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

Citation: *K. D. v Canada Employment Insurance Commission*, 2019 SST 54

Tribunal File Number: AD-18-602

BETWEEN:

K. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. Although I have found errors in the General Division decision, the outcome remains unchanged.

OVERVIEW

[2] The Applicant, K. D. (Claimant), was employed 600 kilometres from her home at a camp job where she worked a rotation of 14 days on and 7 days off. She left her employment because of the difficulty she had commuting to work.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), refused her application for benefits on the basis that the Claimant had voluntarily left her employment without just cause. The Claimant requested the Commission to reconsider, but it maintained its original decision. She appealed to the General Division of the Social Security Tribunal, which dismissed the appeal. She now appeals to the Appeal Division.

[4] The appeal is allowed. The General Division erred in law by considering itself bound by Canadian Umpire Benefit jurisprudence, by failing to consider all the circumstances, and by giving reasons that do not adequately describe how the General Division reached its decision. The General Division also concluded that the Claimant had a reasonable alternative to leaving without analyzing the Claimant's evidence of the increasing difficulty of arranging transportation to work.

ISSUES

[5] Did the General Division err in law by relying on decisions of the Umpire?

[6] Did the General Division err in law by failing to have regard to all the circumstances?

[7] Did the General Division err in law by providing inadequate reasons for its decision?

[8] Did the General Division base its decision on an erroneous finding of fact by ignoring or misunderstanding evidence related to the Claimant's evidence of the cost and increasing difficulty of obtaining transportation to the work site?

ANALYSIS

General Principles

[9] 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 described below:

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 err in law by relying on decisions of the Umpire?

[11] The General Division stated that "the jurisprudence clearly points out that difficulty in obtaining transportation to and from work does not constitute just cause." It referred only to the "several pieces of law" the Commission cited.[1] The General Division also noted that "[it was] guided by the jurisprudence and while sympathetic to the Appellant's situation [was] unable to find that she had just cause for leaving her employment."

[12] The General Division did not refer to Federal Court or Federal Court of Appeal jurisprudence in which it was found that "transportation difficulties" should be excluded from

[1] General Division Decision at para 18.

consideration when determining whether reasonable alternatives exist. The only jurisprudence cited by the Commission were Canadian Umpire Benefit (CUB) decisions, which are not binding on the General Division.

[13] The General Division might have referred to the CUB decisions as being persuasive, but instead it dismissed transportation difficulties from consideration based on its understanding of the law as expressed in those decisions. In so doing, it fettered its discretion and erred in law under section 58(1)(b) of the DESD Act.

Issue 2: Did the General Division err in law by failing to have regard to all the circumstances?

[14] Section 29(c) of the *Employment Insurance Act* (EI Act) states that just cause for voluntarily leaving an employment exists where a claimant has no reasonable alternative to leaving having regard to all the circumstances. A non-exhaustive list of circumstances follows which includes section 29(c)(v), obligation to care for a child or a member of the immediate family.

[15] The Claimant testified that her husband had cancer and that his illness and inability to take her to work was the reason that she began to have transportation difficulties. Her representative said that the Claimant continued to commute to her work for about a year after her husband became ill.

[16] The Claimant also testified that she had once attempted to obtain leave to be with her husband when he was going through surgery[2] and to help him with daily living afterwards,[3] but that her employer was unreceptive, telling her that they "don't give time off" and she would "have to quit."[4] Her representative stated that, at the same time she was commuting to work, she also had to do a lot of her husband's work for him and care for him.[5]

[17] The General Division acknowledged that the Claimant's transportation problems began after her husband became sick. However, it failed to consider whether the Claimant's obligation

[2] Recording of General Division hearing at 17:00.
[3] Recording of General Division hearing at 18:25.
[4] Recording of General Division hearing at 18:00.
[5] Recording of General Division hearing at 13:00.

to care for her husband was a relevant circumstance under section 29(c)(v) of the EI Act, despite the fact that it was raised by the Claimant and suggested by her evidence.

[18] The General Division failed to have regard to all the circumstances as required by section 29(c) and erred in law under section 58(1)(b) of the DESD Act by doing so.

Issue 3: Did the General Division err in law by providing inadequate reasons for its decision?

