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

Citation: *D. G. v Canada Employment Insurance Commission*, 2019 SST 781

Tribunal File Number: AD-19-415

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] The Claimant has established that the General Division erred under section 58 (1) of the *Department of Employment and Social Development Act*. I have made the decision that the General Division should have made but I must still confirm the decision of the Commission.

OVERVIEW

[3] The Appellant, Mr. Graham (Claimant), voluntarily left his employment for a number of reasons. These included his own poor performance that he attributed to stress from various personal circumstances, as well as mechanical problems with the vehicle he needed for work. The Respondent, the Canada Employment Commission (Commission), refused his application for benefits on the basis that he did not have just cause for leaving his employment. When the Claimant requested a reconsideration, the Commission responded by maintaining its original decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal but his appeal was dismissed. He is now appealing to the Appeal Division.

[5] The Claimant has established that the General Division failed to observe a principle of natural justice by a decision that supports a reasonable apprehension of bias. I have made the decision that the General Division should have made. I find that the Claimant did not have just cause for leaving his employment.

ISSUES

[6] Did the General Division fail to observe a principle of natural justice by a decision that supports a reasonable apprehension of bias?

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 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.

Did the General Division fail to observe a principle of natural justice by a decision that supports a reasonable apprehension of bias?

[9] The Claimant objected to how his evidence was scrutinized, that he felt "cornered" by the General Division, and he disagreed with the General Division's assertions that he had contradicted himself. I understand that the Claimant has raised an objection that the General Division member was biased or that he came to the hearing with a closed mind.

[10] According to the Supreme Court of Canada reasonable apprehension of bias is "an apprehension of bias [that is] a reasonable one held by reasonable and right-minded persons, applying themselves to the question." The Court continued: "The test is what an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude [about whether the decision–maker would decide the matter fairly]".[1]

[11] In its decision, the General Division repeatedly found contradictions and discrepancies, and in one case referred to the Claimant's evidence as suspicious. The General Division also

[1] R. v S. (R.D.), [1997] 3 SCR 484

relied on those contradictions to ignore or discount some of the Claimant's evidence. It stated that the changing nature of the Claimant's reasons for leaving his employment lessens his credibility.[2] In one instance, the General Division stated that it was unconvinced of a particular fact because of the Claimant's contradictory testimony.[3]

[12] A claimant is likely to believe that the decision maker is set against him or her if the decision maker points to several examples of contradiction of the claimant's testimony or other evidence. However, that would not mean that a "reasonable and right-minded person" would reasonably believe that the identification of contradictions actually represent some kind of bias. The identification of contradictions would not give rise to a reasonable apprehension of bias, where the contradictions were obvious, or where the decision maker could objectively explain why it understood the evidence to be contradictory.

[13] In this case, almost every one of the contradictions identified by the General Division was either not contradictory, or not necessarily contradictory. And where a particular "contradiction" was not necessarily contradictory, the General Division failed to rationalize its conclusion that it was a contradiction. I have listed a number of examples below.

[14] The General Division stated that the Claimant made no mention in his resignation letter of having asked for a leave of absence or of his vehicle problems. It characterized this as a "discrepancy" because the Claimant had stated elsewhere that he had a number of reasons for resigning.

[15] The Claimant testified that he had asked for time off but it is not obvious how his previous request would necessarily have been relevant to his resignation, or so important that the General Division could expect that it would be included in the resignation email. The Claimant also testified that he had vehicle problems and could not afford to repair it. He explained that he had been embarrassed to mention this to his employer. Again, it is not self-evident that the Claimant would have given his employer every one of his reasons for leaving in his resignation email.

---

[2] General Division decision, para. 12.
[3] General Division decision, para. 17.

[16] If the General Division had wanted to give less weight to the Claimant's testimony or to the resignation letter, it ought to have explained why it believed they should have contained identical information. The fact that the Claimant omitted certain details from his resignation does not mean that his testimony is "discrepant", and the General Division did not explain why it characterized the Claimant's evidence in that manner.

