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

Citation: *H. C. v Canada Employment Insurance Commission*, 2019 SST 72

Tribunal File Number: AD-18-572

BETWEEN:

H. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 31, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] After leaving his employment as a waiter, the Appellant, H. C. (Claimant), applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim for benefits, initially and upon reconsideration, having determined that he left his employment without just cause. On appeal, the General Division upheld the determination, having found that the Claimant had failed to show just cause for voluntarily leaving his employment because he did not pursue all reasonable alternatives to quitting.

[3] In this appeal before me, the Claimant submits that the General Division erred in law and that it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it. The parties agree that the General Division made erroneous findings of fact and that it erred in law, but they disagree on the appropriate disposition of this matter.

[4] I agree with the parties that the General Division erred in law and that it made erroneous findings of fact. I am allowing the appeal because I find that the Claimant had just cause for voluntarily leaving his employment and that he had no reasonable alternative to leaving. I am also rendering the decision that the General Division should have given.

ISSUE

[5] Did the General Division err in law by failing to consider sections 29(c)(i), (x), and (xi) of the *Employment Insurance Act*?

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.

Did the General Division err in law by failing to consider sections 29(c)(i), (x), and (xi) of the *Employment Insurance Act*?

[7] In his submissions filed with the General Division, the Claimant noted that he would be relying on sections 29(c)(x) and (xi) of the *Employment Insurance Act.* The Claimant asserted that he faced antagonism from his supervisor for which he was not primarily responsible and that his employer engaged in unlawful practices. He argued that he therefore had just cause to voluntarily leave his employment under sections 29(c)(x) and (xi) of the *Employment Insurance Act* and that he did not have any reasonable alternatives to voluntarily leaving his employment. He argues that, despite the evidence and his submissions, the General Division failed to consider sections 29(c)(x) and (xi) of the *Employment Insurance Act*.

[8] Under sections 29(c)(x) and (xi) of the *Employment Insurance Act*, just cause for voluntarily leaving an employment exists if a claimant had no reasonable alternative to leaving, having regard to all the circumstances, including:

> 29(c)(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism, and
>
> (xi) practices of an employer that are contrary to law.

[9] The General Division examined whether there were "significant modification of terms and conditions respecting wages or salary" under section 29(c)(vii) of the *Employment Insurance Act* and whether the Claimant had any reasonable alternatives to quitting. The General Division found that the Claimant had accepted the significant reduction in his working hours by taking an unauthorized leave of absence, so the section did not apply. It also found that the Claimant had reasonable alternatives to leaving. In particular, it found that he could have made a formal

complaint with provincial authorities about his employer's antagonism and unlawful practices before he left his employment. It also found that he could have stayed until he found other employment elsewhere.

[10] However, the General Division did not examine the Claimant's assertions that he faced harassment and antagonism from his employer and that his employer engaged in unlawful practices. The General Division did not consider his arguments that sections 29(c)(x) and (xi) of the *Employment Insurance Act* applied to his situation, either. In this regard, the General Division erred in law by failing to consider whether sections 29(c)(x) and (xi) of the *Employment Insurance Act* applied in the Claimant's circumstances. This could have established that the Claimant had just cause to leave his employment. Because the Claimant also alleged that his employer harassed him, the General Division should have considered whether section 29(c)(i) of the *Employment Insurance Act* applied. Under section 29(c)(i) of the *Employment Insurance Act*, just cause for voluntarily leaving exists if a claimant has no reasonable alternative to leaving, having regard to all the circumstances, including sexual or other harassment.

REMEDY

[11] The Commission argues that I do not have any jurisdiction to render the decision that the General Division should have given because that would involve considering mixed facts and law and conducting a new hearing altogether. The Commission requests therefore that I return the matter to the General Division for reconsideration.[1]

[12] The Claimant, on the other hand, argues that the Appeal Division has broad powers under section 59 of the DESDA. The Claimant asks me to render the decision that the General Division should have given, rather than delaying the matter further, given that there are no gaps in the evidence and there is a complete evidentiary record.

[13] 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,

[1] Commission's Representations to the Social Security Tribunal, dated November 7, 2018, at AD2-4 and Additional Commission Representations to the Social Security Tribunal, dated November 30, 2018, at AD6-1.

rescind, or vary the decision of the General Division in whole or in part. Under section 64 of the DESDA, I may also decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[14] Here, I am not dealing with mere disagreement with the application of settled law to the facts. In this case, the General Division did not apply the law to the facts. The General Division overlooked the issue of the applicability of section 29(c)(i), (x), and (xi) of the *Employment Insurance Act* altogether. Under these circumstances, I have the jurisdiction to intervene.

[15] I do not see any critical gaps in the evidence, so I will render the decision that the General Division should have given, except for those areas where I accept the General Division's findings.

[16] To be clear, I accept the General Division's finding that the Claimant voluntarily left his employment, but I depart from the General Division on its findings and analysis on the issue of whether the Claimant had just cause for voluntarily leaving his employment. I will be considering the Claimant's argument that his employer harassed or antagonized him, and my focus will be on the employer's most recent efforts to antagonize or harass the Claimant by reducing his hours.

[17] The Claimant's employer significantly reduced the Claimant's work hours, prompting him to leave his employment. The Claimant asserts that there were several other contributing factors causing him to leave his employment, including antagonism and the employer's unlawful practices. Indeed, he filed a formal complaint with provincial authorities about the employer's unlawful practices, but he did this after the Commission denied his application for Employment Insurance benefits.

