider the circumstances listed under section 29(c) but also notes that the list is non-exhaustive. The member states that she considered all the circumstances to find that just cause was not proven because leaving her employment was not the Claimant's only reasonable alternative.[2] There is no evident error in law in the manner in which the General Division stated the test.

[17] However, the Claimant claimed that she had been required to work excessive hours and that she had not been paid for overtime. This was raised in the Claimant's application for benefits[3] and again in her notice of appeal submission.[4] If excessive hours or unpaid overtime was established in violation of applicable employment standards legislation, this would also be a practice of an employer contrary to law. These are both circumstances specifically listed under

[2] General Division decision at para 11.
[3] GD3-11.
[4] GD2-6.

section 29(c) of the EI Act. The General Division did not refer to or consider the Claimant's statements that she had worked excessive hours and not been paid overtime.

[18] In submissions to the Appeal Division, the Claimant also suggested that the facts in her case support the presence of harassment and discrimination, which are also relevant circumstances under section 29(c) of the EI Act. I agree that the facts that were considered within the General Division's analysis of "antagonism" (per section 29(c)(x) of the EI Act), would be more properly analyzed as "harassment" (section 29(c)(i)). In considering "antagonism", the General Division considered many of the same circumstances that relate to the Claimant's assertion of harassment. However, the Claimant brought some facts forward that could not have been properly considered under antagonism and which I therefore cannot presume the General Division to have considered.

[19] In particular, the General Division did not refer to the particular incident described by the Claimant in which she answered the door of her home naked when D., the male owner of the employer company, arrived at her doorstep to ask her to come in to work. She recalled that D. had reacted to the sight of her by commenting that it was a "gift", or words to that effect. Regardless of whether sexual or other harassment could be said to be a factor in the Claimant's leaving her employment on the basis of this incident, the General Division member apparently did not turn her mind to this circumstance in her consideration of the antagonism between the employer and the Claimant, or elsewhere in the decision.

[20] Turning to the Claimant's argument that the General Division did not consider discrimination as a relevant circumstance: So far as I can determine, the claim of discrimination relates to the Claimant's miscarriage. The Claimant appears to be asking that I accept that there was evidence before the General Division that the employer's demands were insensitive to the Claimant's miscarriage, and that the General Division should have considered this to be discrimination, a factor identified in section 29(c)(iii) that could be relevant to her reasonable alternatives to leaving.

[21] Discrimination is defined in section 29(c)(iii) of the EI Act with reference to a prohibited ground of discrimination under the *Canadian Human Rights Act* (CHRA). Under the CHRA, discrimination in relation to pregnancy may be considered discrimination on the prohibited

ground of "sex". However, I was not directed to any evidence that was before the General Division that would have allowed it to determine that the employer discriminated against the Claimant on the basis of her sex, pregnancy, or her experience of miscarriage in any of the ways described in the CHRA. The General Division did not err in law by failing to identify discrimination as a relevant circumstance.

[22] Because the General Division failed to consider the excessive hours, unpaid overtime, and possible harassment as circumstances that were relevant to the existence of reasonable alternatives, I find that it failed to have regard to "all the circumstances" as required by section 29(c) of the EI Act. This is an error of law under section 58(1)(b) of the DESD Act.

Considering the Claimant's departure to be voluntary

[23] The Claimant argued that she did not leave voluntarily but rather that she was constructively dismissed. The General Division found that the Claimant had a choice to quit when she did and found that she exercised that choice. The General Division applied the test as set out in *Canada (Attorney General) v Peace*.[5]

[24] The Claimant argued in oral submissions that the test for voluntary leaving in *Peace* is more "nuanced" than the manner in which the General Division interpreted it, but she did not explain in what way it is more nuanced or how the General Division incorrectly expressed or applied the test.

[25] *Peace* rejected the applicability of the constructive dismissal concept to the determination of Employment Insurance benefits, and its position on voluntary leaving actually appears to be fairly straightforward. The Court said this:

> Whether or not an employee is entitled to treat the employment relationship as having been terminated at common law on the grounds of constructive dismissal is a different issue from the issue of whether an employee has voluntarily left employment under the Act such that he may not be entitled to EI benefits. Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one.

[5] *Canada (Attorney General) v Peace*, 2004 FCA 56.

> The question to be asked is as follows: did the employee have a choice to stay or to leave?[6]

[26] The General Division did not err in law in determining that the Claimant voluntarily left her employment with reference to the existence of a choice to stay or leave, and the General Division was not required to consider whether the Claimant's circumstances amounted to constructive dismissal at common law.