[17] At paragraph 17, the General Division stated that it was not convinced that the Claimant left his job due to the breakdown of his vehicle because the Claimant provided "contradictory" testimony as to when his breakdown occurred and whether his vehicle was inoperable. At paragraph 18, the General Division noted that the Claimant, when questioned about how he could drive his truck during the two-week notice period, stated that he could still drive the truck if he topped up the oil, but he admitted that he may have gotten his dates mixed up (see above). Given the Claimant's position that his vehicle problems were a deciding factor in his decision to resign, the General Division appears to have been implying that the Claimant's vehicle problems could not have interfered with his work in such a way as to require him to quit.

[18] The Claimant initially testified that he discovered his truck needed repairs on a date that would have been after the date that he submitted his two-week notice. This one, clear, contradiction is a confusion as to dates. When presented with his resignation letter, the Claimant readily agreed that he had confused the dates. He did not try to maintain positions that contradicted one another, or to maintain a position that contradicted other evidence on the file. The Claimant confirmed that he identified the issue with his truck before giving notice and that he was able to drive the truck during the notice period.

[19] The Claimant offered uncontradicted evidence that his vehicle problems interfered with his work, even though he continued to drive it. The Claimant's testimony was consistent that a mechanic diagnosed his vehicle with a cracked block, that he could not afford the repair, that he knew this at the time that he sent his resignation to the employer, and that this was a deciding factor in submitting his resignation. The Claimant testified that his job ordinarily required him to drive from one call-out to another[4] and that he had to drive to service out-of-town retailers.[5]

---

[4] Audio recording of General Division hearing at timestamp 31:10.
[5] *Ibid.* at timestamp 27:50

While the Claimant stated that he was able to keep driving his vehicle by adding oil, this does not mean that the Claimant considered his vehicle reliable enough for his work purposes.

[20] The General Division reviewed the evidence selectively. It did not reference any of the other evidence that suggested that he could not rely on his vehicle for his usual work duties, or that his employment might not be sustainable in light of how he handled his work duties with a "broken" vehicle.

[21] In answer to the member's question about how the Claimant could still use his vehicle to work after he had given notice, the Claimant did state that he topped up the oil, as the General Division noted.[6] However, that is not all that the Claimant said. He told the General Division that he could do a lot of his work from home and that, because he knew he would be leaving anyway, he was able to neglect some of his calls, and that he "wasn't doing much" because no one was monitoring his day-to-day work.[7]

[22] At paragraph 20, the General Division stated again that the Claimant contradicted himself. The General Division said that the Claimant was "embarrassed about his situation and did not think he needed assistance from his doctor or anyone else, because he was not suffering from an illness", but that he also said that he was dealing with "mental health issues and stress".

[23] The Claimant testified that he was missing deadlines at work because of his mental health issues, that he was not sleeping, and that his brain was not functioning properly.[8] He also said that he did not know what was happening to him,[9] and that the burglaries had "taken [their] toll", but that he did not think that medical assistance would help or who to go to for help.[10] According to the General Division's view, it is contradictory for someone to claim to be dealing with mental health issues or stress but not seeking medical or other assistance. "Dealing" with stress is not synonymous with seeking the assistance of someone else. This is not a contradiction.

---

[6] General Division decision, para. 18
[7] Audio recording of General Division hearing at timestamp 57:00
[8] *Ibid.* at timestamp 46:00
[9] *Ibid.* at timestamp 51:57
[10] *Ibid.* at timestamp 52:13

[24] The General Division found another contradiction at paragraph 29 between the Claimant's belief that he was not suffering from a medial condition *that anyone could assist him with*, and his statement to his employer that he was dealing with medical issues. Medical issues that one considers treatable would be a *subset* of medical issues, but would be clearly distinguishable from the set of *all* medical issues. Once again, the General Division describes the Claimant's evidence as contradictory without justifying that characterization.

