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

Citation: *A. E. v Canada Employment Insurance Commission*, 2019 SST 327

Tribunal File Number: AD-18-818

BETWEEN:

A. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: April 3, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. E. (Claimant), left her employment for a number of reasons, including her medical condition, and she applied for regular Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), approved sickness benefits but denied her claim for regular benefits on the basis that she voluntarily left her employment without just cause. The Commission maintained this decision on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal, but the General Division dismissed her appeal. The Claimant now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division erred in law in failing to have regard for all of the circumstances as required by section 29(c) of the *Employment Insurance Act* (EI Act) and by failing to consider all the materials that were before it.

[4] I have made the decision that the General Division should have made. Considering all of the circumstances together, I find that the Claimant had just cause for leaving her employment and should not be disqualified from receiving benefits.

ISSUES

[5] Did the General Division err in law by finding the Claimant had reasonable alternatives to leaving without considering all the circumstances?

[6] Did the General Division find that the Claimant did not provide evidence to support that she had just cause to leave based on her antagonism with a supervisor, without considering the letters/notes given to staff by the supervisor?

ANALYSIS

[7] 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 s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only 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 before it.

Issue 1: Did the General Division err in law by finding the Claimant had reasonable alternatives to leaving without considering all the circumstances?

[9] In granting leave to appeal, I found an arguable case that the General Division erred in law by failing to consider all the circumstances before finding that the Claimant had a reasonable chance of success, as required by section 29(c) of the EI Act. In particular, I found that the General Division did not take into analyze the Claimant's assertions of extra, unpaid hours of work, which is identified as a relevant factor by section 29(c)(viii).

[10] I note that the Commission now agrees that the General Division erred in *either* fact or law by failing to consider the Claimant's testimony of unpaid overtime hours and failing to analyze the impact of this factor as required by section 29(c)(viii) of the EI Act.

[11] In the Claimant's reconsideration request, she told the Commission that she was "required to work outside of her work time (at home) without being paid".[1] She said she worked more than 15 hours without payment from February 24, 2018 to March 31, 2018. She also told the Commission that her principal held staff meetings during her unpaid lunch break on more

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[1] GD3-33

than 15 occasions.[2] The Claimant told the Commission that she had raised the unpaid work once with the employer in a casual way but that the employer responded that it was a “team effort”. She also said that she had investigated whether she could file a complaint with the Ministry of Labour.[3] The General Division did not reference any of this evidence and it did not analyze the application of section 29(c)(viii), “excessive overtime work or refusal to pay for overtime work”. The General Division erred in law under section 58(1)(b) of the DESD Act by failing to consider one of the relevant circumstances identified in the list of circumstances in section 29(c).

[12] Furthermore, the General Division erred in the manner in which it applied the law to the circumstance described in section 29(c)(x), “antagonism with a supervisor if the claimant is not primarily responsible for the antagonism.” The General Division found that the Appellant did not provide any evidence to support that she had just cause to leave pursuant to paragraph 29(c)(x) “antagonism with a supervisor if the claimant is not primarily responsible for the antagonism”.[4]

[13] Individual circumstances, like antagonism with a supervisor, are not properly analyzed in terms of whether they amount to “just cause” independently of the other circumstances. According to section 29(c) of the EI Act, just cause is a determination that must be made having regard to all the circumstances. The Claimant is not required to establish “just cause” with reference to antagonism alone, unless antagonism is the only circumstance arising from the evidence that might have affected her reasonable alternatives to leaving.

[14] Furthermore, the General Division stated that a claimant has an obligation to try to reconcile differences with an antagonistic supervisor before leaving,[5] but this is not correct. The Federal Court of Appeal has recognized that a claimant generally has a duty “to attempt to resolve workplace conflicts” with an employer before leaving.[6] However, that is not the same as requiring a claimant to attempt to reconcile differences with a supervisor found to be antagonistic. The nature or degree of the antagonism may be such as to preclude attempts to reconcile.

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[2] GD3-34
[3] GD3-35
[4] General Division decision, para 19
[5] General Division decision, para 23
[6] *Canada (Attorney General) v Hernandez* 2007 FCA 320

[15] If the evidence supports a finding that a supervisor's relationship with a claimant is antagonistic, that antagonism must be considered as a relevant factor in determining whether a claimant had no reasonable alternatives to leaving, whether or not the claimant has provided evidence that he or she attempted to resolve that antagonism. The General Division did not analyze the circumstances of the Claimant's antagonism with her supervisor in conjunction with the other factors arising from the circumstances to determine whether the Claimant had just cause for leaving.

