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

Citation: *P. J. v Canada Employment Insurance Commission*, 2019 SST 20

Tribunal File Number: AD-18-73

BETWEEN:

P. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 11, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, P. J. (Claimant), denies that he voluntarily left his employment. He claims that he was terminated from his employment for refusing to perform specific work, despite the fact that his employer was aware that the work exceeded his physical capabilities. He claims that his employer instructed him to remain at home until it contacted him, but he never heard back from his employer. He claims that his employer terminated him without just cause.

[3] The Claimant applied for Employment Insurance regular benefits, but the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, having determined that he voluntarily took leave from his job without just cause.[1] The General Division maintained the Commission's decision on appeal, finding that the Claimant had the "reasonable alternative of returning to his position that was available under the modified duties guidelines."

[4] The Claimant is appealing the General Division's decision. In this appeal, I must determine whether the General Division either erred in law or based its decision on any erroneous findings of fact without regard for the material before it. I find that the General Division erred, largely by failing to consider some of the evidence that could have had an impact on the outcome. Given the need to clarify the evidence, it is appropriate to return this matter to the General Division for a redetermination.

ISSUES

[5] The issues before me are as follows:

> Issue 1: Did the General Division base its decision on an erroneous finding of fact without considering the three Records of Employment in the hearing file?

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[1] Commission's initial letter dated August 4, 2016 (GD3-29), and reconsideration decision dated October 5, 2016 (GD3-70 to GD3-71).

Issue 2: Did the General Division err by failing to consider the applicability of section 29(c)(iv) of the *Employment Insurance Act* in the Claimant's circumstances?

Issue 3: Did the General Division base its decision on an erroneous finding without considering the decision of a Workplace Safety and Insurance Board appeals resolution officer?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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 before it.

[7] The Claimant submits that the General Division erred under section 58(1)(c) of the DESDA.

Issue 1: Did the General Division base its decision on an erroneous finding without considering the three Records of Employment in the hearing file?

[8] The Claimant submits that the General Division based its decision on an erroneous finding of fact without regard for the material before it when it determined whether he had just cause for voluntarily leaving his employment. In particular, the Claimant argues that the General Division ignored the evidence that the working conditions constituted a danger to his health or safety. He argues that, if the General Division had addressed this evidence, it would have recognized that he did not quit or that he had just cause for voluntarily leaving his employment and did not have any reasonable alternatives to leaving his employment.

[9] The employer prepared three different Records of Employment:[2]

- Record of Employment dated July 6, 2016, stated the reason for issuance as "illness or injury"
- Record of Employment dated October 13, 2016, stating the reason for issuance as "dismissal," and
- Record of Employment dated October 14, 2016, stating the reason for issuance as the Claimant quitting his employment.

[10] The Claimant argues that the initial Record of Employment suggests that the employer was aware that the Claimant was so unwell or injured that he could not meet job expectations, and that if he were asked to perform certain tasks, this would endanger his health or safety.

[11] By stating that the employer had dismissed the Claimant, the second Record of Employment could show that the employer still considered the Claimant to be an employee and that he had not already quit.

[12] The General Division did not refer to or undertake any analysis of the possible significance of the three Records of Employment that showed three different reasons for the Claimant's departure from his employment. The General Division should have assessed and determined what significance, if any, the three different Records of Employment had. The General Division therefore based its decision on an erroneous finding of fact without regard for the material before it when it failed to consider the three Records of Employment.

Issue 2: Did the General Division err by failing to consider the applicability of section 29(c)(iv) of the *Employment Insurance Act* in the Claimant's circumstances?

[13] The Claimant argues that the working conditions constituted a danger to his health or safety and that the General Division erred in law by failing to apply section 29(c)(iv) of the *Employment Insurance Act* in his case.

[2] Records of Employment, at GD3-19 to GD3-21.

[14] Section 29(c)(iv) of the *Employment Insurance Act* states that there is just cause for voluntarily leaving an employment if the claimant had no reasonable alternative to leaving, having regard to working conditions that constitute a danger to health or safety.

[15] The Commission notes that on June 24, 2016, the Claimant had refused to lift a bundle of vinyl at his work because of chronic back pain. The Claimant had previously injured his back in June 2015 from lifting a heavy object and claimed that he had ongoing symptoms. The Claimant consulted his physician on June 27, 2016, and obtained a medical note that indicated the Claimant has a chronic back problem and that he was unable to do heavy and repetitive lifting.[3] The Claimant argued that his working conditions constituted a danger to his health and safety.

[16] The Commission submits that, given these factual circumstances, the General Division should have considered whether section 29(c)(iv) of the *Employment Insurance Act* applied in this case.

[17] I concur with the Commission on this point. There was ample evidence before the General Division to show that the Claimant was concerned about his working conditions because he feared re-injury or aggravating his pre-existing back issue. He had previously sustained a work-related back injury. After missing one week of work, he returned to modified duties. Although an appeals resolution officer with the Workplace Safety and Insurance Board determined that the Claimant's upper back strain had resolved by December 2015,[4] the Claimant continued to complain of ongoing back pain. An MRI revealed multi-level degeneration throughout the thoracic spine, as well as a small disc herniation at the T12 level. The appeals resolution officer was unconvinced that these particular findings related to the accident and declined to comment on "this aspect of the ongoing symptomology,"[5] but they acknowledged that he complained of lower back pain, even if it was unrelated to his initial work injury.

