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

Citation: *H. A. v Canada Employment Insurance Commission*, 2019 SST 520

Tribunal File Number: AD-19-29

BETWEEN:

H. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 29, 2019

Canada

DECISION AND REASONS

DECISION

[1] The General Division decision is confirmed.

OVERVIEW

[2] The Appellant, H. A. (Claimant), held a part-time or casual position (X), and a full-time, seasonal job (X). The Claimant quit her X job a few weeks before she intended to start school for reasons that included diminishing hours and scheduling conflicts. However, she continued working at the seasonal job at X. When she applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), found that she was disqualified from receiving benefits because she had voluntarily left an employment without just cause. The Claimant asked the Commission to reconsider, but it maintained its original decision. The Claimant appealed to the General Division of the Social Security Tribunal where her appeal was dismissed. She now appeals to the Appeal Division.

[3] The Claimant has established grounds for appeal. The General Division erred by failing to consider and analyze the Claimant's evidence related to the nature of her job before finding that her employment was not casual in nature. This finding was central to its finding that she had significantly increased the risk of her unemployment.

[4] I have made the decision that the General Division should have made. Regardless of whether her X job should properly have been described as "part-time" or "casual", there was no necessary conflict between the two jobs and no circumstance that would have required the Claimant to quit one or the other. The Claimant had the reasonable alternative of remaining employed with X.

ISSUES

[5] Was the General Division's finding that the Claimant had significantly increased her risk of unemployment made in a manner that perverse or capricious fashion or without regard for the evidence before it?

[6] Did the General Division err in law by failing to provide adequate reasons?

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 section 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: Was the General Division's finding that the Claimant had significantly increased her risk of unemployment made in a manner that perverse or capricious fashion or without regard for the evidence before it?

[9] The General Division based its decision in part on a finding that the Claimant significantly increased her risk of unemployment when she left her permanent, part-time job because she also had other employment that was full-time but temporary. It found that she had reasonable alternatives to acting as she did.

[10] The General Division acknowledged the Claimant's statements that one of the reasons she left her employer was that she was being scheduled for less hours.[1] It referred to her Record of Employment (ROE) which showed that she worked 5–28 hours per week with an average of 14 hours per week. It also acknowledged that the Claimant's representative said that the

[1] General Division decision, para 18

Claimant did not have a guaranteed number of hours per week[2] and that the Claimant had been discouraged by her diminishing hours.[3]

[11] However, the General Division did not consider the employer's evidence relative to the Claimant's *evidence*, and it did not fully analyze the Claimant's evidence. The General Division states that it prefers the employer's evidence relative to the "argument" and the "opinion" of the Claimant's representative.[4] The Claimant's statement that she left because of diminishing hours is evidence. In addition to that evidence, the Claimant also stated that she was hired on a casual basis,[5] and that she did not have a guaranteed number of hours.[6] An assistant manager (of the employer) that was contacted by the Commission did not contradict the Claimant's evidence that she did not have a guaranteed number of hours, and he confirmed that the Claimant was not working many hours at the time she left the employment.[7]

[12] The General Division's description of the ROE information is accurate, but incomplete for the purposes of analyzing the nature of her employment. At the Claimant's rate of pay ($11.00 per hour[8]), it is possible to confirm from the ROE[9] that that she only worked about 5 hours per week over a period of approximately 4 weeks not long before she quit, and that she worked 10–15 hours per week in the 4 or 5 weeks before that. The number of hours per week is variable but reveals a rough trend of diminishing hours over the second half of her employment.