[16] The General Division states that it relies on *Landry v. Canada (Attorney General)*[7] . In Landry the Federal Court of Appeal stated that it must consider whether the claimant left his employment in any of certain circumstances, and if not, whether the claimant had no reasonable alternative to leaving immediately. *Landry* is a 1993 decision that applied section 28(4)(b) of the former Unemployment Act and it has limited application to the proper interpretation and application of the test in section 29(c) of the current EI Act.

[17] In any event, neither *Landry* nor the current legislation suggests that a *claimant* must prove that he or she considered all of the relevant circumstances before determining that there was no reasonable alternative but to leave, as seemingly suggested by the General Division's paraphrase. It is the Commission, and the Tribunal in an appeal, that must have regard to all the circumstances and determine whether the claimant has established that he or she had no reasonable alternative to leaving.

[18] Whatever one makes of the reference to *Landry*, it is apparent that the General Division erred in law under section 58(1)(b) of the DESD Act by not considering "all the circumstances" before determining that the Claimant had reasonable alternatives to leaving, as required by section 29(c).

Issue 2: Did the General Division find that the Claimant did not provide evidence to support that she had just cause to leave based on her antagonism with a supervisor, without considering the letters/notes given to staff by the supervisor?

[7] *Landry v. Canada (Attorney General), A-1210-92*

[19] In its submissions in support of allowing this appeal, the Commission suggested that the General Division erred when it said that the Claimant "did not provide any evidence to support that she had just cause to leave pursuant to paragraph 29(c)(x) "antagonism with a supervisor".[8] The Commission noted that the Claimant supported her arguments of the supervisor's negative and stressful attitude towards employees with copies of log entry/notices[9] from the supervisor to the employees.

[20] It appears that the Commission has interpreted the General Division's finding to mean that the Appellant had not established the existence of an antagonistic relationship with her supervisor. If that is the correct interpretation, then the Commission is correct that the General Division ignored corroborative evidence supplied by the Claimant.

[21] To be clear, the General Division did not state that the Claimant failed to provide evidence to support that the antagonism *existed*, but that she did not provide evidence to support *just cause* in relation to that antagonism. The balance of the General Division's analysis is a discussion of circumstances in which antagonism may be considered just cause. The General Division's finding that the Claimant "did not provide any evidence" was related to the existence of "just cause" and not to the existence of antagonism.

[22] Even so, the Commission is correct that the General Division ignored relevant evidence. The evidence to which the Commission now points remains relevant for the purpose of establishing the circumstances under which that antagonism arose. It is therefore of potential relevance to whether reasonable alternatives to leaving might have existed. While a tribunal may often be entitled to a presumption that it considered the evidence that was before it,[10] such a presumption can not apply where there is some evidence on a point, and the tribunal declares that there is none.

[23] Therefore, the General Division erred by finding that the Claimant's antagonism with her supervisor did not establish just cause for leaving her employment, because it failed to have regard to all the material before it as required by section 58(1)(c) of the DESD Act.

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[8] General Division decision para. 19
[9] GD2 -6, 7
[10] *Simpson v. Canada(Attorney General)* 2012 FCA 82

CONCLUSION

[24] The appeal is allowed.

REMEDY

[25] Having allowed the appeal, I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind, or vary the General Division decision in whole or in part. I consider the record complete and I will give the decision that the General Division should have given.

[26] In her oral argument to the Appeal Division, the representative for the Commission invited me to give the decision that the General Division should have given, and she suggested that the Claimant should be successful on the substantive issue as well.

[27] The Claimant was disqualified from receiving benefits under section 30(1) of the EI Act because it was determined that she voluntarily left her employment without just cause. The Commission expressed doubt that the Commission had even established that the Claimant left her position voluntarily and further suggested that, if Claimant did leave voluntarily, she had just cause for doing so.

[28] I did not discover an error in the General Division decision that was relevant to its determination that the Claimant had voluntarily left her employment and I will not be addressing that issue. I have considered only whether the Claimant had just cause for leaving which, according to section 29(1) of the EI Act, exists where the Claimant has no reasonable alternative to leaving having regard to all the circumstances.