[18] Despite the Claimant's complaints of ongoing lower back pain, the Claimant's employer expected him to lift a pile of vinyl, which the Claimant estimated weighed upwards of 150 lb. The employer estimated that the pile weighed 20 lb., although in a telephone conference with the

[3] Medical note dated June 27, 2016, at GD3-22.
[4] Appeals Resolution Officer Decision dated September 22, 2016, at GD3-64 to GD3-67.
[5] *Ibid*. at GD3-67.

Commission, the employer also asserted that it did not require the Claimant to lift more than 10 lb.[6]

[19] The Claimant refused to lift the pile. He subsequently obtained a medical note confirming his ongoing back pain. The note also indicated that the Claimant had a follow-up appointment with a specialist on August 24, 2016. When the Claimant provided the note to his employer, the employer found that the note was unclear about any accommodations that the Claimant required because the note simply stated that the Claimant was unable to do heavy and repetitive lifting.

[20] The Claimant also filed a complaint with the Ministry of Labour's Occupational Health and Safety Division, although by the time of its investigation at the workplace on July 6, 2016, production had stopped for inventory preparations and there were no imminent dangers for the worker.[7] On that same date, the employer issued a Record of Employment, citing the Claimant's illness or injury as the reason for his departure from work. The Claimant suggests that by citing illness or injury as the reason for issuing the Record of Employment, the employer showed that it was aware that he was unable to fully meet all of the physical work demands and that it recognized that he required modified duties.

[21] The General Division noted that the employer and the Claimant agreed that the Claimant's duties had been modified as required by a functional abilities form and as directed by the Workplace Safety and Insurance Board. They also agree that the employer asked the Claimant to do some lifting. The parties dispute whether the employer expected the Claimant to work beyond the functional abilities form. A copy of the functional abilities form was not included in the hearing file, but the Claimant referred to an October 2015 Functional Abilities Form as one of the attachments to an email from him to his employer.[8]

[22] All of these factors merited consideration when the General Division was determining whether there was just cause under section 29(c)(iv) of the *Employment Insurance Act*. The General Division did not directly refer to section 29(c)(iv) of the *Employment Insurance Act*, although it appears to have accepted the employer's assertions that it modified the Claimant's

[6] Telephone notes taken on July 28, 2016. Supplementary Record of Claim, at GD3-24.
[7] Field Visit Report of Occupational Health and Safety, dated July 6, 2016, at GD3-25 to GD3-26.
[8] Claimant's email, dated August 8, 2016, at GD3-37.

duties to accommodate him. The General Division does not appear to have considered the Claimant's allegations that the employer expected him to perform duties beyond what was set out in the functional abilities form. From this perspective, the General Division did not address whether section 29(c)(iv) of the *Employment Insurance Act* was applicable. This constitutes an error of law.

Issue 3: Did the General Division base its decision on an erroneous finding without considering the decision of a Workplace Safety and Insurance Board appeals resolution officer?

[23] The Commission submits that the General Division's analysis "may not be entirely compatible with the evidence."[9] In particular, the Commission refers to paragraph 26 where the General Division found that the Claimant had the reasonable alternative of returning to his job under the modified duties guidelines. The Commission notes that it was unclear which guidelines these were.

[24] The Commission claims that it is also unclear whether the General Division considered the Workplace Safety and Insurance Board report, which it argues clearly demonstrates that the Claimant fully recovered from his mid-back strain effective December 9, 2015. The Commission argues that, according to the Workplace Safety and Insurance Board Appeals Resolution Officer Decision, the Claimant was fully recovered from his mid-back strain and that this suggests that there was no need for any modified duties.

[25] I note, however, that, at the same time, the appeals resolution officer observed that the Claimant complained of ongoing symptoms involving his lower back. As I found above, there is no doubt that the Claimant continued to experience back pain, even if it was unrelated to his initial work injury.

[26] Given these considerations, I find that the General Division based its decision on an erroneous finding of fact that the Claimant had the reasonable alternative of returning to his job under the modified duties guidelines when it was unclear what these guidelines were and whether they accounted for the Claimant's complaints of ongoing lower back pain.

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[9] Commission's Representations to the Social Security Tribunal - Appeal Division, at AD3-4.

Summary

[27] The General Division based its decision on two erroneous findings of fact without regard for the existence of three different Records of Employment, at least one of which could have changed the outcome, and the Workplace Safety Insurance Board appeals resolution officer's decision. The General Division also erred by failing to consider whether section 29(c)(iv) of the *Employment Insurance Act* applied.

RELIEF SOUGHT

[28] Under section 59 of the DESDA, I can dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with any directions that I might consider appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

[29] The Commission requests that I return the matter to the General Division for a redetermination. As I have noted above, the parties dispute whether the employer expected the Claimant to perform work beyond what was described in a functional abilities form. On the one hand, the Claimant expected his employer to contact him for a return to work once it was able to arrange for accommodations, whereas, on the other hand, the employer claims that it was already accommodating the Claimant because it did not require him to do any heavy lifting. The General Division did not have a copy of the functional abilities form, although it may have been critical to determining whether the employer provided the appropriate accommodations or expected the Claimant to work beyond his physical abilities without the appropriate accommodations. The functional abilities form may be critical to ultimately establishing whether the Claimant had just cause for voluntarily leaving his employment and whether he had any reasonable alternatives to leaving. It is therefore appropriate under these circumstances to return the matter to the General Division for a redetermination.

CONCLUSION

[30] The appeal is allowed and the matter returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	P. J., Appellant James Anampiu, Representative for the Appellant J. Thiffault, Representative for the Respondent