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

Citation: *K. A. v Canada Employment Insurance Commission*, 2019 SST 10

Tribunal File Number: AD-18-851

BETWEEN:

K. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: January 8, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, K. A. (Claimant), resigned his job and applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), initially determined that the Claimant was disqualified but changed its decision on reconsideration and allowed the claim. The Claimant's employer appealed to the General Division of the Social Security Tribunal, which allowed the appeal, again disqualifying the Claimant from benefits. The Claimant now seeks leave to appeal to the Appeal Division.

[3] There is no reasonable chance of success on appeal. The Claimant has not made out an arguable case regarding how the General Division failed to observe a principle of natural justice, how it erred in law, or how it ignored or misunderstood any significant facts.

PRELIMINARY MATTERS

Is the application for leave to appeal late?

[4] According to section 57(1)(a) of the *Department of Employment and Social Development Act* (DESD Act), a party must make an application for leave to appeal within thirty days of the date the decision is communicated to the party. Unless the party can prove otherwise, a decision that is sent to that party by ordinary mail is deemed under section 19(1)(a) of the *Social Security Tribunal Regulations* (Regulations) to have been received ten days from the date that the decision is mailed.

[5] The General Division decision was dated October 29, 2018, but was mailed to the Claimant with a cover letter dated October 30, 2018. The Claimant's application for leave was not filed until December 13, 2018.

[6] However, the deadline is not calculated from the date of mailing but from the date that the decision is communicated to a party. Applying section 19(1)(a) of the Regulations, a decision

mailed by ordinary mail is deemed to have been received ten days from the date of the decision, which, in this case, would be November 9, 2018. Thirty days from November 9, 2018, would be December 9, 2018. Therefore, **if the application for leave to appeal was filed late**, it would only be four days late.

[7] The Claimant states that he received the decision only on November 15, 2018, and suggests this may have had something to do with the Canada Post strike. I take judicial notice of the fact that Canada Post was engaged in job action beginning in late October which involved rotating strikes. It is plausible that this job action may have delayed delivery of the decision to the Claimant. I therefore accept the Claimant's evidence that he received the decision only on November 15, 2018, which means that his application for leave to appeal was received within 30 days of the date that the decision was communicated to him.

[8] I find that the application for leave was filed in time.

ISSUES

[9] Is there an arguable case that the General Division failed to observe a principle of natural justice or erred in jurisdiction?

[10] Is there an arguable case that the General Division erred in law by determining that the Claimant had no reasonable alternative to leaving without considering "all the circumstances?"

[11] Is there an arguable case that the General Division erred in law in the manner in which it applied the balance of probabilities standard?

[12] Is there an arguable case that the General Division erred by misapplying the case law?

[13] Is there an arguable case 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 for the material before it?

ANALYSIS

[14] 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 DESD Act.

[15] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

[16] The grounds of appeal under section 58(1) 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 before it.

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice or erred in jurisdiction?

[17] In the submissions attached to the Claimant's leave to appeal application, the Claimant argues that the General Division member was biased. This a argument is based on the Claimant's view that the General Division found, without evidence, that the Claimant's absence from work was unexplained and also that it found that the evidence did not support that the Claimant was deliberately excluded from the "huddle" meetings.

[18] The General Division reviewed the evidence that the Claimant had been absent one day during his notice period. At paragraph 19 of its decision, the General Division noted that the employer said that the Claimant did not report to work one day in his notice period and that this

[1] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.

was confirmed by an email from the Claimant's manager to Human Resources.[2] The employer also said that the Claimant had not informed anyone of his reason for being absent that day. The General Division also acknowledged the Claimant's testimony that he had called in sick but that he could not be certain whether he spoke to his manager or someone else. Following this review, the General Division found that the Claimant had an unexplained absence during his notice period.

[19] The Claimant is correct that the General Division's finding that he had an "unexplained absence" during his notice period was not necessary to the General Division's decision that the Claimant did not have just cause for leaving. Despite this, the General Division's finding was supported by the evidence, does not demonstrate bias in itself, and there is nothing in the decision to suggest that the General Division relied on the finding or that it affected the outcome in any way.

[20] Other evidence that the General Division expressly dismissed as irrelevant in its decision, included evidence regarding the manner in which the Claimant submitted his resignation; whether the Claimant made false statements about the employer's products; and how the Claimant was escorted from the employer premises. It is not apparent to me that any of this other evidence would have been relevant to the decision or could have affected the outcome. I do not observe any obvious pattern to suggest that the General Division determined the relevance of evidence based on whether it supported or challenged the Claimant's position.