[13] The General Division stated that it preferred the employer's statement to the Commission (in which he described the job as a permanent, part-time position), because it is "a direct statement from the employer regarding the terms of employment".[10] The "direct statement" is actually the Commission's notes of a conversation with an assistant manager of the employer retail store. The Claimant's representative was not familiar with this assistant manager, indicating that the Claimant had been hired by "X" and that she had discussed her scheduling

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[2] General Division decision, para 16
[3] General Division decision, par 18
[4] General Division decision, para 17
[5] GD3-24;GD5-7
[6] *Ibid*.
[7] GD3-27
[8] GD3-19
[9] GD3-15
[10] General Division decision, para. 17

conflicts with X[11], a different person described by the representative as the actual store manager. This was also the person to whom the Claimant said she gave her notice.[12] The General Division's explanation for its preference suggests that the General Division believed that this assistant manager, to whom the Commission spoke, to be more knowledgeable or sophisticated as to the "employment terms" under which the Claimant worked, than was the Claimant. However, there was no evidence to support this belief or presumption.

[14] The General Division did not analyze the actual conditions of the Claimant's employment. Instead, it relied on the fact that both the Claimant and the employer used the term "part-time" to describe her employment in other communications with the Commission. However, whether the Claimant and the assistant manager labelled her employment as "part-time" does not determine whether the work is part-time, in fact.

[15] There was no evidence to challenge the Claimant's statement that she had no guaranteed number of hours, but the fact that her hours varied widely from week to week, and that she had several weeks with minimal hours is supported by evidence on file. These facts would seem to suggest casual employment. At the same time, the Claimant did not dispute that the X position was permanent, or that her hours would be scheduled,[13] even if they were irregular. These facts would not tend to the conclusion that the employment was not casual.

[16] While the General Division may have found that the Claimant's evidence was not casual without regard to the evidence, I must also find that its decision was based on this finding to conclude that the General Division erred under section 58(1)(c) of the DESD Act. The Claimant had testified that the scheduling of work in her two positions began to conflict, which required her to choose between the jobs. The General Division failed to make a finding on whether the conflict required the Claimant to choose. However, if there was a necessary conflict between the jobs, the General Division would have had to properly appreciate the terms of both the employment at X and at X to compare them and determine whether the Claimant's choice

[11] Audio recording of the General Division hearing at timestamp 21:45
[12] GD3-24
[13] Audio recording of the General Division hearing at timestamp 22:15

increased her risk of unemployment. [14] The fact that the General Division explicitly rejected the Claimant's argument that the employment she left had been casual, and found instead that it was part-time, suggests that the General Division considered the distinction between casual and part-time work to be a significant distinction, and also one that was relevant to its analysis.

[17] I find that the General Division decision was based, in part, on its assessment of the circumstances of the two employers, which involved its finding that the employment at X was not casual. Because this conclusion was reached without regard for the material before it, I find that the General Division erred under section 58(1)(c) of the DESD Act.

Issue 2: Did the General Division err in law by failing to provide adequate reasons?

[18] The General Division found that the Claimant's work at X was not casual but it did so without defining "casual" and it failed to analyze the facts in relation to any such definition. The General Division notes that the Claimant's reason for asserting that her work was casual was that she did not have a guaranteed number of hours, but it then prefers the evidence of the employer that it was part-time, to find that the employment was not casual. As noted, there was other evidence before the General Division by which the Claimant's work might have been characterized as casual.

[19] I am unable to determine from the reasons whether the General Division rejected the Claimant's evidence that she did not have a guaranteed number of hours or whether it rejected that this factor was sufficient to establish that the employment at X was casual. Therefore, I cannot determine what the General Division meant by preferring the evidence of the employer, or the effect that its determination (that the X employment was not casual) had on the General Division's finding that she had increased her risk of unemployment by quitting her job at X.

[20] Therefore, I find that the General Division erred in law under section 58(1)(b) of the DESD Act by failing to provide adequate reasons.

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[14] General Division, para 19

CONCLUSION

[21] I have found that the Claimant has established grounds for appeal under section 58(1)(c) and 59(1)(b) of the DESD Act. This means that I must consider the appropriate remedy.

REMEDY

[22] 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 with or without directions, or confirm, rescind or vary the General Division decision in whole or in part.

[23] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

[24] Prior to June 18, 2018, the Claimant held two jobs. The X job was a full-time, term position that was to end on July 26, 2018. The X was an indeterminate position which I accept was permanent but which did not guarantee any number of hours. I also accept that the hours at the X had generally diminished and that, shortly before the Claimant quit, the Claimant had had only worked about 5 hours a week for about 4 weeks.