[19] I am unable to determine the basis for the General Division's decision. The General Division accurately represented the legal test for just cause,[6] but it appears to have applied the test incorrectly when it found the Claimant's transportation difficulties did not constitute just cause,[7] rather than considering transportation difficulties as a circumstance relevant to the existence of reasonable alternatives.

[20] However, it is also possible that the General Division considered the Claimant's transportation difficulties to be irrelevant because the General Division considered itself to be bound by CUB decisions that did not accept that transportation difficulties should be taken into account.

[21] Another possibility is that the General Division considered transportation difficulties to be a relevant circumstance but that it was still not persuaded that the Claimant had any reasonable alternative to quit.

[22] In the Federal Court of Appeal in *Canada (Attorney General) v Thériault*,[8] the Court stated that a reviewing court must be able to "understand why the tribunal made its decision and [reasons must] permit it to determine whether the conclusion is within the range of acceptable outcomes." I find that I cannot understand on what basis the General Division reached its decision, and I therefore find that the reasons are inadequate. On this basis, I find that the General Division erred in law under section 58(1)(b) of the DESD Act.

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[6] General Division decision at paras 10–12.
[7] General Division decision at para 18.
[8] *Canada (Attorney General) v Thériault*, 2017 FC 405.

Issue 4: Did the General Division find that the Claimant had a reasonable alternative without regard for the Claimant's evidence about her transportation difficulties?

[23] The Commission has conceded that grounds to appeal exist. It acknowledges that the General Division may have misinterpreted the circumstances of the claimant's difficulty with transportation to and from work. The Commission characterizes this as an error of law, but I will consider this as an erroneous finding of fact under section 58(1)(c) of the DESD Act.

[24] The Claimant's evidence included the following:

- She resided inX, a small community that is relatively remote from other population centres and is 600 kilometres north of her former job site;
- The Claimant's husband could no longer drive her because of illness;
- The Claimant had no vehicle of her own;
- The Claimant said that no one in her community worked for the same employer.[9] She asked relatives and others in her area and advertised on social media but was having increasing difficulty obtaining private rides. She stated that "some people would get tired of it and say no;"[10]
- The cost of paying for rides to and from the job site was roughly half of her income; and
- The Claimant had already missed work rotations when she could not secure transportation.

[25] The Claimant's evidence was that she could not always obtain rides since her husband had become sick, that she had been forced to miss work as a result, and that she was spending nearly half her pay cheque on rides to work and back.[11] This was undisputed.

[26] The General Division found that the Claimant could still obtain rides and stay employed based on the fact that she had been able to make it to work most of the time (to that point) that it was her issue with the cost of the rides that led to her quitting.[12] This conclusion disregards the

[9] GD3-21.
[10] GD3-26.
[11] GD2-2.
[12] General Division decision at paras 17 and 18.

Claimant's evidence that it was "getting hard to hire and have funds to find someone to drive [her] to work,"[13] and it was "getting harder for [her] to find [her] transportation to get to work"[14] and that it "was becoming impossible to find rides,"[15] suggesting that the Claimant's situation was not sustainable and getting worse.

[27] It was open to the General Division to find on the facts that the cost of transportation was a significant, or even the most significant, reason that the Claimant quit, but the facts did not support the conclusion that her difficulty obtaining transportation was **not** a significant factor. The General Division gave no reason for finding that it was the cost of transportation— that led to her quitting, and not her difficulty arranging transportation.

[28] As the Federal Court of Appeal held in *Oberde Bellefleur v Canada (Attorney General)*,[16] a decision maker is not entitled to ignore important evidence or reject it without explanation. The General Division did not explain why it rejected the Claimant's evidence related to her increasing difficulty in obtaining transportation.

[29] The General Division's finding that the Claimant's difficulty finding transportation was not a significant factor was made without regard for the evidence and was an error under section 58(1)(c) of the DESD Act.

CONCLUSION

[30] The General Division erred in deciding as it did. However, the appeal must still be dismissed for the reasons that follow.

REMEDY

[31] The Claimant has suggested that the matter should be referred back to the General Division because the determination of just cause is a question of mixed fact and law and the General Division is the trier of fact. I accept that the Appeal Division has no jurisdiction to interfere with a General Division decision on the basis of an error of mixed fact and law, but

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[13] GD3-10.
[14] GD3-13.
[15] GD3-21.
[16] *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

there is no reason that, having found an error of law, the Appeal Division should not apply the law to the facts to make the decision the General Division should have made.