[21] The fact that the General Division made an unnecessary finding on one matter which was neither relevant to its decision nor relied on as a basis for the decision does not establish an arguable case that the General Division was biased.

[22] The other basis for the Claimant's argument that the General Division was biased is that the General Division had no evidentiary basis for finding that he was not excluded from the huddle meetings. To the contrary, the General Division relied on the employer's evidence that the weekly huddle is for all staff in the department, that staff are expected to attend at least one of the two weekly huddles, and that either she or another employee would walk around the work stations announcing the meetings when they were taking place. It also relied on the Claimant's

[2] GD6-8.

own evidence that he knew the meetings occurred at the same time each week and that he interpreted the manager's failure to notify him personally as an indication he was not invited.

[23] The fact that the General Division found that the evidence did not support the idea that the Claimant was deliberately excluded does not suggest an arguable case that the General Division was biased.

[24] It is not an easy task to successfully establish bias on appeal. As stated by the Supreme Court of Canada:

> Regardless of the precise words used to describe the test [for bias], the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.[3]

[25] There is no arguable case that that the findings that the Claimant has challenged could, either individually or collectively, create a reasonable apprehension of bias. The Claimant has not made out an arguable case that the General Division member erred under section 58(1)(a) of the DESD Act.

Issue 2: Is there an arguable case that the General Division erred in law by determining that the Claimant had no reasonable alternative to leaving without considering "all the circumstances?"

[26] Section 30(1) of the *Employment Insurance Act* (EI Act) states that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause. Section 29(c) of the EI Act states that just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances.

[27] Section 29(c) lists a number of circumstances that must be considered where they are present. The Claimant references a number of the listed circumstances, including

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[3] *R. v S. (R.D.)*, [1997] 3 SCR 484.

section 29(c)(vi), “reasonable assurance of another employment in the immediate future;” section 29(c)(ix), “significant changes in work duties;” section 29(c)(x), “antagonism with a supervisor if the claimant is not primarily responsible for the antagonism;” section 29(c)(xiii), “undue pressure by an employer on the claimant to leave their employment;” and section 29(c)(xiv), “any other reasonable circumstances that are prescribed.”

[28] The Claimant agrees that he did not have a reasonable assurance of another employment when he quit. Because the circumstance under section 29(c)(vi) was not present, there was no need for the General Division to take it into account.

[29] The most obvious circumstance that does arise out of the Claimant’s arguments and testimony seems to be that of “undue pressure by an employer”, as per section 29(c)(xiii) of the EI Act. However, the General Division specifically and directly addressed this circumstance in the decision.

[30] Neither the employer’s feedback to the Claimant about how he might more effectively perform his duties nor the temporary redirection from taking calls to catching up on his case management—both part of his regular duties—suggest a “significant change in work duties” as per section 29(c)(ix), The evidence does not support a finding that there was any significant change in the type, amount, or scheduling of his work.

[31] The Claimant also suggests that the feedback he received from management equates to “antagonism with a supervisor.” While the General Division did not refer to section 29(c)(x) specifically, it is clear that the General Division did consider the significance of the circumstances which the Claimant characterizes as antagonism with a supervisor. At paragraph 14, the General Division reviewed the conflict in evidence between the Claimant’s testimony that the manager yelled at him and threatened him with dismissal and the employer’s evidence that the manager did not yell or threaten but did ask the Claimant to consider whether the role was right for him. The Claimant then agreed that the employer did tell him to consider whether the role was right for him but that it is “not what you say, it is how you say it.”[4] On balance, the Commission found the employer’s version of events to be more likely.

[4] General Division audio recording at 01:02:49.

[32] Beyond the Claimant's allegation that the employer yelled at him and threatened him, the Claimant also claimed that the manager was nitpicking and fault-finding, but the General Division found that the behaviour that the Claimant complained about was the manager's attempt to coach the Claimant to improve his performance. It relied in part on the Claimant's email of January 24, 2018, expressing appreciation for the feedback. In my view, the General Division's findings related to the circumstances that the Claimant now characterizes as "antagonism with a supervisor" demonstrate that the General Division had regard for section 29(c)(x).