[29] The Claimant left her job for a number of reasons but her medical condition appears to have been the most significant. In October 2017, the Claimant's doctor provided her with a letter indicating that she was medically restricted from lifting anything in excess of 10 pounds, and also restricted from repetitive bending.[11] The Claimant stated that she gave the school this note but that the school told her that the kids' beds (that she had to carry at naptime) were less than 10

[11] GD3-22

pounds and that she could still manage.[12] She said that the employer felt there was no “heavy lifting” involved in her work[13]. According to the Claimant, the employer told her that there was “no way to get away from her duties and nothing can be done”. She was “just told to not use her right hand or arm.” The Claimant stated that she continued working despite having to carry the kids’ beds, other “heavy stuff” such as food and dishes to the kitchen throughout the day, and having to push carts.[14]

[30] The Claimant stated that her work also required her to constantly use her right arm, and that the repetitive movements made her right arm worse. She stated that she used a sanitizer spray bottle repetitively, cleaning tables and other spaces at least ten times a day. In mid-May 2018, the Claimant’s doctor advised her to take four months off work and rest in connection with the “worsening of her right elbow tendonitis and right carpal tunnel syndrome from doing even light work”.[15] The doctor stated that her work as a preschool teacher required her to use her right hand and arm, which she “couldn’t do”.

[31] The employer was aware of the Claimant’s medical restrictions[16] and of her view that her work duties exceeded those restrictions, but the employer allowed her to work regardless. The employer confirmed to the Commission that it would have been unlikely to find lighter or alternate duties for the Claimant based on the nature of her position.[17]

[32] Having reviewed the medical restrictions and the Claimant’s undisputed account of her work duties, I am satisfied that her regular work duties exceeded her work restrictions. I am also satisfied that the employer did not offer accommodated duties that were within the restrictions set out in that original medical note.

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[12] GD3-33
[13] GD3-26
[14] *Ibid.*
[15] GD3-25
[16] GD3-35
[17] GD3-36

[33] I am also satisfied, based on the medical report of May 16, 2018,[18] that, by the date of that report, the Claimant had no option other than to leave her employment until at least September 1, 2018, which is the date the report indicates she is "incapable of working until".

[34] If I restrict my consideration, for the moment, to the Claimant's work duties and their danger to her health, I would have to find that the Claimant had no reasonable alternative to leaving her employment - at least temporarily. This narrows down the possible "reasonable alternatives to leaving" to the prospect of a medical leave for the period or the Claimant's incapacity. Therefore, the only question that I must resolve is whether it would be reasonable for the Claimant to have requested a medical leave of at least four months, having regard to all the circumstances.

[35] The Claimant stated that she told her employer that she would like to leave due to medical reasons but that she was not offered the choice of leave of absence. She thought she would be forced to resign and that she had no choice but to resign.[19] The employer stated that it would have been willing to provide a leave of absence, saying, "Of course, we have a duty to accommodate".[20]

[36] According to the Federal Court of Appeal in *Canada (Attorney General) v. Patel*[21], the burden rests on the claimant to establish just cause. The Court in *Patel* rejected the reasoning of the Umpire (the decision-maker in the decision that the Court was reviewing) that the Claimant would have needed an indefinite leave and that therefore leave would have been refused if requested. The Court said that the Umpire assumed a fact for which there was no foundation: It said that nothing on the record allowed for the conclusion that a leave of absence, if sought, would have been refused.

[37] The decision in *Patel* means that without evidence, I cannot just presume that the employer would have denied the Claimant leave if requested. However, *Patel* does not mean that

[18] GD3-25
[19] GD3-35
[20] GD3-36
[21] *Canada (Attorney General) v. Patel* 2010 FCA 95

the only way a claimant can establish that he could not take a temporary leave as a reasonable alternative to leaving is if that claimant has first requested and been denied leave.

[38] In this case, I find that requesting a medical leave was not a reasonable alternative to leaving. The Claimant had previously raised her medical restrictions and her difficulty performing her work tasks with the employer but the Claimant stated that she did not feel that the employer respected her concerns.[22] The employer's response to the Claimant's medical problems was that there was nothing that could be done.[23] She continued performing her regular duties with arm pain that had become chronic.

[39] The employer had a legal duty to accommodate the Claimant's disability,[24] up the point that those accommodations impose an undue hardship on the employer. It is conceivable that "accommodation" could have involved nothing more than some form of job demands analysis, providing that the analysis found that the Claimant's regular duties could be safely performed by the Claimant within her medical restrictions. Accommodation might have required the employer to offer a period of medical leave as an alternative to, or in addition to, accommodated duties.

[40] However, the employer admits to having offered the Claimant no accommodation at all: It permitted the Claimant to keep her employment but required her to perform her regular duties. The employer's response to the first medical note challenges the employer's commitment to its "duty to accommodate" that it affirmed in connection with the availability of a medical leave at the time the Claimant resigned.

[41] Not only was the Claimant required to perform her regular duties without accommodation, but the employer apparently pressured her to put in additional hours working at her home. The employer was in the midst of an apparent crunch in its efforts to meet accreditation requirements at the same time that the Claimant was bringing forward these medical concerns. The Claimant pointed to a specific period, from February 24 to March 31, 2018, in which she worked these hours.