[25] While these underlying facts are relevant, I do not find that it is necessary to determine whether the X employment should properly be termed as a casual job or a part-time job for the purpose of determining whether the Claimant had just cause in leaving her employment. The Act excludes casual employment from insurable employment, but does not otherwise make a distinction between casual and part-time employment, and neither the Act nor the Regulations define what is meant by casual employment. Whether the hours of employment at X were insurable hours was not at issue in this appeal.

[26] Ultimately, the question is whether the Claimant increased her risk of unemployment by quitting one job for the other. In this case, she quit a job at X that did not guarantee her any number of hours per week, and which had often given her only about 5 hours per week. She claimed the job was conflicting with her full-time job at X, although the job at X was due to lapse about three weeks after she quit the X job.

[27] The General Division recognized that the Claimant had a reasonable assurance of another employment in the immediate future (with X) when she quit X, because she was already working at X. This circumstance is listed at section 29(c)(vi) of the EI Act as a circumstance that the General Division is obliged to consider under section 29(c) in order to determine whether the Claimant had no reasonable alternatives to leaving her job. Having found section 29(c)(vi) to be applicable, the General Division went on to consider that particular circumstance under section 29(c) together with "all the circumstances" and found that the Claimant had reasonable alternatives to quitting.

[28] In *Canada (Attorney General) v Langlois*[15], the Federal Court of Appeal commented on the difficulty of reconciling section 29(c)(vi) with the requirement that a Claimant has no reasonable alternative as follows:

> [I]t is difficult, if not impossible, to contend or conclude that a person who voluntarily leaves employment to occupy different employment is doing so necessarily because leaving is the only reasonable alternative. …"

[29] *Langlois* determined that the "no reasonable alternative requirement" must be viewed differently when applied to the section 29(c)(vi) circumstance. The court stated that, in the situation where a claimant leaves a non-seasonal job for a seasonal job, the most important circumstances to consider are the time of the voluntary separation and the remaining duration of the seasonal employment.

[30] The reason these factors were considered important is that:

> The insurance offered by the scheme is a function of the risk run by an employee of losing his employment. Apart from certain exceptions, it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke that risk or, a fortiori, transform what was only a risk of unemployment into a certainty.[16]

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[15] *Canada (Attorney General) v Langlois* 2008 FCA 18
[16] *Tanguay v. Canada (Unemployment Insurance Commission)*(F.C.A.), [1985] F.C.J. No. 910

[31] Other decisions of the Federal Court of Appeal have held that a claimant, who holds more than one employment, may quit one of those employments if he or she has reasonable grounds to believe that the employment he retains will continue.[17]

[32] Although the General Division did not reference *Langlois* specifically, it did consider that the employment at X would last only another three weeks. It also noted that the Claimant would be unable to obtain the number of hours of insurable employment to qualify for employment insurance benefits in these three weeks, after quitting X. This relates to the time of the voluntary separation and is in fact, the justification given by *Langlois* for why the duration of the season is an important factor.

[33] The Federal Court of Appeal summarized the case law in *Canada (Attorney General) v. Marier*[18], and stated that the cases stood for the proposition that, when a claimant voluntarily leaves an employment without just cause within the meaning of paragraph 29(c) and this act results in either a period of immediate unemployment of which he or she could not have been unaware, or of deferred unemployment of which he or she should have been aware, then it is not justified because it is not the only reasonable alternative for that claimant.

[34] The Claimant had an indeterminate job with X that was providing her with only a few supplemental hours while she simultaneously worked at X full time. She knew when she quit X that the job at X would only last for another three weeks, and therefore she created a situation of deferred unemployment as at the date that her seasonal term of employment ended at X.

[35] Therefore, the fact that she had a reasonable assurance of employment, as found by the General Division, does not mean that she had no reasonable alternative to leaving her employment. She must establish the existence of other circumstances that rule out reasonable alternatives.