[33] Section 29(c)(xiv) is inapplicable to the facts of this case. This section refers to other "prescribed" circumstances, which means prescribed by regulation. The prescribed circumstances are found at section 51.1 of the EI Act, and the additional circumstances that are described in that section do not apply to these facts.

[34] The list of circumstances in section 29(c) is not intended to be exhaustive, but the Claimant has not raised any other relevant circumstance that is apparent from the evidence but which the General Division failed to consider.

[35] I find that there is no arguable case that the General Division failed to consider all the circumstances as required by section 29(c) of the EI Act.

Issue 3: Is there an arguable case that the General Division erred in law in the manner in which it applied the balance of probabilities standard?

[36] The Claimant argues that the General Division misapplied the "balance of probabilities" standard because it preferred the evidence of the employer based on "assumptions and hypothetical inference."[5]

[37] The General Division made a general finding against the Claimant's credibility such that where his evidence and that of the employer were in conflict, the General Division preferred the evidence of the employer. This finding appears to have been influenced by the substance and tone of the Claimant's email in response to the employer's feedback and of his resignation letter, both of which were consistent with the employer's position that there was no antagonism or pressure to quit. The General Division also observed the Claimant's subsequent retractions of his

[5] AD1-13.

remarks in those communications; he seemed to be claiming that he was not truthful or sincere when he wrote them.[6]

[38] As the Claimant pointed out and as I have acknowledged above, the Claimant's absence during his notice period is not relevant to whether he had just cause for quitting in the first place. However, the Claimant submits that this is another example of how the General Division misapplied the balance of probabilities. The General Division drew an inference that the Claimant's absence from work on a particular day was "unexplained" from the simple fact that he was absent and there was some communication between management confirming his absence.

[39] During the oral hearing, the manager for the employer responded to the Claimant's questioning about the reason the Claimant had to be escorted from the employer's premises by saying that the Claimant "had not shown up for work with no explanation". I note that that the Claimant did not refute this in his own testimony. Thus, the General Division was entitled to draw the inference that he had not given the employer an explanation for his absence and to conclude that it was an "unexplained absence." Nothing in the manner in which the General Division reviewed the evidence suggests that it misunderstood its role or the manner in which it was to weigh evidence.

[40] The Claimant appears to take the position that his evidence should be preferred where it is in conflict with that of the employer, because of an "imbalance of power."[7] The Claimant may be misreading the law: There is no presumption that the evidence of the employer is somehow less credible because an employer has more power than an employee, just as there is no presumption that the Claimant's evidence should be disregarded because he is providing evidence in his own interests: to obtain Employment Insurance benefits.

[41] Reaching a decision on a balance of probabilities requires a decision-maker to weigh all of the evidence—including the testimony, statements, and documents of both the Claimant and the employer—and this requires an assessment of the credibility, reliability, and significance of all the evidence. In this case, the Claimant has the burden of proof to establish on a balance of probabilities that he had just cause for leaving, so it was his responsibility to establish that his

[6] General Division decision, paras 9, 12–16.
[7] AD1-13.

supervisor was antagonistic towards him and that any antagonism was not primarily his fault. It was also his responsibility to establish that he was under undue pressure to quit or to establish any other circumstance that affected his decision to leave. It is his responsibility to establish that he had no reasonable alternative to leaving because of these circumstances.

[42] The Supreme Court of Canada described the "balance of probabilities" in *F.H. v McDougall*:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened. In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.[8]

[43] The Claimant also argued that the General Division failed to determine whether his leaving was a "constructive dismissal" based on a balance of probabilities. An employee may claim "constructive dismissal" to challenge their termination in a wrongful dismissal suit, but the term does not apply here. The General Division was determining whether the claimant should be disqualified for voluntarily leaving his employment or whether he had "just cause" for leaving. There is no need for the General Division to determine whether the employer's actions amounted to constructive dismissal.

[44] There is no arguable case that the General Division erred in law its application of the "balance of probabilities," and no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

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[8] *F.H. v McDougall*, 2008 SCC 53.

Issue 4: Is there an arguable case that the General Division erred by misapplying the case law?

[45] The Claimant also submits that the General Division inappropriately cited *Canada (Attorney General) v Lamonde.*[9] *Lamonde* is a case whose facts are quite different from the facts in this case. However, the principle on which the case was decided is as follows: "The circumstances referred to in paragraph 29(c), which must be taken into account in determining whether the taking of leave may be justified, are those existing at the time the respondent took leave from his employment." The General Division cited *Lamonde* in support of its determination that it could not consider the circumstances after the Claimant's resignation. There is no arguable case that the General Division erred in law in doing so.