Defining "no reasonable alternative"

[27] The Claimant argued that the General Division substituted its own measure of "no reasonable alternative" as opposed to the correct legal analysis[7]. When I questioned the Claimant's representative on what he believes the correct legal analysis to be, he said that he was just referring to the Canadian Umpire Benefit (CUB) decisions on which he relied in his oral submissions.

[28] While I am not bound to follow the interpretations of CUB decisions, I nonetheless reviewed the CUB decisions to which the Claimant's representative referred. However, the exercise was fruitless, and I was unable to discern the representative's point. "No reasonable alternative" is the language of section 29(c) of the EI Act, and the Claimant agreed that the *Canada (Attorney General) v Laughland*[8] case, cited by the General Division, is a correct statement of the test.

Making a finding of fact for which there was no evidence

[29] It would be an error of law for the General Division to have made a finding of fact for which there was no evidence whatsoever. The Claimant claims that it is an error of law to fail to consider the "paucity of contradictory evidence" from the Commission or to consider the "virtually uncontroverted" nature of the Claimant's evidence. She gave a number of examples in which this is said to be the case[9].

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[6] *Ibid.*, para 15.
[7] AD1-6 B-2(c)
[8] *Canada (Attorney General) v Laughland*, 2003 FCA 129.
[9] AD1-6, B-2(d)

[30] The Claimant's assertions fall short of even claiming that the General Division made a finding of fact without **any** evidence, let alone establishing such an error. I do not accept that any of the General Division's findings of fact have no evidentiary foundation.

[31] The manner in which the General Division *weighed* the evidence is beyond the limits of what I may review under the grounds of appeal. However, I can consider the failure to take particular evidence into account when reaching findings of fact. This is more properly addressed under "erroneous findings of fact", according to section 58(1)(c) of the DESD Act.

Not giving the Claimant the benefit of the doubt

[32] The Claimant emphasized that the appellant is entitled to the benefit of the doubt in relation to disputed facts relative to the finding of just cause for voluntary leaving. I asked if the Claimant was referring to section 49(2) of the EI Act, where it states, in part, "The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30." The Claimant's representative confirmed that this is the section he is relying on.

[33] The law is clear that the Commission has the onus of establishing that a claimant voluntarily left an employment and that the onus then shifts to the claimant to establish just cause. "Just cause" is determined by whether there are reasonable alternatives to leaving, having regard to all the circumstances. This suggests that the claimant is responsible for establishing the circumstances under which it could be said that no reasonable alternative to leaving exists.

[34] The "benefit of the doubt" never means that, where there is a doubt, the claimant's evidence should be believed. In the case of "just cause", where the onus is on the claimant, the benefit of the doubt does not mean that the Commission must establish the absence of just cause on a balance of probabilities. The benefit of the doubt is only ever available to a claimant when the evidence on each side of an issue is equally balanced.[10] There is no suggestion that the General Division or the Commission considered the evidence to be evenly balanced.

[10] *Alcuitas v Canada (Attorney General)*, 2004 FCA 185.

[35] Regardless, the Federal Court of Appeal in *Chaoui v Canada (Attorney General)*,[11] has made it clear that the "benefit of the doubt" in section 49(2) applies only to the Commission. There is no requirement that the **General Division** give the benefit of the doubt to the Claimant, and it was not an error of law if it failed to so.

Inadequate reasons

[36] The Claimant has not identified in what manner the General Division's reasons were inadequate. The Claimant's submissions listed a number of circumstances12, and I therefore presume that the Claimant considered the reasons inadequate in some fashion relating to those circumstances. However, it is not my role to develop the Claimant's arguments. On review of the list, I cannot determine if the Claimant believes that the reasons do not address these circumstances, that the reasons do not explain why the General Division found any of the circumstances to be inapplicable, or that the reasons do not explain how any of the circumstances affected the availability of reasonable alternatives or why they did not.

[37] According to the Federal Court of Appeal in *Canada (Attorney General) v Thériault*,[13] "what is required is that the reviewing court can 'understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes.'" I do not find that the General Division's reasons are so inadequate that I cannot understand why the Tribunal made its decision or determine whether its conclusion is within a range of acceptable outcomes, and I therefore do not find that the General Division erred in law by the inadequacy of its reasons.

Issue 3: Is there an arguable case that the General Division based its decision on an erroneous finding of fact by failing to have proper regard for the evidence before it?

[38] The Claimant argues that the General Division failed to consider evidence regarding the employer's refusal to pay earned overtime, the toxic atmosphere, working conditions that are a danger to health and safety, and the effect of the Claimant's miscarriage.