[32] Section 64 of the DESD Act states that I may decide any question of law or fact that is necessary for the disposition of any application. Therefore, if I consider the record to be complete, I am authorized under section 59 of the DESD Act to assess the evidence.

[33] To find that the Claimant had just cause for leaving her employment, I would have to find that she had no reasonable alternative to leaving, having regard to all the circumstances.

[34] I have considered the following circumstances:

- The Claimant had to commute 600 kilometres to her job and she would be away from her home and her husband two weeks at a time;[17]
- The Claimant's husband had surgery in March 2017, and the Claimant was laid off to care for him at or about that time. The Claimant returned to work for the employer in October 2017;[18]
- The Claimant's husband could no longer borrow a vehicle and drive her to work, and the Claimant had to hire people to drive her to work. The Claimant had to pay $300.00 for a ride in each direction, or $600.00 per work rotation, which she describes as almost half her pay cheque;
- The Claimant was finding it increasingly difficult to find anyone to drive her to work, and she had been forced to miss work as a result;
- The Claimant had looked for work in the area of her home community before she quit, but she lived in a relatively remote and economically depressed region and had been unsuccessful.

[35] I earlier found that the General Division failed to consider whether the Claimant's obligation to care for her husband was a relevant circumstance. I accept that the Claimant had, or

[17] GD2-2.
[18] AD4-2.

has, cancer and that he had surgery for his cancer. Her representative said that the Claimant had to do "a lot of the work for [her husband],"[19] and I do not doubt that he continued to require care. However, I note that after the Claimant had been laid off to care for her husband, she returned to work again.

[36] This means that the Claimant was already aware of her husband's condition when she returned to work. There was no evidence that her husband's condition deteriorated after the Claimant returned to work for the employer in October or that he required more intensive care. If it was reasonable for the Claimant to return to work for another 20 weeks (according to the Record of Employment) while her husband still needed care, then she cannot maintain she had no reasonable alternative to leaving on the basis that her husband needed her help.

[37] The Claimant clarified the timing of her husband's surgery and her return to work in answering my questions, and it is now clear that the Claimant asked for this time off in March 2017, that she was laid-off at that time, and that her evidence that she had requested leave to care for her husband also relates to this earlier time. Therefore, I do not accept that she explored the possibility of obtaining a leave to sort out her transportation difficulties after she returned to work in October 2017. Having said that, the General Division did not directly address the relevance of her request for leave to the availability of reasonable alternatives, and it is not apparent to me that asking for a leave would have helped the Claimant to resolve her difficulty in getting to work, whether she was granted leave or not.

[38] The General Division suggested that it would be reasonable for her to remain in her job until she obtained a new job. I understand that the Claimant had looked for work in her home community and in the surrounding area, but that her home community is small with limited job prospects. She said that there are six businesses in town and she applied to all of them but without success. Her representative, the local Member of the Legislative Assembly, raised the fact that, regionally, Northern Saskatchewan had the highest unemployment and lowest income in Canada. There was no reasonable prospect of employment in her home community.

[39] However, the Claimant returned to work after her employer laid her off, and so she

[19] Recording of General Division hearing at 23:42.

apparently accepted the 600-kilometre commute after the time when her husband could no longer drive her. The difficulty with the Claimant's justification for leaving is that those circumstances that she believes demonstrate that she had no reasonable alternative to leaving already existed at the time that she returned to work. If her husband was unable to drive her as early as March 2017 and she returned to work in October 2017, she had to have known and accepted, even before she started her employment, that she would have to ask for (and likely pay for) rides from other people if she was to get to work.

[40] The Claimant told the Commission that she had already missed work because she could not find rides, and that it was increasingly difficult to get rides.[20] However, as noted by the General Division, the Claimant had shown that she could obtain transportation most of the time. While the Claimant testified to increasing difficulty, there was no evidence to suggest that the Claimant's absences due to missed rides had become a problem for the employer yet or that the Claimant's dismissal was imminent.

[41] Therefore, I accept that the Claimant had the reasonable alternative of remaining employed until she found a job closer to home and continuing to pay for rides to work, and that she did not have just cause for leaving her employment.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
SUBMISSIONS:	K. D., Appellant S. Prud'Homme, Representative for the Respondent

[20] GD3-26.