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

Citation: *K. H. v Canada Employment Insurance Commission*, 2019 SST 443

Tribunal File Number: AD-18-399

BETWEEN:

K. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: May 10, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] K. H. is the Appellant in this case. He was a foreman on a large construction project until July 25, 2017. His former employer says that he quit on that day. The Appellant strenuously denies this and accuses his former employer of being a liar and a cheat.

[3] After his work ended, the Appellant applied for Employment Insurance (EI) regular benefits, but the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim initially and on reconsideration. It concluded that the Appellant had voluntarily left his job without just cause, as defined under the *Employment Insurance Act* (EI Act). As a result, he was disqualified from receiving the benefits that he had applied for.

[4] The Appellant appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. He then applied for leave to appeal the General Division decision to the Tribunal's Appeal Division. One of my colleagues previously granted that application.

[5] The Appellant also asked the General Division to rescind or amend its initial decision based on new facts, but the General Division refused to do so. The Appellant did not appeal that decision, so it is not something that I can consider.

[6] I have now concluded that the appeal should be allowed because the General Division's May 2018 decision contains an error of law. In short, the General Division failed to analyze the evidence in a meaningful way. I have also decided to give the decision that the General Division should have given: the Commission failed to prove that the Appellant voluntarily left his employment in July 2017. As a result, the disqualification that the Commission imposed against the Appellant should be lifted.

PRELIMINARY MATTER

[7] In my colleague's leave to appeal decision, she decided that she would not consider any new documents that the Appellant had filed after the General Division had rendered its decision.[1]

[8] I agree with my colleague's decision on this point. As described further below, the Appeal Division's role is normally limited to assessing the General Division decision based on the information that it had in front of it.[2] As a result, I have not considered the Appellant's new documents either.

ISSUES

[9] As part of this decision, I focused on the following issues:

a) Did the General Division make an error of law by failing to analyze the evidence in a meaningful way?

b) What is the appropriate remedy in this case?

c) Has the Commission established that the Appellant voluntarily left his job?

ANALYSIS

[10] To succeed at the Appeal Division level, the Appellant must show that the General Division committed at least one of the recognized errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).[3]

[11] In this case, I concentrated on whether it is more likely than not that the General Division committed an error of law when making its decision. According to the words set out in the DESD Act, any error of law could justify my intervention in this case.[4]

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[1] Leave to appeal decision at para 5.
[2] Court decisions in support of this conclusion include *Bartlett v Canada (Attorney General)*, 2018 FCA 165 at para 4; *Marcia v Canada (Attorney General)*, 2016 FC 1367 at paras 20 and 34; and *Parchment v Canada (Attorney General)*, 2017 FC 354 at para 23.
[3] Relevant legal provisions can be found in the annex at the end of this decision.
[4] DESD Act, s 58(1)(b); *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

The General Division failed to analyze the evidence in a meaningful way

[12] Under section 30 of the EI Act, people who claim EI regular benefits are disqualified from receiving those benefits if they voluntarily left an earlier job without just cause. It is the Commission's obligation to prove that a claimant left their job voluntarily.[5] When assessing this issue, the relevant legal question is reasonably straightforward: Did the claimant have a choice to stay or to leave?[6]

[13] In this case, the General Division accepted that it was more likely that the Appellant had left his job voluntarily. When reaching this conclusion, the General Division relied particularly on the Appellant's application for EI benefits, where he indicated that the project he was working on was so demanding that it was putting his marriage at risk. As a result, he "finally just walked off the job and the next thing [he knew he] was out of work."[7]

[14] The General Division preferred the earlier explanation that the Appellant gave for leaving his employment and found that his later explanations, both orally and in writing, were unreasonable and inconsistent.

[15] I recognize that the General Division does not have to refer to every piece of evidence that it has in front of it. Instead, it is presumed to have reviewed all of the evidence.[8] However, the General Division can commit an error of law if it fails to analyze the evidence in a meaningful way.[9] This can happen if, for example, the General Division does not mention sufficiently important pieces of evidence or ignores significant contradictions in the evidence.

[16] In my view, the General Division failed to meaningfully analyze the evidence in this case.