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[22] GD3-33
[23] GD3-26
[24] *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail)* v. *Caron*, 2018 SCC 3

[42] The employer did not dispute that the Claimant had not been paid for staff meetings during her breaks or the Claimant's additional work at home. However, it stated that the Claimant was not required to do anything outside of the usual classroom preparations typical of teachers. There was no evidence of "typical" preparations for teachers, but I doubt that the extra-curricular expectations associated with salaried teaching professionals apply equally to early childhood educators[25] working at a private preschool (According to the Claimant's Record of Employment her hourly rate averaged $16.65[26]). In any event, I prefer the Claimant's evidence as to the nature of her extra work. Unlike the employer, the Claimant made a specific claim, stating that she had recorded 15 hours of extra, unpaid work between Feb 24, 2018 and March 31, 2018 and that this work was for the school's exceptional accreditation process – which is not a usual classroom preparation task.

[43] As I noted, the employer could have offered the Claimant a medical leave even earlier, when the Claimant first brought her struggles to the employer's attention. Instead, the employer permitted her to continue working without any accommodations. It is not surprising that the Claimant did not think to ask her employer for a medical leave at the time that she submitted her doctor's letter. At the same time, the employer was in the midst of an accreditation crunch, and was apparently demanding that everyone work as hard as possible towards this goal.

[44] I have considered the Claimant's undisputed evidence that employees were under pressure in connection with the Montessori accreditation process in particular.[27] I have also considered that the log entries or notices from her supervisor at or about the end of February, 2018 support that management was significantly pressuring employees to make preparations for accreditation, at or about the same time that the Claimant put in the extra hours of work.[28]

[45] I find it significant that the Claimant reports that she worked extra hours within the period that immediately preceded her total disability from work. In my view, the requirement that the Claimant work additional hours at that time, in support of the school's accreditation preparations, suggests that the workload and pressure in that period may have been particularly

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[25] GD3-14
[26] GD3-23, Record of Employment: $22,965.82 total earnings divided by 1379 hours = $16.65 per hour
[27] GD2-3
[28] GD2-6,7

acute in the period just before she left her job. The May 16, 2018, medical report indicates that the Claimant experienced a worsening that resulted in her inability to work starting mid-April. This apparently resulting from the Claimant "doing even light work" and the report noted that the Claimant's work placed requirements on her that she "couldn't do"[29] From this, I infer that an increase in the amount of, or pace of, her work may well have factored in to an exacerbation of her symptoms to the point of disability.

[46] The employer's evidence is that it would have allowed a request for leave if requested. The Claimant is not in a position to dispute the point. Therefore, I accept that medical leave was available as an alternative to quitting.

[47] Nonetheless, I do not accept that requesting a medical leave would have been a reasonable alternative to quitting. I recognize that the Claimant has said that she would have taken leave if she had only known it was an option, but I do not accept that it would have been either reasonable or prudent for her to have done so.

[48] Whether the Claimant took leave or resigned, she would likely have been out of work for at least four months. She described and substantiated a degree of antagonism with her supervisor while she was employed. While she may not have been the only employee with whom the supervisor had antagonistic relations, it is apparent that she was not excluded: She stated that the supervisor watched over her with a "negative attitude" after she made some small mistake, and that the vice-principle then became "the same way". She also said that the supervision was intimidating and was causing her to become depressed.[30] At the time that the Claimant resigned, she had no reason to believe that her supervisor's antagonism towards her would be any different four months later, or that the work environment would be any less pressurized.

[49] More importantly, the employer had not taken seriously the Claimant's past concerns with her physical condition and her work duties, and she had continued working, to her own harm, as a result. A medical leave might allow the Claimant's symptoms to settle but she already knew that her regular work duties aggravated her condition and that her employer could not offer accommodated duties. She would have had to return to the same work conditions and stresses

[29] GD3-25
[30] GD2-3

that produced or provoked her disability in the first place. Requesting a medical leave was not a reasonable alternative to leaving her employment.

[50] I have considered the Claimant's antagonism with her supervisor, the employer's demonstrated failure to accommodate her injury and limitations when they were first reported (that may have been contrary to law), the increased stress associated with the accreditation process, and the increased hours the Claimant worked without remuneration in response to that pressure. Having regard to all the circumstances, I find that taking a temporary medical leave was not a reasonable alternative to leaving her employment, and that she therefore had no reasonable alternative to leaving.

[51] I find that the Claimant had just cause for leaving her employment and she should not be disqualified from receiving benefits under section 30(1) of the EI Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	March 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. E., Appellant Louise Laviolette, Representative for the Respondent