[25] At paragraph 22, the General Division stated that the Claimant "deflected" the member's question as to why he had requested such a long period (six months) of leave, and she said that he did not provide a direct answer. The Claimant's actual testimony was that he had tried to get time off but that it was not an option to ask for six months off.[11] Although he said that this is what "he really wanted", he flatly denied that he had asked for six months.[12] When the member asked him, "Why six months?" He responded that it was just a "hypothetical number" and that he did not know how long it would take to get his mental health back.[13] I am not sure how this can be considered as a deflection but, in any event, it would appear that the Claimant was responding to why he *wanted* six months. According to his testimony, he did not *ask* for six months. The General Division may have misunderstood the Claimant's testimony but the Claimant could easily have understood the member's use of the term "deflecting" to suggest that the member believed he was deliberately avoiding her question.

[26] At paragraph 23, the General Division states that the Claimant made no mention of any robberies in his *initial* application or *first* conversation with the Commission. The General Division does not explain why it specifically mentioned that the Claimant did not raise the robberies in his initial contacts with the Commission. It would be reasonable to suppose that the General Division meant to imply that the Claimant was mistaken about the robbery stories or he was being deceptive, or that the robberies had not been of any significance to the Claimant's decision to resign. Before drawing such an inference, the General Division might have

[11] Audio recording of General Division hearing at timestamp. at timestamp 51:10
[12] *Ibid.* at timestamp 52:50
[13] *Ibid.* at timestamp 51:40

acknowledged that the Claimant had already mentioned the impact of the robberies in his resignation letter,[14] before his initial application for benefits.

[27] At paragraph 24, the General Division described the Claimant's explanation as to why he had not reported the second robbery to the police as "suspicious". The General Division did not explain why it found the Claimant's explanation for not reporting the robbery "suspicious", but the explanation to which it was referring was that the Claimant said he suspected he knew the person who robbed him. It does not say why this is suspicious except to say that the Claimant provided no "further explanation".

[28] Except that the Claimant did provide a further explanation. The Claimant testified at the General Division that he did not report the robbery because he had already lost everything of value in the first robbery less than a month earlier (except for a bag of change and some CDs), and that the police had done nothing about the first robbery.[15] These additional facts constitute some "further explanation" that might have made the Claimant's testimony less suspicious. However, they were not considered.

[29] Many of the instances referred to could also be considered factual errors, in which evidence was ignored or misunderstood as noted. They have resulted in findings of credibility and some findings of fact (such as exclusions of certain of the Claimant's justifications for leaving his employment) on which the decision was based in part.

[30] However, I have instead considered the cumulative effect of a number of instances in which the Claimant is said to contradict himself or the evidence, his evidence is referred to as discrepant or suspicious, or the conclusions rely on a selective view of the evidence. Except for the Claimant's confusion as to the date that he began to have vehicle problems and how this related to his resignation, the General Division has failed to justify the several contradictions to which it points.

[31] I do not accept that the General Division member necessarily came to the hearing with a closed mind or that he demonstrated actual bias. However, I find that the General Division

---

[14] GD3-30
[15] Audio recording of General Division hearing at timestamp 24:50

decision gives rise to a reasonable apprehension of bias, and that the General Division thereby failed to observe a principle of natural justice under section 58(1)(a) of the DESD Act.

REMEDY

[32] Section 30 of the *Employment Insurance Act* (EI Act) states that a Claimant who leave employment without just cause is disqualified from receiving benefits. Section 29(c) of the EI Act states that a claimant has just cause for leaving his or her employment when the claimant has no reasonable alternative to leaving, having regard to all the circumstances. The question is whether the Claimant in his particular circumstances had reasonable alternatives to leaving.

[33] Section 29(c) lists a number of included circumstances that the General Division would need to take into account. The Claimant's circumstances do not fall within any of the listed circumstances, but the list is not meant to be exhaustive. The Federal Court of Appeal said that the test is whether, on the balance of probabilities, a claimant has no reasonable alternative to leaving his employment, having regard to all the circumstances, including but not limited to those specified in sections 29(c)(i) to (xiv) of the EI Act. The list is not exhaustive.[16] Therefore, the Claimant's particular circumstances may still be considered, even if they do not align with one of the circumstances in the list.