[17] For example, in paragraph 8 of its decision, the General Division correctly found that the Appellant completed his application for EI benefits as though he had quit. However, the General

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[5] *Green v Canada (Attorney General)*, 2012 FCA 313 at para 49.
[6] *Canada (Attorney General) v Peace*, 2004 FCA 56 at para 15.
[7] GD3-11.
[8] *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.
[9] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498 at para 51; *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 at paras 7–9; *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at paras 3 and 7; *Yantzi v Canada (Attorney General)*, 2014 FCA 193 at para 4.

Division then said that the Appellant's oral evidence at the hearing provided no reasonable explanation as to why he would have written this:

> The Appellant disputes that he quit his employment. However, the Tribunal finds the Appellant documented on his application for benefits he voluntarily left his employment as his job was very demanding and consuming all his time and energy to the point it was jeopardizing his marriage and family and he finally walked off the job and the next thing he knew he was out of work (GD3-11). **The Tribunal also finds the Appellant testified that he does not know why he documented that he quit his employment when he did not quit.** His explanation was that "he does not know why he would document that," and he further stated "he was not thinking clearly or he did not read the questions properly." The Tribunal did not find the Appellant's explanation as to why he documented that he voluntarily left reasonable considering he insisted that he did not voluntarily leave. [Bold added]

[18] Significantly, the General Division does not mention in its decision an important explanation offered by the Appellant. Indeed, three times during the General Division hearing, the Appellant said that he marked quit on his application for EI benefits based on advice that he had received from one of the Commission's agents.[10] In my view, the General Division needed to consider this explanation as part of its analysis.

[19] In addition, there are other important pieces of evidence that the General Division failed to mention but that contradict some of its conclusions. For example, the General Division did not mention:

a) emails that the Appellant and his former employer exchanged between July 29 and 31, 2017.[11] In these emails, the Appellant complained that his holiday plans had been thrown into disarray and that he had been locked out of the worksite, meaning that he was unable to recover his personal tools. These complaints suggest that it was the employer, and not the Appellant, who severed the employment relationship;

[10] Audio recording of General Division hearing, starting at approximately 19:00 (Part 1), 7:20 (Part 2), and 11:40 (Part 2).
[11] GD3-51 to 53.

b) a record of a telephone conversation showing that, within three days of submitting his application for EI benefits, the Appellant contacted the Commission to clarify that he had not quit his job and to dispute what his former employer had written on his Record of Employment;[12] and

c) letters of reference documenting the Appellant's integrity and work ethic, along with his history of sacrifices and commitment to his former employer.[13]

[20] The question of whether the Appellant had voluntarily left his job was at the very heart of the issue in dispute. In my view, however, the General Division failed to meaningfully analyze all of the important and contradictory evidence on this question. As a result, it committed an error of law, as described under section 58(1)(b) of the DESD Act.

[21] Alternatively, the General Division committed an error as described under section 58(1)(c) of the DESD Act: its decision is based on an error of fact that it made without regard for the material before it.

It is appropriate to give the decision that the General Division should have given

[22] The remedies available to me are set out under section 59(1) of the DESD Act. Among the available options, I mostly considered whether to send the matter back to the General Division for reconsideration or to give the decision that the General Division should have given.

[23] In the end, I have decided that this is an appropriate case in which to give the decision that the General Division should have given because:

a) the EI Act is meant to provide benefits to people who find themselves without work through no fault of their own and creates a system that is intended to provide quick determinations;

[12] GD3-28.
[13] GD3-45 to 48.

b) the Tribunal has broad powers to decide any question of law or fact that is necessary to dispose of an appeal;[14] and

c) doing so promotes the goals of expedient and cost-efficient decision-making and is supported by sections 2 and 3(1)(a) of the *Social Security Tribunal Regulations*.

[24] It is also worth highlighting that the parties have had a full opportunity to present evidence and file submissions explaining why the Appellant is or is not disqualified from receiving EI benefits. I have also listened to the audio recording of the General Division hearing. As a result, there would be little benefit in sending the appeal back to the General Division for yet another member to review the file, particularly when I am able to bring an end to the matter.

[25] For all of these reasons, I have decided to give the decision that the General Division should have given.

The Commission has not established that the Appellant voluntarily left his job

[26] The Appellant's Record of Employment and application for EI benefits both say that the Appellant quit on July 25, 2017.[15]

[27] On August 25, 2017, however, three days after submitting his application for EI benefits, the Appellant phoned the Commission to dispute the reason for separation that his former employer had marked on his Record of Employment.[16] The Appellant denied quitting and said that there was a shortage of work instead. As a result, the Commission launched an investigation into the issue.