[18] In the proceedings before the General Division, the Claimant alleged that the employer verbally abused the restaurant wait staff over a span of several years, even calling them "garbage" in front of customers. Other staff were unprepared to speak up about the way the employer treated them, but the Claimant was more outspoken. The Claimant confronted the employer at some point, after which he perceived that the employer seemed to single him out for

poor treatment.[2] In a telephone call with the Commission, the Claimant stated that his disagreements with the employer's treatment of the staff persisted throughout his three-year employment.[3] The Claimant further alleges that the employer engaged in unlawful practices by failing to pay him overtime, failing to pay minimum wage, and failing to provide proper pay documentation. He also testified along these lines.[4]

[19] While the Claimant would have been justified in leaving his employment because of the employer's unlawful practices and the instances of antagonism that the General Division described, it is clear, however, that he tolerated his workplace environment and his employer's practices for several years, up to the point that the employer reduced his work hours. These conditions, up to the point that the employer reduced his work hours, were not the primary reasons that caused him to leave his employment. The Claimant did not mention these factors in any of his early communications with the Commission or in the notice of appeal filed with the General Division. Early communications with the Commission indicate that the Claimant left his employment because the employer had drastically reduced his hours from an average of 30 to eight hours per week.[5]

[20] At first glance, it appears that the reduction in hours simply represented a change in the terms of the Claimant's employment. However, it was much more than just a change in the terms of employment. The employer used the change in terms of employment as a tool to antagonize or harass the Claimant. The reduction in work hours was the latest part of the chain of antagonism and harassment towards the Claimant, and it represented the straw that broke the camel's back. It was this particular incident that the Claimant also viewed as antagonism that left him unable to tolerate the employer's antagonism and harassment.

[21] There is no documented evidence that the employer had told the Claimant that it would reduce his hours if he were to take an unauthorized leave of absence. There is no evidence that the Claimant accepted changes to the terms of his employment or that he could have expected a reduction in his hours, either. Indeed, when the Claimant returned from his leave of absence, the

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[2] Letter dated February 2, 2018, from Claimant's counsel, at GD3-28 to GD3-29 and Claimant's statement, at GD6-10.
[3] Supplementary Record of Claim, March 9, 2018, at GD3-40 and Claimant's statement, at GD6-10.
[4] At approximately 34:00 of the audio recording of the General Division hearing on July 10, 2018.
[5] Supplementary Record of Claim, at GD3-17 and Request for Consideration, at GD3-22.

employer continued to provide him his usual work hours for close to two weeks before drastically reducing his hours. The employer stated that it was forced to hire a replacement and that it was therefore unable to offer the Claimant his usual hours. While that may be so, it does seem inconsistent with the fact that the employer continued to offer the Claimant his usual hours when he returned from his leave of absence and then continued to offer him hours—albeit greatly reduced—while giving other workers more hours too.[6] Having returned from his leave of absence to his usual set of hours, the Claimant could not have predicted that his employer would reduce his hours the third week into his return.

[22] According to the Claimant, when he asked his employer whether he could expect any additional hours in the future, the employer told him that there would be no more additional hours in the future and that it would not issue a positive record of employment so that he would not get any Employment Insurance benefits. The employer reported to the Commission that it might have given the Claimant more hours in the future. The Claimant felt "extremely angry"[7] because he felt that his employer was targeting him for reprisal for speaking out on behalf of all of the employees, including himself.[8]

[23] When the Claimant requested a leave of absence, his employer required him to provide a vacation request form. Under any other setting, that might have seemed a reasonable request. However, this was the first and only time that the employer requested any employee to provide a vacation request form. The Claimant was justified in feeling harassed or antagonized by his employer because he alone was singled out. On top of that, the employer verbally abused the staff, including the Claimant, by belittling them in front of customers.

[24] Thus, the context in which the work reduction occurred was important. The reduction in hours represented not only a significant modification of terms and conditions respecting the wages or salary for the Claimant, but from the Claimant's perspective, the reduction was another way for the employer to antagonize and harass the Claimant. This is clear from the Claimant's immediate response when he learned about the reduced hours. Viewing the change in the terms

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[6] The Claimant stated that he observed that the employer assigned other people more hours. See Supplementary Record of Claim at GD3-17.
[7] Claimant's statement, at GD6-11.
[8] *Ibid*.

of his employment from this lens, there was workplace antagonism and harassment for which the Claimant was not primarily responsible.

[25] However, that still leaves me to determine whether the Claimant had any reasonable alternatives to voluntarily leaving his employment.

[26] Remaining in his position and looking for other employment was an unreasonable alternative for the Claimant, given the level of antagonism that the employer displayed towards him by this time. As well, it was unreasonable to require the Claimant to have made and resolved any complaints with provincial authorities before leaving his employment. Certainly, he was under no obligation to do so. Furthermore, as I noted in my leave to appeal decision, lodging a complaint against the employer could have inflamed the Claimant's working situation.

[27] For these reasons, I find that the Claimant had just cause for voluntarily leaving his employment and that he did not have any reasonable alternatives to leaving, taking into account the harassment and antagonism from his employer.

CONCLUSION

[28] The appeal is allowed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	H. C., Appellant Victoria Wan, Counsel, Representative for the Appellant S. Prud'Homme, Representative for the Respondent