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

Citation: *C. M. v Canada Employment Insurance Commission*, 2019 SST 785

Tribunal File Number: AD-19-279

BETWEEN:

C. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: August 20, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, C. M. (Claimant), left his job with X (doing business as X) after approximately one month because he found that it had misled him about the nature of his employment and because there was a significant change in his work duties. He applied for Employment Insurance regular benefits, but the Respondent, the Canada Employment Insurance Commission (Commission) denied his application because it found that the Claimant had left his employment without just cause and that voluntarily leaving was not his only reasonable alternative. This meant that the Claimant was disqualified from receiving any benefits. However, by the time the Commission decided that the Claimant was disqualified from receiving any benefits, it had already paid several months of benefits to the Claimant. Effectively, this resulted in a large overpayment that the Claimant had to pay back.

[3] The Claimant appealed the Commission's reconsideration decision to the General Division, which dismissed his appeal. The General Division found that the Claimant did not have just cause and that voluntarily leaving was not his only reasonable option. The Claimant is now appealing the General Division's decision because he says that the General Division did not fully consider his arguments about why he had just cause to leave his employment and because the General Division member did not give him a fair chance to present his case.

[4] I am dismissing the appeal because although I find that the General Division failed to consider whether there was a significant modification of terms and conditions respecting his wages or salary under subsection 29(c)(ix) of the *Employment Insurance Act*, the Claimant was unable to show that he did not have any reasonable alternatives to leaving his job. As well, I find that the General Division member explained the case that the Claimant had to meet, and that he also gave the Claimant a full and fair chance to present his case.

ISSUES

[5] The issues before me are as follows:

Issue 1: Did the General Division base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it or err in law by failing to consider whether 29(c)(ix) of the *Employment Insurance Act* applied?

Issue 2: Did the General Division fail to observe a principle of natural justice by failing to provide the Claimant with a full and fair opportunity to present his case on the issue of just cause?

GROUNDS OF APPEAL

[6] The only three grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* 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.

ANALYSIS

Issue 1: Did the General Division base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it or err in law by failing to consider whether 29(c)(ix) of the *Employment Insurance Act* applied?

(a) Subsection 29(c)(ix) of the *Employment Insurance Act*

[7] The Claimant argues that he had just cause for leaving his job because there was a significant change in his work duties, between what he expected and what his employer actually required him to do.

[8] The Claimant studied industrial mechanics in school. During the hiring process, the employer told him that he would get to work on a particular machine. The Claimant was happy with the pay that the employer offered. Once the Claimant joined the company, the employer gave him other work, mostly washing pots and pans, at a greatly reduced salary that was not enough for him to live on.

[9] The Claimant said that the company should have hired double the amount of staff because everyone had to work "way more than they're allowed to." His employer forced him to work "crazy hours" of upwards of 16 hours a day to 2 a.m. without any breaks, and then his employer expected him to return the next morning.

[10] The Claimant said that his employer also forced him to work on some machinery on which he did not get any training. He thought that could be a safety problem.

[11] The Claimant felt that his employer was harassing him, but there was no one he could turn to for help and no one would listen to him. So, if the employer had lied to him about the work, he felt that he should not have to stay with the company, especially if he was not earning enough money. If he had known that the job would turn out like this, he would not have accepted the position.[1]

[12] The Claimant submits that the General Division did not consider his arguments. However, as I noted in my leave to appeal decision, the General Division considered the Claimant's arguments that his employer harassed him. I noted on the other hand that it was less apparent whether the General Division considered the Claimant's allegations that he had just cause to leave his job because of a significant change in his work duties under subsection 29(c)(ix) of the *Employment Insurance Act*.

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[1] Claimant's submissions to Appeal Division, July 18, 2019.

[13] Subsection 29(c) of the *Employment Insurance Act* lists some of the factual scenarios where just cause for voluntarily leaving an employment can exist. The subsection states in part:

> (c) just cause for voluntarily leaving an employment … exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
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> . . .
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> (iv) working conditions that constitute a danger to health or safety, …
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> (vii) significant modification of terms and conditions respecting wages or salary,
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> (viii) excessive overtime work or refusal to pay for overtime work, …
>
> (ix) significant change in work duties, …
>
> (xi) practices of an employer that are contrary to law.

[14] I have reviewed the audio recording of the General Division decision. The General Division member said that he would look at each these issues.

[15] The General Division referred to subsection 29(c) of the *Employment Insurance Act* generally, but he did not refer to any specific subsections under 29(c). The member noted the Claimant's evidence that he was under the impression that he would be a machine operator, not a labourer. The General Division also noted the employer's evidence that new hires did not start working as machine operators; they had to work their way up before they could work as a machine operator.[2]

[16] The General Division seems to have recognized that the Claimant was arguing that he had just cause for leaving his job because there was a significant change in his work duties. It wrote, "The Appellant here has expressed a number of issues that he claims led to his quitting his employment. He had encountered problems with this employer in that he believed he was hired as a machine operator, however, he was doing labour work."

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[2] See Supplementary Record of Claim, dated December 13, 2018, at GD3-39.