[34] According to the Claimant, there was a lot going on in the Claimant's life at the time. He and his fiancé had supported themselves on both of their incomes, but his fiancé had experienced some health issues and was not working. He was worried about her health and under financial pressure. Not long before he quit his job, his home had been burgled. He had moved, and then he was robbed again almost immediately. He claimed that he was very stressed by all of this and had been unable to sleep. He said that both he and his boss had noted how his performance at work was suffering. He stated that he had been a valued employee and that his boss had tried to cover for him through his difficulties. The Claimant believed that he was on the verge of being fired at the time that he quit and also believed that, if he was fired, he would not be able to find work in the field again if he was fired. He needed a good reference.

[16] *Canada (Attorney General) v. Marier* 2013 FCA 39

[35] The Claimant sent in his two-week notice of resignation after his truck developed a cracked block. Although he could still drive it if he kept adding oil, he could not depend on it to service communities outside of his home city as he was required to do. The Claimant said he did not tell his employer about his vehicle problems because his employer was already aware of his performance issues, and he was embarrassed to admit that he could not afford the repairs.

[36] I have no reason to disbelieve any of the Claimant's evidence. I have reviewed the file, and listened to the audio recording of the Claimant's General Division hearing, and I accept his evidence as plausible, internally consistent, and reasonably reliable given the time that has passed since the events.

[37] However, I cannot find that the Claimant had just cause unless I find he had no reasonable alternative to leaving. The Claimant says that he quit when he did because he needed his vehicle for work and could not afford to repair it. However, he did not discuss his vehicle problems with his boss before quitting.

[38] If the Claimant needed alternate transportation, he might have approached his boss for an advance, or for the loan of a company vehicle. Or he could have asked whether the employer could authorize temporary work arrangements in which the Claimant could focus on work from home duties or service/sales calls within the city. Having such a discussion with his boss before resigning would have been a reasonable alternative to leaving.

[39] I note that the General Division said that the Claimant had taken leave once before at a time when his fiancé was ill and that therefore, the Claimant should have been able to get another leave. The Claimant said that the General Division misunderstood and that he had not taken leave before. He had taken time off as vacation when his fiancé was ill. He said that he did not believe it was an option to take as much time off as he would need for his own mental health.

[40] Whether or not the Claimant had requested or been granted a leave in the past, he did not ask for a medical leave, compassionate leave, or any other kind of leave at the time that he was considering quitting. Since he was concerned that his job performance would continue to suffer, he could have sought professional assistance and possibly obtained a medical note or excuse to take a medical leave. This would also have been a reasonable alternative to quitting.

[41] I appreciate that the Claimant was embarrassed about his personal circumstances, his poor performance, and his financial straits. Furthermore, I acknowledge the possibility that his employer would not have been able to accommodate him or to maintain the Claimant's employment if the Claimant did not have reliable transportation.

[42] However, the Claimant did not try. I accept that he truly believed that he was on the verge of being fired. But it is also possible his employer might have been willing to support him to get help with his mental health issues or help him find alternative transportation. A reasonable alternative to quitting would have been for the Claimant to have a full and frank discussion with his employer and explore the possibility of any final medical or transportation accommodations.

[43] Having regard to all the circumstances, and the reasonable alternatives to quitting that remained despite all of those circumstances, I find that the Claimant did not have just cause for leaving his employment within the meaning of section 29(c) of the EI Act.

CONCLUSION

[44] The Claimant has established that the General Division failed to observe a principle of natural justice and erred under section 58(1)(a) of the DESD Act. However, I have made the decision that the General Division should have made and I confirm the Commission decision that the Claimant did not have just cause for leaving his employment.

[45] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. G., Appellant