



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Z. S. v Canada Employment Insurance Commission*, 2019 SST 756

Tribunal File Number: AD-19-260

BETWEEN:

Z. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: August 12, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] Z. S. (Claimant) was hired as a welder provided he passed certain tests. He did not pass these tests and was given work using a large grinder. He left this job and applied for Employment Insurance benefits. The Canada Employment Insurance Commission decided that the Claimant was disqualified from receiving these benefits because he had voluntarily left work without just cause.

[3] The Claimant appealed the Commission's decision to the Tribunal. The Tribunal's General Division dismissed the appeal for the same reason. The General Division made an error in law by failing to consider all of the Claimant's legal arguments regarding just cause for leaving employment. However, when all the arguments are considered, I conclude that the Claimant did not have just cause to voluntarily leave his employment.

ISSUE

[4] Did the General Division base its decision on an erroneous finding of fact when it preferred the Commission's unsworn submissions over the Claimant's testimony?

[5] Did the General Division make an error in law when it failed to consider all of the Claimant's reasons for leaving his employment?

ANALYSIS

[6] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. 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.¹ If one of these errors was made, the Appeal Division can intervene. The Claimant's grounds of appeal are examined in this context below

Issue 1: Preferring the Commission's submissions over the Claimant's evidence

[7] The first ground of appeal that the Claimant presents is that the General Division based its decision on an erroneous finding of fact when it preferred the Commission's unsworn submissions over the Claimant's sworn evidence when it made its decision. However, the General Division's mandate is to receive the evidence and submissions of the parties, weigh the evidence and consider the submissions, and make a decision based on the law and the facts. The Federal Court of Appeal instructs that a reviewing tribunal ought not to retry the issues to reach a different conclusion than was made at first instance.² The Claimant's disagreement with how evidence was weighed is not a ground of appeal on which the appeal can succeed.

Issue 2: Failure to consider all the Claimant's reasons for leaving work

[8] The *Employment Insurance Act* (EI Act) states that when deciding whether a claimant had just cause to voluntarily leave employment regard must be had to all of the circumstances.³ The Claimant in this case gave a number of reasons for leaving his job. They were

- a) That he was discriminated against because of his disability/inability to continue to use the large grinder;
- b) That he left because of unsafe work conditions – using the large grinder was causing injury; and
- c) That he was required to work excessive hours.

¹ DESD Act s. 58(1)

² *Gaudet v. Attorney General of Canada* 2013 FCA 254

³ EI Act s. 29(c)

[9] The Claimant argues that the General Division made an error in law because it did not consider all of his reasons for leaving work, and therefore failed to have regard for all of the circumstances. The Commission agrees that the General Division failed in this regard.

[10] The General Division decision states that the Claimant's representative made submissions regarding the Claimant's medical issues and his alleged request for accommodation by the employer. It summarizes the evidence on this issue, which was that the Claimant's duties required him to use a large grinder. This was difficult and caused him pain. The Claimant took some days of work as a result. He asked his supervisor if he could use a smaller grinder and this was refused. He also told the supervisor that he was taking medication for pain. After he left work, the Claimant produced a medical report regarding injury from using the grinder, but this note did not recommend that the Claimant quit his job. After considering this evidence, the General Division concluded that the Claimant did not have just cause to leave his employment because of working conditions that caused a danger to health or safety.⁴

[11] The General Division decision explains why it reached the conclusion that the Claimant did not have just cause to leave his employment for this reason, including that telling a supervisor that taking pain medication was not a request for accommodation due to work injury, and that the production of a medical note after the Claimant quit did not substantiate that the Claimant required accommodation when he spoke to the employer. There is an evidentiary basis for the General Division's decision. The appeal cannot succeed on the basis that the General Division made an error in this regard.

[12] The Claimant also argues that the General Division made an error in law because it failed to consider his argument that he had just cause to leave his employment because of discrimination within the meaning of the *Canadian Human Rights Act*.⁵ He argues that the basis for the discrimination was his disability, which was his inability to work with the large grinder.