[28] As part of the Commission's investigation, various agents spoke to the Appellant.[17] The Appellant explained that, due to the demands of the project, he had been able to take very little time off, even when a family member had passed away. As a result, the Appellant and his boss

[14] DESD Act, s 64(1).
[15] GD3-3 to 26.
[16] GD3-28.
[17] GD3-29 to 31; GD3-35 to 36; GD3-55 to 56; GD3-58.

(the owner of the company) agreed that he would be able to take some time off in July 2017, once work on the project had slowed down.

[29] According to the Appellant, his vacation started on Wednesday, July 19, 2017, and he had planned to spend the first week working on his home, followed by a family vacation to British Columbia. The Appellant also said that he was due a performance bonus, and he was counting on this money before leaving on his family vacation.

[30] Just a few days into his vacation, however, the Appellant said that he was called back to work because things had fallen behind. The Appellant said that he inspected the worksite on Saturday, called in a crew to work on Sunday, and had the project back on track by Monday morning. The Appellant also said that he worked on Monday and on Tuesday morning, but insisted on having his performance bonus by lunch on Tuesday because he was leaving for British Columbia with his family.

[31] When Tuesday, July 25, 2017, arrived, however, the Appellant admitted to getting frustrated because his boss was unavailable and his bonus cheque had not been prepared. Since it was the end of a pay period anyway and the Appellant wanted to at least have some money before leaving on his holiday, the Appellant called his employer's office and demanded that they prepare a cheque for his regular wages as quickly as possible.

[32] Shortly after that call, the Appellant says that he went to the office to get his paycheque, which was in an envelope, though he did not open it immediately. After getting his envelope, the Appellant said that he returned to the worksite, but was unexpectedly denied access. He soon realized that his work phone had also been disconnected. When the Appellant eventually opened the envelope with his paycheque, he was stunned to discover that it also contained a Record of Employment indicating that he had quit.

[33] The Appellant testified to being so distraught by this news that his sister-in-law had to drive from British Columbia so that the rest of his family could start their family vacation without him. Meanwhile, the Appellant stayed at home for several more days to try to sort things out with his former employer.

[34] The Appellant recognized that this version of events is different from what he wrote on his application for EI benefits, but explained in his oral evidence that one of the Commission's agents had advised him to complete his application in a way that was consistent with the reason for separation that was marked on his Record of Employment. The Appellant believed that his former employer would be issuing another Record of Employment, at least because they had paid him some additional money, and that the reason for separation would be corrected at that time. According to the Appellant, the agent that he spoke to said that everything could be fixed once he received the new Record of Employment, but it never came.

[35] In support of his story, the Appellant filed the contemporaneous emails and reference letters described above.[18] The emails indicate that the Appellant did not gather his tools before leaving the worksite and that he had not, in fact, left the city to go on vacation. The letters speak to the Appellant's integrity, commitment, and work ethic.

[36] The Appellant also explained that he had difficulty gathering additional documents because he was unexpectedly denied access to the worksite and to his work email account. Finally, the Appellant described the profoundly negative impact that these events have had on him and his family.[19]

[37] As part of its investigation, however, the Commission heard a very different version of events from the Appellant's former employer. For example, the Appellant's former boss, the owner of the company, denied that the Appellant was leaving on an approved vacation.[20] According to him, the Appellant called the office on July 25, 2017, to ask for an advance on his pay or performance bonus, and when he was told that it was not available, he got frustrated and quit. According to the owner, the Appellant never provided written notice of his decision to quit, but this was communicated orally to him, to the company's receptionist, payroll clerk (the owner's wife), and to a project manager.

