



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: W. M. v Canada Employment Insurance Commission, 2019 SST 609

Tribunal File Number: AD-19-138

BETWEEN:

W. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 25, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] W. M. (Claimant) worked for an all-terrain vehicle and travel trailer retailer. He was injured at work when moving an all-terrain vehicle with his own strength. He returned to work after this injury, and was to perform RV technician duties only. He was asked to perform other duties and refused. He left the workplace. The Claimant applied for Employment Insurance benefits. The Canada Employment Insurance Commission decided that the Claimant was disqualified from receiving regular benefits because he had voluntarily left work without just cause.

[3] The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal, again finding that the Claimant voluntarily left work without just cause. I granted leave to appeal this decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division had made an error in law when it considered whether the Claimant was bullied or harassed at work. The appeal is dismissed because although the General Division made errors in law, the same decision is made when this error is corrected.

PRELIMINARY MATTER

[4] This appeal was decided on the basis of the documents filed with the Tribunal after considering the following:

- a) The legal issues to be resolved is straightforward;
- b) The parties have filed submissions on the issues, and there are no gaps in the submissions;
- c) Neither party requested an oral hearing; and

- d) The *Social Security Tribunal Regulations* require that proceedings be concluded as quickly as the considerations of fairness and natural justice permit.¹

ISSUES

[5] Did the General Division make an error in law when it considered whether the Claimant was bullied or harassed at work?

[6] Did the General Division base its decision on an erroneous finding of fact made without regard for the Claimant's evidence?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.² Therefore, to succeed on appeal, the Claimant must prove that it is more likely than not that the General Division made at least one of these errors. His grounds of appeal are considered below.

Issue 1: Errors in law

[8] The *Employment Insurance Act* sets out a partial list circumstances to consider when deciding if there is just cause for leaving employment, which includes sexual or other harassment.³ The Claimant says that he was bullied and harassed when he refused to perform unsafe work duties for the Employer. The General Division considered this. The decision states

The evidence does not establish the requests [to perform unsafe work duties] were made in an effort to continually trouble or to annoy the Claimant or to make his workplace so intolerable as to leave him with no option but to leave his employment when he did on July 3, 2018. As a result, I find that, on a balance of probabilities, the Claimant has not

¹ *Social Security Tribunal Regulations* s. 3

² DESD Act s. 58(1)

³ *Employment Insurance Act* s. 29(c)(i)

established that the bullying constituted harassment or that the bullying was the reason he left his employment.⁴

The Federal Court of Appeal, in the *Chaoui* decision, teaches that the legislation does not require that such conduct make a workplace intolerable.⁵ *Chaoui* involved a case where the employer changed an employee's work conditions. The Commission argues that this decision does not apply to the present case because the issue here is harassment and bullying, not a change in work conditions.

[9] However, the *Employment Insurance Act* does not define harassment. This term has been defined as “to vex, trouble, or annoy continually or chronically, plague, bedevil, badger”⁶, and “to trouble and annoy continually; to make repeated attacks on (an enemy)”⁷. Different legislation has different definitions of harassment. Similarly to changes in work conditions, these definitions do not require that conduct make the situation “intolerable” for it to be harassment. Therefore, the General Division made an error in law when it added this requirement for conduct to be considered harassment under the *Employment Insurance Act*.

[10] The Claimant also argues that he was bullied at work because he was asked to do mechanic’s duties that he had no training for. The General Division failed to consider this. This was also an error in law, as the *Employment Insurance Act* requires that all of the circumstances of employment be considered.

[11] Therefore the Appeal Division should intervene.

Issue 2: Erroneous finding of fact

[12] Another ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact made without regard for all of the evidence that was

⁴ General Division decision at para. 18

⁵ *Chaoui v. Canada (Attorney General)*, 2005 FCA 66

⁶ CUB 58193

⁷ Oxford Reference Dictionary, as cited by the General Division at para. 16

before it.⁸ The Claimant argues that the General Division did so because it failed to consider his evidence, and instead relied on the Employer's evidence.

[13] However, the General Division decision summarized all of the evidence before it, including that of the Claimant. The decision refers to the Claimant's testimony about his refusal to conduct a pre-delivery inspection on an ATV,⁹ that he expected to receive a call when trailer work was available for him,¹⁰ that he did not want to do mechanics work because of safety concerns,¹¹ that he submitted that he was bullied into performing unsafe work with examples given,¹² and the circumstances that led to his workplace injury and his refusal to perform these same duties upon returning to work.¹³ From this it is clear that the General Division considered the Claimant's evidence. It is for the General Division to receive the parties' evidence, weigh it, and reach a conclusion based on the law and the facts. It made no error in this regard, so the appeal fails on this basis.

