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

Citation: *W. M. v Canada Employment Insurance Commission and X*, 2019 SST 504

Tribunal File Number: AD-19-214

BETWEEN:

W. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: June 26, 2019

DATE OF DECISION: July 15, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, W. M. (Claimant), was a machinist with over 30 years of work experience. He was confident about how to do his job. However, he and his employer, the Added Party, X, had fundamental differences over how he should perform his work. On top of that, his employer was unreceptive to any of his suggestions. One day, his employer gave him instructions for an assignment, but the Claimant felt that those instructions could lead to errors and ultimately hurt his professional reputation. He felt that he did not have any choice but to leave his employment. He also complained that his employer habitually ignored any safety concerns.

[3] The Claimant applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission) initially accepted his claim, having found that the Claimant had just cause for having voluntarily left his employment. His employer however asked the Commission to reconsider its decision, arguing that there had been no safety issues for this last job assignment.[1] After further investigations, the Commission changed its decision and denied the claim. It found that the Claimant had voluntarily left his employment without just cause within the meaning of the *Employment Insurance Act* and that voluntarily leaving was not his only reasonable alternative.

[4] The Claimant appealed the Commission's reconsideration decision to the General Division, which also found that he did not have just cause for having voluntarily left his employment. The General Division also determined that the Claimant was disqualified from receiving any benefits.

[5] The Claimant sought leave to appeal the General Division's decision. This means that he had to get permission from the Appeal Division before he could move on to the next stage of his

[1] Employer's Request for Reconsideration dated August 7, 2018, at GD3-25 to GD3-26.

appeal. I granted permission to the Claimant because the General Division may have erred in law by overlooking the Claimant's argument that he had just cause for leaving his work because of unsafe working conditions.

[6] The Commission responded that I should allow the appeal because the General Division's decision was unclear and because it did not consider one of the Claimant's arguments. The Commission asks me to give the decision that the General Division should have given. The Claimant produced a statement from one his former colleagues, who described the work environment at the company.

[7] The General Division did not examine whether the Claimant had just cause for leaving his work because of unsafe working conditions. Even so, the overall circumstances indicate that the Claimant joined this company, knowing that there were safety issues. He accepted his work conditions and any associated safety risks for several years. As such, any unsafe work conditions could not have formed the basis for his departure from that employment. On this basis, I am dismissing the appeal.

PRELIMINARY MATTER

Is the witness statement admissible?

[8] One of the Claimant's former colleagues prepared a written statement. He talked about the workplace safety issues and their employer's lack of response. The Claimant relies on his former colleague's statement to show that the employer did not do anything to address any safety issues.

[9] The General Division did not have a copy of this statement because the Claimant got the witness's statement after I granted leave to appeal. The Claimant filed a copy of the statement with the Social Security Tribunal on May 30, 2019.

[10] The Appeal Division generally does not consider any new evidence on appeal, unless it falls within any of the exceptions to this general rule. The Federal Court of Appeal set out some of these exceptions,[2] but the witness statement does not fall into any of the categories in the list

[2] See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

of exceptions. Because of this, the former colleague's statement is inadmissible in these proceedings before me.

[11] Even if there were no issue about the admissibility of the statement, I would have assigned little weight to it. Although the colleague has left the company, he prefers to remain "anonymous." There would have been no opportunity for any cross-examination of this witness. Some of his statements are based on hearsay, what was reported to him by the Claimant, rather than on his own personal observations. Part of the statement is based on conjecture and there is no means of determining what experiences the witness is referring to, although he states that his opinions are based on his experiences.

ISSUES

[12] The issues are:

(a) Did the General Division err by failing to provide sufficient reasons?

(b) Did the General Division err by failing to consider the Claimant's argument that he left his employment because of safety concerns?

(c) Did the Claimant have just cause to leave his job because working conditions constituted a danger to health or safety?

GROUNDS OF APPEAL

[13] The only three grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) are:

(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.

[14] The Claimant argues that the General Division erred under subsection 58(1)(c) of the DESDA.

ANALYSIS

(a) Did the General Division err by failing to provide sufficient reasons?

[15] As the Federal Court of Appeal set out in *White v. Canada (Attorney General):*[3]

> the question of "just cause" for leaving employment requires an examination of "whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment": *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306.

[16] The General Division identified what it considered were the Claimant's reasonable alternatives to leaving his employment. They included continuing to speak to the employer about his concerns, refusing the particular work that the employer had assigned but continuing to work for the employer, contacting an outside agency regarding safety concerns, looking for other employment, and quitting his current employment only after receiving assurances of other employment.

[17] The General Division found that the Claimant made "a personal decision to leave his employment without considering the reasonable alternatives available to him."[4]

[18] The Commission acknowledges that the evidence shows that the Claimant quit without exhausting all of the reasonable alternatives available to him but the Commission argues that it is unclear what evidence the General Division relied on to conclude that the Claimant did not consider the reasonable alternatives available to him prior to quitting.