Issue 5: Is there an arguable case 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 for the material before it?

[46] The Claimant submits that the General Division ignored or misunderstood several facts. Although they are not clearly defined and they are intertwined with some of the issues I have already discussed, I have attempted to compile and paraphrase below those factual disputes that I could distinguish. The Claimant argues that:

a) He was yelled at on numerous occasions and not just during one meeting discussing his customer service performance;
b) The General Division ignored that the employer planned to fire him;
c) He was yelled at and reprimanded by other departments as well as by dealers and customers;
d) The General Division misunderstood the nature of his "acknowledgement" email and his resignation letter;
e) The General Division failed to take into account the imbalance of power;
f) The General Division should have taken into account the irrationality of quitting without a good reason;
g) There is no evidence that his absence during his notice period was unexplained; and
h) He had no formal training for the job.

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[9] *Canada (Attorney General) v Lamonde*, 2006 FCA 44.

[47] Before I respond to each of these points, it is important to understand that a tribunal need not refer, in its reasons, to each and every piece of evidence before it, but it is presumed to have considered all the evidence, as the Federal Court of Appeal stated in *Simpson v Canada (Attorney General)*.[10]

[48] In response to the point above at 45(a), I note that the Claimant referred in his application for benefits to a particular discussion regarding his customer service with a manager on both January 20 and 23, but it appears that these references relate to the same discussion.[11] There is no evidence he was "yelled at" on other occasions. In his statements to the Commission, he did not refer to yelling except in connection with the January 20 discussion.[12] Where the Claimant testified about the manager yelling, it related to the same incident, as did his questioning of the manager about whether she yelled. If the Claimant was yelled at on other occasions, it was not in the evidence that was before the General Division. There is no arguable case that the General Division failed to consider evidence that the employer yelled at the Claimant on multiple occasions.

[49] In making the second point, 45(b) above, the Claimant suggests that the General Division did not understand or consider his evidence that he had been told he could be fired based on his job performance. The evidence that the Claimant would have been fired if he had not quit largely came from the Claimant. He stated in his application for benefits that he had been told he could be fired several times.[13] However, the General Division did refer to the employer's testimony where, at the Claimant's prompting, "the [employer] listed several customer and internal complaints received regarding the Claimant at the hearing."[14] The General Division also noted that the Claimant stated "that he knew his performance was poor enough that he would be fired eventually and the only option he had from being fired was to quit before that happened."[15]

[50] However, the Claimant also said in his application that he was told by the Customer Relations Manager that the employer could have fired him but did not want to fire him, because

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[10] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[11] GD3-15.
[12] GD3-39, paras 1, 4; GD3-40, para 1.
[13] GD3-15.
[14] General Division decision, para 27.
[15] General Division decision, para 25.

it expected him to grow. The Claimant wrote that he was told that he should stay. The Customer Relations Manager testified for the employer at the hearing, and her evidence was that she told the Claimant that he should consider whether he was in the right type of position for him, that being customer relations.

[51] There is no arguable case that the General Division ignored or misunderstood evidence about the Claimant's prospects of being dismissed from his employment.

[52] Following from point 45(c), the Claimant argues that the General Division ignored evidence that he was yelled at and reprimanded by other departments as well as by dealers and customers.[16] As noted above, the General Division referenced the many sources of complaints. It also referenced the Claimant's reference to a "toxic" workplace and noted that "he did not speak to anyone about his feelings regarding the work environment."[17] In my view, the General Division addressed the issue, whether or not it referenced the manner in which complaints were communicated to the Claimant by people other than management, and there is no arguable case that the General Division erred in failing to understand that the Claimant may also have been yelled at by others.

[53] Point 45(d) relates to the Claimant's testimony and claim that both his acknowledgement of feedback email and his resignation letter were false or insincere and meant ironically. So far as I understand him, he suggests that the General Division should not have relied on this evidence when it determined what his relationship was like with his supervisor or what kind of pressure he was under at the employer. The General Division noted the Claimant's testimony that everything he had written in his resignation letter was false[18] and that he had lied because he felt he needed a justification to leave his employment so he could leave "on a good note." With regard to the email that the Claimant sent following his feedback, the Claimant suggests that the General Division erred in that it failed to understand this email as "derisive." I understand him to be saying that the acknowledgement did not reflect his real feelings about the feedback he received and was therefore also false.