[13] The General Division decision does not address this argument. However, there was no evidence before it that suggested that the Claimant was disabled. He was able to attend work and perform grinding duties, although it caused him pain. He asked to use a smaller grinder or to do

⁴ *Employment Insurance Act* s. 29(c)(iv)

⁵ *Ibid.* s. 29(c)(iii)

welding work. He did not ask that performance expectations be changed to accommodate a physical or mental condition that rendered him disabled.

[14] In addition, no documents in the written record refer to the Claimant as disabled, or as having a permanent condition that prevented him from performing duties without accommodation. There was also no evidence that the Claimant was treated differently than other employees.

[15] The General Division could not have erred by failing to consider a legal argument that was not presented to it, and for which there was no evidentiary basis. The appeal fails on the basis of this argument.

[16] Finally, the Claimant argues that the General Division made an error in law because it failed to consider that the Claimant left work because he was required to work excessive overtime.⁶ His representative stated that he was relying on this as just cause for leaving work at the General Division hearing.⁷ The General Division decision makes no reference to this, so it appears that it failed to consider this argument. This is an error in law. The Appeal Division must therefore intervene.

REMEDY

[17] The DESD Act sets out what remedies the Appeal Division can give when it intervenes on an appeal. This includes giving the decision that the General Division should have given, and referring the matter back to the General Division for reconsideration.⁸ The Act also says that the Tribunal can decide any questions of law or fact necessary to dispose of an appeal.⁹ In addition, the *Social Security Tribunal Regulations* require that the Tribunal conduct proceedings as quickly as the circumstances and considerations of fairness and natural justice permit.¹⁰

[18] It is appropriate that I make the decision that the General Division should have given in this case. The facts are not in dispute. The written record is complete, there are no gaps in the

⁶ *Employment Insurance Act* s. 29(c)(viii)

⁷ General Division hearing recording at approximately 1:28:34

⁸ DESD Act s. 59(1)

⁹ DESD Act s. 64

¹⁰ *Social Security Tribunal Regulations* s. 3(1)

evidence and there is no indication that either party would like to present any additional evidence. In addition, the Claimant made the claim for benefits in June 2018, and further delay would be incurred if the matter were returned to the General Division. Finally, the Claimant requested that I make the decision that the General Division should have made.

[19] There is no reason to disturb the General Division's conclusion that the Claimant did not have just cause for leaving employment because of his health or unsafe work conditions, and I adopt the General Division's reasons and conclusion on this issue.

[20] For the reasons set out above, there is also no need to consider whether there was discrimination.

[21] Therefore, the only issue to be considered is whether the Claimant had just cause to leave his employment because of excessive overtime. The Claimant testified that he regularly worked from 7:00am to 6:00pm Monday to Friday with two 15-minute breaks and 30 minutes for lunch; and on Saturdays from 6:00am to 12:00pm. Therefore, he regularly worked 58 or 58.5 hours per week. It appears that the Claimant regularly worked these hours throughout the time he was employed. Therefore, I am satisfied that the Claimant accepted these working conditions.

[22] There is no indication that the Claimant was not paid for all of his work. There was also no evidence that the Claimant spoke to his supervisor about the hours that he worked, or that he requested to work fewer hours. A claimant has a legal obligation to try to resolve issues with his employer. He made no attempts to do so.

[23] For these reasons, I find that the Claimant did not have just cause to leave his employment because he was working excessive overtime.

[24] When all of the circumstances are considered together, I am not satisfied that the Claimant had just cause to leave his employment. Although he had some pain from work and worked long hours, the Claimant took no steps to address any concerns with the employer. He had reasonable alternatives to leaving work, including discussing issues with the employer, and

looking for alternate work before he quit this job.

CONCLUSION

[25] Although the General Division made an error in law by failing to consider all of the Claimant's legal arguments when I examine them, I reach the same conclusion.

[26] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	July 23, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. S., Appellant Victoria Wan, Counsel for the Appellant