[38] This version of events was essentially repeated by the company's other employees, though some differences and details are worth highlighting:

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[18] GD3-45 to 53.
[19] GD3-44.
[20] GD3-32.

a) According to the project manager, the Appellant called at 11:00 a.m. for an advance on his pay and then quit when he was told that it would not be ready until after lunch. The project manager also said that he had texted the Appellant to find out why he was absent from work on July 24, 2017.[21] In contrast, the Appellant says that he was at work on July 24, 2017, but that he was absent at the end of the previous week because he had already started his vacation. However, the Commission obtained no documents to support either of these competing accounts.

b) The payroll clerk denied that the Appellant had asked for any advances on his pay and denied that the Appellant told her directly that he was quitting. She claims to have learned that the Appellant was quitting from her husband (the owner) or from the project manager.[22]

c) In a later conversation between the Commission and the Appellant's former boss, the Appellant's former boss changed his story somewhat. On that occasion, he said that he learned of the Appellant's decision to quit through his project manager and denied hearing the news from the Appellant directly. The Appellant's former boss also denied that he and the Appellant had ever discussed changing the reason for separation on his Record of Employment, but an email that the Appellant provided as evidence contradicts this statement.[23]

[39] In the face of these vastly different accounts, I cannot say that it is more likely that the Appellant voluntarily quit his job on July 25, 2017. As a result, the Commission failed to prove its case. In particular, I note that the Appellant provided some documentary evidence in support of his version of events and was the only person to give oral evidence, under oath, at the General Division hearing. He also explained why he was unable to access more documentary evidence.

[40] In contrast, one might have expected the Appellant's former employer to have far more relevant documents at its disposal, but the Commission did not obtain any of them.

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[21] GD3-33.
[22] GD3-37.
[23] GD3-52; GD3-57.

[41] I recognize that the Appellant's application for EI benefits says quite clearly that he quit, but the Appellant explained why he wrote that, and he phoned the Commission just three days later to dispute the reason for separation marked on his Record of Employment.[24]

[42] In my view, the version of events recounted by the Appellant's former employer also contains some important inconsistencies in terms of who the Appellant apparently told of his decision to quit. In addition, the employer's version of events has less of an air of reality to it. For example:

a) If the Appellant was not on approved vacation leave, as his former employer suggested, it is unclear why he was in such a rush to be paid. Certainly, it seems unlikely that he would have been frustrated to the point of quitting because his cheque would only be ready after lunch, rather than at 11:00 a.m. when he called and spoke to the project manager. For the Appellant to quit over this short delay seems entirely out of character, based on the reference letters that he provided;

b) If the Appellant had quit, it is peculiar that he left the worksite without first gathering his personal items, like his tools and notebooks. Similarly, it is curious that the Appellant was given his pay before handing over the company's tools and any other company property that he might have had; and

c) If the Appellant's motivation to quit involved choosing between his family and his work, then why did he not leave for British Columbia with the rest of his family?

[43] The Appellant also described the importance of his job to him and his family. He was well paid, enjoyed a range of employee benefits, was in a position of authority, and had a measure of job security in that the company's next project had already been secured. The Appellant also felt that he had significant amounts of money owed to him in the form of overtime pay and a performance bonus. The Appellant asked why he would throw these things away by quitting, especially since he was the sole breadwinner in the family.[25]

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[24] GD3-28.
[25] Audio recording of General Division hearing, starting at approximately 23:00 (Part 2).

[44] Conversely, the Appellant argued that his former employer had a great deal to gain by taking the position that the Appellant had quit, and this was in keeping with its move towards having fewer employees and more independent contractors.[26]

[45] For the purposes of this case, I do not need to conclusively decide which version of events is true. Nevertheless, it seems clear to me that the Commission has failed to establish that it is more likely that the Appellant voluntarily quit his job on July 25, 2017. Given this conclusion, I do not need to consider whether the Appellant had just cause for quitting his job.

CONCLUSION

[46] I am allowing this appeal because the General Division failed to analyze the evidence in a meaningful way. As a result, it committed an error of law or of fact, as set out under sections 58(1)(b) and 58(1)(c) of the DESD Act. In particular, the General Division did not mention important pieces of evidence that contradicted some of its key conclusions.

[47] As part of this decision, I have also decided to give the decision that the General Division should have given. In that respect, I find that the Commission failed to prove that the Appellant voluntarily left his job in July 2017. As a result, the disqualification imposed against the Appellant under section 30 of the EI Act should be lifted.

Jude Samson
Member, Appeal Division

HEARD ON:	March 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. H., Appellant S. Prud'Homme, Representative for the Respondent (written

[26] Audio recording of General Division hearing, starting at approximately 20:20 (Part 1).

	submissions only)

Annex

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

(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.

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Decision

59 (1) The Appeal Division may 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 the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Employment Insurance Act

Disqualification — misconduct or leaving without just cause

30 (1) 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, unless…