REMEDY

[14] The DESD Act sets out what remedies the Appeal Division can give when an error is found. This includes giving the decision that the General Division should have given.¹⁴ The DESD Act also provides that the Tribunal may decide any question of law or fact that is necessary to dispose of an appeal,¹⁵ and the *Social Security Tribunal Regulations* require that appeals be concluded as quickly and efficiently as the considerations of fairness and natural justice permit. The record before me is complete. The facts are not in dispute. There would be additional delay if this matter were to be referred back to the General Division for reconsideration. Therefore, it is appropriate for me to give the decision that the General Division should have given in this case.

[15] The facts are summarized as follows:

⁸ DESD Act s. 58(1)(c)

⁹ General Division decision at para. 8

¹⁰ *Ibid.*

¹¹ *Ibid.* at para. 9

¹² *Ibid.* at para. 17

¹³ *Ibid.* at para. 20

¹⁴ DESD Act s. 59

¹⁵ DESD Act s. 64

- a) the Claimant was employed by an all-terrain vehicle (ATV) and recreational vehicle (RV) retailer.
- b) The Claimant was injured at work and returned with medical restrictions only to do RV technician work.
- c) On July 3, 2018 the Claimant refused to perform duties that he had been injured doing, which was to move an ATV from its crate without assistance.
- d) There was no RV technician work available, and the Claimant left the workplace.
- e) The Employer says that there were other duties available for the Claimant.
- f) The Claimant later called the Employer to inquire if suitable duties were available, but no one answered his calls.
- g) The Claimant says that he was bullied into performing unsafe work throughout his employment. He did not report this to a manager, but refused unsafe work duties (e.g. remove an ATV from its crate using his own strength).
- h) The Claimant says that through his involvement with a workplace safety committee he learned that the Employer did not take safety concerns seriously, or take steps to remedy them. The Employer disagrees with this.

[16] To decide whether a claimant voluntarily left employment without just cause, I must first decide if he voluntarily left work.¹⁶ The General Division made no error in this regard, so I adopt its decision that the Claimant voluntarily left work.

[17] Second, I must decide whether the Claimant had just cause to leave his employment. That is, whether the Claimant had no reasonable alternative to leaving his employment having regard to all of the circumstances.¹⁷ The Claimant says that he had no reasonable alternative to leaving

¹⁶ *Canada (Attorney General) v. Peace*, 2004 FCA 56

¹⁷ *Canada (Attorney General) v. White*, 2011 FCA 190

his employment because he was bullied/harassed, that he was asked to perform duties beyond his restrictions, and that he was asked to perform unsafe work duties.

[18] Regarding the bullying/harassment, the *Employment Insurance Act* does not define harassment. The term harassment has been defined as “to vex, trouble, or annoy continually or chronically, plague, bedevil, badger”¹⁸, and “to trouble and annoy continually; to make repeated attacks on (an enemy)”¹⁹. These definitions both indicate that harassment is a course of action, and not simply one incident. The Claimant did not present evidence that demonstrated that the Employer badgered or vexed him continually or chronically. He characterized the incidents of harassment as intermittent. Therefore, I am not satisfied that the Claimant was harassed at work.

[19] Regarding his work duties, the Claimant’s evidence was clear that he believed that he was asked to perform unsafe work duties and provided examples of this over the course of his employment. The Claimant also testified that he refused to complete some unsafe work duties, including moving an ATV without assistance. He also says that the Employer asking him to do work he was not trained for was bullying.

[20] In addition, the Claimant states that through his involvement with the workplace-safety committee he was convinced the employer did not take workplace safety concerns seriously and would not take appropriate steps to correct them.

[21] The Claimant also testified that he was asked to perform duties beyond the limitations imposed by his work injury.

[22] The Employer disagrees with the Claimant, but also did not explain to the Commission any steps taken to resolve any safety concerns.²⁰ The Employer told the Commission is that it offered duties to the Claimant that were not too physically onerous, that the Claimant had done them previously, and that they were offered in an attempt to continue to provide him with work when there was no work available that he regularly did.

¹⁸ CUB 58193

¹⁹ Oxford Reference Dictionary, as cited by the General Division at para. 16

²⁰ GD3-22

[23] Having regard to all of the circumstances, I find that the Claimant had reasonable alternatives to leaving his employment. He says that he brought workplace safety concerns to the Employer's attention on a number of occasions, but that they were not taken seriously.²¹ He was part of a workplace safety committee at some points during his employment. He could have reported the unsafe work conditions to the provincial agency. While I understand that the Claimant had little faith that making such a report would result in any changes at the workplace, the outcome of any such report was unknown. The Claimant also could have discussed his medical restrictions with his family doctor in more detail to determine specifically whether he could complete some of the alternative duties that he was asked to do.

[24] Therefore, although the General Division made errors in law in its consideration of the harassment issue, it does not change the outcome of the appeal. The application of the correct law to the facts leads to the same result.

CONCLUSION

[25] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	W. M., Appellant S. Prud'Homme, Representative for the Respondent

²¹ GD3-32