



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. V. v Canada Employment Insurance Commission*, 2019 SST 789

Tribunal File Number: AD-19-335

BETWEEN:

**J. V.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: August 22, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed

### OVERVIEW

[2] The Appellant, J. V. (Claimant), left his job in disputed circumstances. When he applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim. It found that the Claimant voluntarily left his job without just cause. The Claimant asked for a reconsideration on the basis that he had not left his job voluntarily, but the Commission maintained its original decision. The Claimant's appeal to the General Division of the Social Security Tribunal was dismissed. He is now appealing to the Appeal Division.

[3] The appeal is allowed. The General Division misunderstood the phone text evidence, causing it to reject the Claimant's credibility. Its finding that the Claimant voluntarily left his employment was made in a perverse or capricious manner or without regard for the evidence before it.

[4] I have made the decision that the General Division should have made and I find that the Claimant did not voluntarily leave his employment under section 29(c) of the *Employment Insurance Act* (EI Act) and he is not thereby disqualified from benefits under section 30.

### ISSUE

[5] Did the General Division find that the Claimant voluntarily left his employment in a perverse or capricious manner or without regard for the evidence before it?

### ANALYSIS

[6] 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 s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] 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: Did the General Division find that the Claimant voluntarily left his employment in a perverse or capricious manner or without regard for the evidence before it?**

[8] The General Division decision is substantially based on findings against the Claimant's credibility.<sup>1</sup> The General Division considered that the Claimant's evidence was contradicted by the text evidence and this factored significantly into those findings.<sup>2</sup>

[9] I find that the General Division misunderstood the text evidence. The texts were not scanned to the file in chronological order. Once they are re-ordered so that they make sense, they support the Claimant's version of events.

[10] To re-order the text messages, I noted the phone message overlaps from page to page, and I used the time stamps of individual comments. The correct chronological order of the text messages is as follows: GD3-39, 42, 40, and 41. That means that the date stamp of "Tuesday, August 21, 2018" now appears at the end of the very last page of the messages; appearing as the header to whatever (un-included) conversation occurs later.

[11] When the Claimant denied that he would be back "today" (at 12:19 pm) and that he would be "back on Tuesday" (12:14 pm) this occurred within the same 20-minute text exchange, which is found on GD3-39. However, once the text message evidence is correctly ordered, the context of the exchange on GD-39 suggests that this conversation (GD3-39—the last part of which is reproduced at the top of GD3-42) occurred prior to Tuesday.

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<sup>1</sup> General Division decision, paras. 16, 26

<sup>2</sup> General Division decision, para 19, 26

[12] The General Division understood that this text exchange took place Tuesday, probably assuming from the order in which the messages appear in the GD3 file that the date stamp at the bottom of GD3-41<sup>3</sup> should immediately precede the Claimant's denial that he would be back "today" at the top of GD3-42. Working from its understanding that the text conversation took place on Tuesday (and not Sunday or some other day prior to Tuesday), the General Division concluded that the Claimant "left the employer no choice but to end the employment", because the Claimant had not returned for his Tuesday shift as promised.

[13] The Claimant's version of events is that it was Sunday when the Claimant denied that he said he would be back "today" on Sunday but that he planned to be back on Tuesday, and when the employer then told him that he should not come back even to work to the end of the month. I accept that the conversation on GD3-39 occurred prior to Tuesday and that there is no inconsistency on the face of the text messages. There is also no inconsistency between the text message evidence and the Claimant's testimony that it was Sunday that he told the employer he would be back Tuesday (and that the employer told him not to come back).<sup>4</sup> In other words, the text exchange might well have taken place on Sunday, before the Tuesday he was to come back.

[14] The General Division based its decision on a finding against the Claimant's credibility, and on a specific finding that the Claimant was the one to sever the employment relationship. These findings relied on a misapprehension of the evidence and the General Division therefore erred under section 58(1)(c) of the DESD Act.

## **REMEDY**

[15] 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.

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

[17] I find that the Claimant's testimony is consistent with the text message evidence. I accept that the Claimant was ready to try something new and was ready to move on, as he told the

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<sup>3</sup> See General Division decision, para. 25

<sup>4</sup> General Division decision, para 24

Commission on December 11, 2018.<sup>5</sup> This is suggested by his text message to the employer at the time that he accepted that he was being let go but offered to finish the month out.<sup>6</sup>

[18] In the same December 2018 conversation with the Commission, the Commission recorded that the Claimant said that he would have quit his job in a couple of weeks if he had not been told to leave right away. He also said that he would have looked for other employment before leaving, if he had had the chance.

[19] While I acknowledge the notes made by the Commission record that the Claimant planned to quit, the Claimant did not have an opportunity to cross-examine the note taker. Among the possibilities is that the Commission misunderstood the Claimant's intention to quit his management position, or that it mistook his willingness to delay his leaving until the end of the month (as evidenced in the text exchange), with an intention to quit in a couple of weeks.

[20] In his testimony, the Claimant said that he did not intend to quit but only wanted to step down from management to a kitchen position.<sup>7</sup> He said the same thing in his submission to the Commission on December 21, 2018.<sup>8</sup> I give the Claimant's direct evidence more weight than the Commission's notes. In my view, the Claimant's testimony is more consistent with the preponderance of evidence which suggests that the Claimant did not intend to quit.

[21] Even if the Claimant had been waiting for an opportunity to quit, I accept that the employer did not know of this at the time that he fired the Claimant. The employer sent several text messages to the Claimant about how the Claimant's employment was not working out, but none of the texts mention that the Claimant had said he was planning to quit anyway. At one point, the Claimant texted "I just think I need change" but this was only after accepting the employer's verdict. One would expect that an exchange between the employer and the Claimant about his termination would touch on his plans to quit, if the employer had been aware of such plans.

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<sup>5</sup> GD3-33

<sup>6</sup> GD3-40

<sup>7</sup> General Division decision, para. 20

<sup>8</sup> GD3-38

[22] To find that the Claimant was fired, I rely on his own testimony, the text messages properly ordered, and the testimony before the General Division of the general manager of the employer, O.. O. testified that she was present when “the boss” was in the process of texting the Claimant, and that the Claimant told her then that he had been terminated when she called to ask why he did not come in for his shift. She also said that she was present at a meeting called by the boss in which he informed the staff that he had fired the Claimant. She said that the Record of Employment was mistaken and that it should have read, “terminated”.

[23] O. was in a position to know, first-hand, that the Claimant had been fired and she gave clear evidence before the General Division as to that knowledge. There was no suggestion that she was partial to the Claimant and the General Division did not express any particular concerns with her evidence, except to say that it preferred the Claimant’s testimony that he “made the choice” not to come in on Tuesday. This preference relied on the General Division’s understanding that the Claimant had made that choice before the date of his termination and not on any defect in O.’s evidence. The General Division did not otherwise express any reservations with the credibility of O., and I accept O.’s evidence as credible and reliable and I give it significant weight.

[24] I find that the Commission has not established on a balance of probabilities that the Claimant voluntarily left his employment, and I therefore find that he is not disqualified from receiving benefits for having left his employment without just cause under section 29(c) of the EI Act.

## **CONCLUSION**

[25] The appeal is allowed.

[26] The Claimant did not voluntarily leave his employment under section 29(c) of the *Employment Insurance Act* (EI Act) and he is not thereby disqualified from benefits under section 30.

Stephen Bergen  
Member, Appeal Division

HEARD ON:	August 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. V., Appellant