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[11] *Chaoui v Canada (Attorney General)*, 2005 FCA 66.
[12] AD1-6 B-2(b)
[13] *Canada (Attorney General) v Thériault*, 2017 FC 405.

Refusal to pay earned overtime and toxic atmosphere

[39] I acknowledge that there was some evidence before the General Division that the Claimant had worked excessive hours and had not been paid for overtime, and that the General Division made no finding about whether it accepted this or not. I have addressed this as an error of law above.

[40] As far as the assertion of a "toxic atmosphere" is concerned, the Claimant agreed during the hearing that antagonism was not a factor, and I am not convinced that the term "toxic atmosphere", in this case, has any meaning or application that is independent of the claim that the employer made excessive demands on the Claimant's time and that the Claimant was concerned about the safety training standards. I see no error in the fact that the General Division did not refer to the "toxic atmosphere" using those words or consider it independently of the other concerns the Claimant raised.

Danger to health and safety

[41] In oral arguments, the Claimant argued that the General Division was mistaken about the facts in evidence regarding her acknowledgement that she had been asked to work with other fully qualified staff and on one occasion a "qualified paramedic".[14] However, she did not actually testify to any occasion involving a qualified paramedic. She testified that, when she confronted C. (joint owner of the business with B.) about one employee who did not know what he was doing, C. admitted the person was not a qualified paramedic. There was one other person with whom the Claimant worked who was a "qualified fireman", but not a qualified paramedic.

[42] The Claimant also argued that the General Division failed to have regard for her evidence when it stated that she had acknowledged that she had not confirmed that the new recruits were inadequately trained. The General Division was correct that she did not confirm that the recruits were inadequately trained, but the Claimant testified that she had tried to confirm their training. The Claimant testified that she had years of experience with this employer and that she knew the employer had hired unqualified recruits in the past. The Claimant testified that she raised her concern with C. and, in so doing, provided the employer with an opportunity to answer her

[14] General Division decision, para 21.

concerns. The Claimant said that C. would not discuss it, saying only that they were "doing what [they are] doing".

[43] This evidence casts a different light on the Claimant's acknowledgement that she did not confirm that the recruits were inadequately trained, but it was apparently ignored. The General Division stated that a reasonable alternative to quitting would have been to verify the ability, knowledge, and skill level of the new employees before speculating that they were not properly credentialed. This disregards the Claimant's attempt to raise her concern with the employer and ignores the adverse inference that might have been drawn if the General Division had considered and accepted the Claimant's evidence that she had raised her concerns about the training or credentials of the recruits with the employer. In response to her concern, one would expect the employer to have made some effort to satisfy the Claimant of the training and credentials of the recruits (when the Claimant would be responsible for supervising at least some of them).

[44] The General Division finding that the Claimant had the reasonable alternative of verifying her safety concerns before quitting was based on an incomplete understanding of the Claimant's evidence regarding her experience of working with untrained or un-credentialed staff, and it failed to consider her evidence that she attempted to question the credentials of new recruits. This is an error under section 58(1)(c) of the DESD Act.

Miscarriage

[45] The Claimant also claims that the General Division failed to consider the evidence that she had had a miscarriage. I recognize that the list of circumstances in section 29(c) is not exhaustive, therefore the General Division might still have considered the Claimant's miscarriage and its emotional impact on the Claimant of her miscarriage when determining whether there was a reasonable alternative to leaving.

[46] While it is not evident that the General Division took the Claimant's miscarriage into account, the General Division is not obliged to refer to each and every piece of evidence, and it may be presumed to have considered the evidence before it.[15] I do not mean to minimize the emotional effect on the Claimant of her miscarriage, but there was no corroborative medical or

[15] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

psychiatric evidence before the General Division to suggest that this was a significant factor, and I do not find that the General Division erred by failing to refer to the Claimant's miscarriage in its reasons.

CONCLUSION

[47] The appeal is allowed.

REMEDY

[48] Having allowed the appeal, I have the authority under section 59 of the DESD Act to make the decision that the General Division should have made, to refer the matter back to the General Division for reconsideration, or to rescind or vary the General Division decision in whole or in part.

[49] I have accepted that the Claimant raised the issue of her excessive hours and unpaid overtime, as well as the manner in which she considered the employer's behaviour to be harassing as part of her justification for leaving and that the General Division erred by failing to consider the relevance of these circumstances.

[50] However, the record is not complete. There is no audio recording of the hearing available, and therefore, I cannot confirm that the Claimant substantiated her claim of excessive hours or overtime in her testimony before the General Division or in what manner she advanced or supported her harassment claim at the oral hearing. As a result, I am referring the matter back to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	November 13, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. A., Appellant Wesley Jamieson, Representative for the Appellant