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[17] *Canada (Attorney General) v Leung* 2004 FCA 160, *Gennarelli v Canada (Attorney General)*, 2004 FCA 198
[18] *Canada (Attorney General) v. Marier*, 2013 FCA 39

[36] The additional circumstance on which the Claimant relied is the conflict in scheduling between the two jobs. She argued that this conflict required her to choose between one or the other job. Unfortunately, this argument is not supported by the evidence. Her representative at the General Division stated that the conflict in scheduling occurred early in her employment with X[19] and that, to address that conflict, the Claimant probably made arrangements to get someone to fill in for her. The Claimant's evidence was that her hours had diminished and she was only getting between zero and five hours per week by June. She also acknowledged that her reduced availability for work at X since she took the job at X may have been a factor in her diminished hours.[20] I accept that the Claimant worked a 35 hour per week, Monday to Friday schedule at X and that X would offer her hours throughout the day[21]when they would conflict with her X schedule. I also accept her evidence that X she could not work just weekends at X (when she was available) and that X would not lay her off.[22]

[37] I do not accept that the conflict required the Claimant to quit her job at X. I accept that the Claimant was likely scheduled more hours at X than she actually worked, but that she could not accept some of those hours because she prioritized her job at X. In that sense, the two jobs were in conflict. However, the Claimant did not quit because she had no choice. She stated that she quit X because she was not getting many hours and that it wasn't worth the 20-minute commute.[23] At no time did the Claimant assert that she was in jeopardy of losing one of her jobs because of accepting work at the other one. There is no evidence that the Claimant suffered any consequence from X as a result of refusing hours, or that X threatened any consequence. The Claimant attributed her minimal hours to X's distribution of those hours among a larger number of staff,[24] which suggests that X had the staff capacity to redistribute any hours refused by the Claimant.

[38] I have also considered the application of section 29(c)(vii), significant modification of terms and conditions respecting wages or salary, based on the claim of significantly reduced

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[19] Audio recording of the General Division hearing at timestamp 22:15
[20] GD3-28
[21] Ibid.
[22] GD3-19
[23] GD3-17
[24] GD3-28

hours. However, by her own evidence, she was not guaranteed hours. In *Canada (Attorney General) v. Horslen*,[25] the court upheld a finding that a claimant did not have just cause in circumstances where the Claimant's hours were significantly reduced but she was a part-time employee with no guarantee of hours.

[39] In addition, I am not satisfied that her reduction in hours was solely due to X's actions, or that the Claimant's hours would have been significantly less than the part-time hours she initially accepted, if she had not refused hours. As noted, the Claimant's evidence was that the X offered her hours at times that conflicted with her regular X schedule, which she could not accept.

[40] The General Division found that the Claimant had the reasonable alternative of remaining employed at X until the scheduling conflict resolved with the end of the X employment. I agree. The Claimant had managed to hold both jobs from June 18, 2018, to July 16, 2018. The only consequence to the Claimant of holding the two jobs was that she could not work as many hours at X as she would have been able to work if she had not held the job at X. The Claimant had only three more weeks in which the two jobs would be in conflict, at which time she might have requested and been offered more hours at X or, if she were not offered more hours, would have had the opportunity to look for work to either complement or replace her X shifts. Having regard to all the circumstances, this would have been a reasonable alternative to quitting.

[41] I appreciate that the Claimant had plans to go to school at the end of the summer in any event and may have had no interest in employment of any kind at the end of the X employment term. However, the case law is clear that quitting employment for the purpose of returning to school, without that course of studies first being approved by the Commission and without obtaining authorization from the Commission to quit, is not "just cause" for leaving.[26]

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[25] *Canada (Attorney General) v. Horslen*, A-517-94
[26] *Canada (Attorney General) v. Martel*, A-1691-92; *Canada (Attorney General) v. Tourangeau* 2001 FCA 293

[42] Although the General Division erred under section 58(1) of the DESD Act, it is also my decision that the Claimant did not have just cause for leaving her employment within the meaning of section 29(c) of the EI Act. Therefore, the General Division decision is confirmed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	X, Representative for the Appellant