---

[3] *White v. Canada (Attorney General)*, 2011 FCA 190.
[4] See para. 23 of General Division decision.

[19] It is clear however that the law requires the Claimant not only to consider what reasonable alternatives he had, but also to explore those alternatives before quitting. Otherwise, if he does not consider his reasonable alternatives and quits before exploring them, he does not have just cause for leaving his employment.

[20] In this case, the evidence before the General Division shows that the Claimant quit his job without exploring whether he had other options. He did not look for other work because he had never thought of quitting his job until his last day there. He also did not think to approach his employer about alternative work that that would address any concerns he had about his workplace environment. He did not think to approach his employer because he did not think his employer would be responsive.[5] He simply did not want to be associated with the company anymore because he thought it produced defective products.[6] The Commission argues that the General Division should have addressed the Claimant's reasonable alternatives, but the evidence shows that the Claimant did not consider whether there were any options anyway. Because of this, I am not persuaded by the Commission's arguments that the General Division's reasons were insufficient.

(b) Did the General Division err by failing to consider the Claimant's argument that he left his employment because of safety concerns?

[21] Under subsection 29(c)(iv) 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 working conditions that constitute a danger to health or safety.

[22] The Claimant maintains that he had just cause to leave his employment because his employer disregarded his safety concerns and expected him to work in an unsafe and dangerous work environment. He felt that he had no choice but to leave his employment. However, the employer argues that the Claimant did not quit over any safety concerns.

---

[5] See for instance Supplementary Record of Claim dated July 11, 2018, at GD3-19.
[6] See Supplementary Record of Claim dated September 13, 2018, at GD3-35.

[23] It is true that when the Commission contacted the Claimant on July 11, 2018, the Claimant mostly complained about how the employer managed the company. At the same time, however, he also complained about safety issues.

[24] The General Division had to have been aware that there was a workplace safety issue. At paragraphs 20 and 22, for instance, it noted that the Commission had argued that the Claimant could have contacted an outside agency regarding his safety concerns before he quit his job.

[25] Despite being aware of the Claimant's claims that he left his employment, in part, because of his concerns over workplace safety, the General Division did not examine whether subsection 29(c)(iv) of the *Employment Insurance Act* applied in the Claimant's circumstances. Because the Claimant said that safety was one of the reasons he left his employment, the General Division should have examined whether subsection 29(c)(iv) of the *Employment Insurance Act* applied. By overlooking this issue, the General Division erred in law.

[26] Because the General Division erred in law, the Commission urges me to give the decision that the General Division should have made in the first place. I find that this is appropriate. This would involve examining whether the Claimant had just cause for voluntarily leaving his employment under subsection 29(c)(iv) under the *Employment Insurance Act*.

(c) Did the Claimant have just cause to leave his job because working conditions constituted a danger to health or safety?

[27] While the General Division overlooked the issue of whether the Claimant had just cause to leave his job for safety reasons, that does not necessarily mean that the Claimant has proven that he in fact had just cause. I still have to examine whether there was just cause under the circumstances.

[28] The employer alleges that the Claimant quit because he did not wish to follow the employer's instructions or to follow instructions on blueprints,[7] rather than because of any safety issues. The Claimant agrees that he mostly quit because the last job was "the straw that broke the camel's back." He could no longer tolerate his employer telling him what to do when he had over

[7] See blueprints at GD3-31 to 32.

30 years of work experience. But the Claimant also argues that the workplace environment was unsafe for him to continue working. In particular, he claims that the horizontal boring mill was dangerous to operate.

[29] The Claimant's employer bought the machinery from the Claimant's employer before that. The Claimant already knew that there were safety issues with the machinery from his past employment, but he followed the machinery to his new employment with the Added Party. Neither employer addressed the safety issues. The same safety issues continued.

[30] The Claimant operated the same machinery throughout the six years he worked for his employer. The Claimant says that the machine has always been unsafe because "the spindle would keep coming out of the gear," "the table would keep on feeding," and the "cutter flies like a bullet and cuts … you can get a piece of steel in your forehead." He said that he had witnessed accidents at other machine shops. In his case, he programmed the machine and then got out of harm's way. It was "almost like playing Russian roulette" but he chose to gamble and continue working. This was consistent with the evidence he gave before the General Division.

[31] Yet, the Claimant had also reported to the Commission that, "it wasn't like it's life and death and he just had to be careful when working with this machine and this was his job so he stuck it out…"[8]

[32] In his discussions with the Commission, he also stated that he had been working with the machinery "long enough to know how to work it."[9]

[33] In the proceedings before the General Division, the Claimant states that he brought his concerns about the machinery to his employer's attention "over and over and over again,"[10] but his employer chose to ignore any safety issues. Yet, I note that when the Claimant spoke with the Commission, he responded that he continued working despite the safety issues because "it was still ok for him to work and if he wanted, he could have reported it and could have got his machine shut."[11] This suggested that he did not actually report any concerns to his employer.