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[16] AD1-22.
[17] General Division, para 21.
[18] General Division, para 13.

[54] The Claimant does not deny that he wrote the email, and, in my view, the General Division was entitled to take the email at face value as evidence that the meeting with the manager was to provide feedback as to the Claimant's performance[19] and that the tone of the meeting was constructive.[20] It is not my role to re-evaluate or re-weigh the evidence that was before the General Division. There is no arguable case that the General Division failed to consider the Claimant's explanation that he misled the employer as to his opinion of the employer or its feedback.

[55] Under 45(e), the Claimant argues that the General Division did not take into account the "imbalance of power" between an employer and an employee. "Imbalance of power" is only a label; it is not a primary fact. It requires an assessment of the circumstances. The Claimant appears to be asking me to first find that an imbalance of power existed and then to find that the General Division ought to have also found an imbalance of power and to have taken it into consideration. However, the Claimant has not pointed to any evidence that the General Division ignored or misunderstood, and the General Division did not err by failing to view the facts through the lens of the potential for employers to exploit employees. Every employer-employee relationship involves an "imbalance of power" in some sense, but it would be absurd if this should mean that every employee has just cause for leaving his or her employment. There is no arguable case that the General Division erred by failing to acknowledge an "imbalance of power".

[56] Point 45(f) is the Claimant's argument that the General Division did not explain why the Claimant left his job when he had many good reasons for staying. The Claimant seems to be saying that the General Division failed to presume that he would have acted rationally and unemotionally and that his own interest in remaining employed would not have permitted him to leave his employment unless the circumstances were objectively intolerable.

[57] Unfortunately for the Claimant, the General Division is not required to presume people to act rationally. Furthermore, claimants may have very good reasons for leaving their employment, but this does not mean that their good reasons will be taken to be "just cause" under the EI Act. Good cause is not the same as "just cause" under the EI Act. There is no arguable case that the

[19] General Division, para 27.
[20] General Division, paras 16, 28.

General Division erred by failing to presume the Claimant's actions to be rational or by failing to consider the reasons why he would have preferred to stay at his job.

[58] Point 45(g) relates once more to the Claimant's contention that there was no evidence that his absence during his notice period was unexplained. As previously addressed, regardless of whether the Claimant's absence was or was not explained, this fact was irrelevant to the decision as per *Lamonde*, and the General Division did not rely on this fact in making its decision. Any error under section 58(1)(c) of the DESD Act requires the General Division to have "based its decision" on an erroneous finding of fact. The General Division did not base its decision on its finding that the Claimant's absence was unexplained, and therefore, the Claimant has not made out an arguable case that the General Division erred under section 58(1)(c).

[59] The last point, 45(h), is the Claimant's assertion that the General Division ignored the fact that he had no formal training for the job. The evidence suggests that he was working in a job in which the usual mode of training was "on-the-job" learning and that he was receiving feedback on his performance. In fact, it is undisputed that the Claimant had no formal training.

[60] However, the Claimant has not explained how this lack of formal training was relevant to the issues or to the General Division's conclusion that the Claimant left his job without just cause because he had reasonable alternatives to leaving. There is no arguable case that the General Division erred by failing to refer to this particular piece of evidence.

[61] I recognize that the Claimant disagrees with the manner in which the General Division weighed and analyzed the evidence and with many of its conclusions, but simple disagreement with the findings does not establish a ground of appeal under section 58(1) of the DESD Act.[21] Nor does a request to reweigh the evidence establish a ground of appeal that has a reasonable chance of success.[22]

[62] The Claimant did not make out an arguable case that the General Division ignored or misunderstood any of the evidence to which he referred. However, in accordance with the direction of the Federal Court in *Karadeolian v Canada (Attorney General*),[23] I have reviewed

[21] *Griffin v Canada (Attorney General)*, 2016 FC 874.
[22] *Tracey v Canada (Attorney General)*, 2015 FC 1300.
[23] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

the record for other evidence that might have been ignored or overlooked and that may, therefore, raise an arguable case.

[63] I did not discover any significant evidence that could have been relevant to the General Division's decision but that the General Division arguably ignored or misunderstood. The General Division's conclusions also appear to be rationally connected to the evidence, and there is no arguable case that they are either perverse or capricious.

[64] There is no arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse of capricious manner or without regard for the material before it under section 58(1)(c) of the DESD Act.

[65] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	K. A., self-represented