---

[8] Supplementary Record of Claim, dated September 13, 2018, at GD3-35.
[9] Supplementary Record of Claim, dated September 13, 2018, at GD3-37.
[10] At approximately 10:31 of audio recording of the General Division hearing.
[11] Supplementary Record of Claim, dated July 11, 2018, at GD3-19.

And, on another occasion, he stated that, "this was his job so he stuck it out and did not report it because he didn't want to stir the pot."[12] This again suggested that he did not raise any concerns with his employer. There was also evidence before the General Division that the Claimant felt it was futile to report any safety concerns because he felt that the employer was unlikely to address the safety issues anyway.

[34] The Claimant did not try to report the safety issues with anyone outside the company such as the Workplace Safety and Insurance Board because he did not want to "stir the pot" by creating any hostility between him and his employer. Besides, despite the risk of severe injury, even after leaving his employment, he did not think it was his responsibility to let anyone else know about his safety concerns. He thought it was up to the employer to provide a safe working environment for employees. And, he did not see the point in reporting problems to anyone, because he felt he would have just gotten the "run-around" anyway. He did not have any confidence in any regulatory or oversight agencies either.

[35] Despite his concerns over safety, the Claimant says that he could not leave his work because he felt the company needed him and he was sure that the business would collapse without him. He cared about his colleagues and did not want to see people lose their jobs.[13] X, Vice President of the company, noted however that even after the Claimant left, the company continued to operate.[14]

[36] The employer denied that the Claimant or any other workers had ever notified it about the working conditions or safety issues.[15] The employer testified that the machine was CSA-approved. In its request for reconsideration, the employer argued that the job that it had assigned to the Claimant posed no safety issues.[16]

[37] There was conflicting evidence between the Claimant and the employer, but there was also mixed evidence from the Claimant about the extent of any safety issues and whether the

---

[12] Supplementary Record of Claim, dated September 13, 2018, at GD3-35.
[13] At approximately 24:00 of the audio recording of the General Division hearing.
[14] At approximately 26:30 of the audio recording of the General Division hearing.
[15] Supplementary Record of Claim, dated July 11, 2018, at GD3-21, and at approximately 27:04 of the audio recording of the General Division hearing.
[16] Request for Reconsideration, signed August 7, 2018, at GD3-25 to GD3-26.

Claimant had reported his concerns to his employer. There was no disagreement from the Claimant however that he had operated the same machinery for several years, even before his employment with the employer. The Claimant also agrees that he did not report any safety concerns to any outside parties.

[38] The claimant bears the burden of proving that not only were the working conditions unsafe and intolerable, but that they were also at least one of the reasons that he left his employment. It is clear that the Claimant left his job primarily because he was dissatisfied with how his employer insisted on how he should do his work. The Claimant asserts that he left his job because of safety concerns too.

[39] The Claimant's own evidence was conflicting. It did little to bolster the Claimant's allegations about the extent of the safety issues. Additionally, the fact that the Claimant had tolerated the working conditions for six years with his most recent employer undermined his claims about the safety of the machinery. The Claimant had been aware of and had accepted the risks from the machinery to his safety for several years—six years with his most recent employer and for 15 years before that.[17] The safety issues did not suddenly arise and become the basis for leaving his employment. The safety issues might have convinced the Claimant that he had made the right choice after he left his job because he would no longer be subjected to what he felt were unsafe work conditions, but the Claimant clearly left his job because he disagreed with his employer over how he should do his work.

[40] In any event, even if the Claimant's concerns over workplace safety was a contributing reason for his departure from his work, the courts have said that claimants who accept work while aware of safety concerns cannot later rely upon those safety issues as just cause for leaving that work.[18] In this case, the Claimant was fully aware of and familiar with the safety issues associated with the machinery long before his employment began with his employer. He joined this employer so that he could work on the machinery, despite knowing that it came with safety

[17] The Claimant testified that he operated the same type of machinery for a total of 21 years, at approximately 9:25 of the audio recording of the General Division hearing.
[18] See *Lau v. Canada (Attorney General)* (November 7, 1996), Doc. A-584-95 (Fed. C.A.); 1996 CarswellNat 2038, [1996] A.C.F. No. 1577, [1996] F.C.J. No. 1577, 67 A.C.W.S. (3d) 933

risks. He did not look for other work at any time during the six years he worked for the employer. This showed that he was prepared to accept his workplace environment.

[41] The overall circumstances indicate that the Claimant joined this company, knowing that there were safety issues. He accepted his work conditions and any associated safety risks for several years. As such, any unsafe work conditions could not have formed the basis for his departure from that employment. Given these facts, I find that the Claimant did not have just cause for leaving his employment under subsection 29(c)(iv) of the *Employment Insurance Act*.

CONCLUSION

[42] The appeal is dismissed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. M., Appellant I. Thiffault, Representative for the Respondent (written submissions only) X, Added Party Representative for the Added party