[17] However, the General Division did not analyze any of the evidence on this point. The General Division did not make any findings one way or the other about any of this evidence and did not draw any conclusions about whether the Claimant left his employment because of any change in duties from what he had expected when he started working for the employer.

[18] In this regard, the General Division erred in law by failing to consider whether subsection 29(c)(ix) of the *Employment Insurance Act*, that the Claimant had just cause for voluntarily leaving his employment, taking into account whether there was a significant change in work duties, applied.

[19] Similarly, I note that the General Division failed to consider whether subsection 29(c)(iv), that working conditions constituted a danger to health or safety, applied. The General Division also did not address whether there was a significant modification of terms and conditions respecting wags or salary, whether there was excessive overtime work or refusal to pay for overtime work, and whether there were employer practices contrary to law. While it may be that the General Division member considered each of these issues, it is not apparent that he considered them because there was no meaningful discussion or analysis of any of these factors. Each of these factors merited some analysis because they could have served as just cause for the Claimant to voluntarily leave his employment, if the Claimant also showed that there were no reasonable alternatives to leaving. The General Division erred in law by failing to consider whether subsections 29(c)(iv), (vii), (viii), and (xi) applied.

(b) Just cause - reasonable alternatives

[20] Although the General Division may have failed to consider whether subsection 29(c)(iv), (vii), (viii), (ix) and (xi) of the *Employment Insurance Act* applied, the Claimant still had to prove that he had no reasonable alternatives to leaving his employment.

[21] The Claimant left his job because he felt that working conditions constituted a danger to his health or safety, that there was a significant change in his work duties, a significant modification of terms and conditions respecting wages or salary and excessive overtime work. He stated that the employer paid cash so that there was no record of excess work hours. He also felt that the employer’s practices were unlawful.

i. hours of work

[22] The Claimant suggested that the employer forced him to work "crazy hours" that were contrary to the law, but there is no evidence that the situation had become so intolerable that he could not have continued working while looking for other work. For instance, there were no medical reports or records to say that he was unable to continue working. Besides, there was conflicting evidence from the employer on this very point.[3] There were pay stubs that show that the Claimant worked as follows:[4]

Dates	Regular hours	Late shift hours
Sept 10 to 23, 2017	80	
Sept 24 to Oct 7, 2017	80	32
Oct 8 to 21, 2017	10	7.5

[23] The Claimant stated that 48 hours per week was reasonable, but the employer asked employees to work more than that.[5] From the pay stubs, it is clear that the Claimant worked overtime but it does not appear excessive nor, for that matter, well beyond what the *Employment Standards Act* allows.

[24] The Claimant argues that his employer did not document the overtime that he worked. The employer denied this.[6]

[25] For most positions in Prince Edward Island where the Claimant worked, the standard work week is 48 hours, after which an employee is eligible for time and one-half their regular rate of pay. Instead of paying the employee at the rate of one and one-half, the employer may give the employee one and one-half hours of paid time off work for each overtime hour worked.

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[3] See Supplementary Record of Claim, December 13 and 14, 2018, at GD3-39 and GD3-48.
[4] See pay stubs, at GD3-27 to GD3-30.
[5] See Supplementary Record of Claim, dated December 13, 2018, at GD3-40.
[6] See Supplementary Record of Claim, dated December 14, 2018, at GD3-48.

Apart from the “crazy hours,” the Claimant does not suggest that there is any issue about lack of overtime pay.

[26] Even if the employer failed to pay overtime or other to the Claimant, or even if he did work “crazy hours” that the employer did not document, the Claimant still had to show that he did not have reasonable alternatives to leaving his job.

ii. working on machinery

[27] The Claimant alleges that he felt unsafe being forced to work on machinery on which he had not been trained. Yet, this seems to somewhat contradict the Claimant’s own statement that there was a significant change in his work duties and that he ended up only doing labour work,[7] mostly washing pots and pans. The employer also seems to confirm that it hired the Claimant to work as a labourer. The employer also stated that once the Claimant started working as a labourer and if a position opened up, he could apply for work as a machine operator.[8] In other words, the employer suggests that if the Claimant operated any machinery, it was because the Claimant chose to do so, not because the employer forced him into it.

[28] Even if there were safety conditions that constituted a danger to health or safety, a significant change in work duties, or a significant modification of terms and conditions in wages or salary, the Claimant still had to show that he did not have reasonable alternatives to leaving his job.

iii. options to leaving

[29] The General Division considered whether the Claimant had reasonable alternatives to leaving when he did. It found that the Claimant had reasonable alternatives to quitting. For example, he could have continued his employment or sought out other employment before quitting.

[30] The Commission argues that the two options—continuing his employment or looking for other work—fell within the range of possible outcomes. The Commission notes that the Federal

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[7] See Supplementary Record of Claim, dated December 12, 2018, at GD3-38

[8] See Supplementary Record of Claim, dated December 13, 2018, at GD3-39.

Court of Appeal has also said that looking for other work is a reasonable alternative and that dissatisfaction with working conditions does not constitute just cause for leaving one's work. There might be just cause if the employee could show that the conditions were such that it left no options but to quit and that the employee had attempted steps to remedy the situation,[9] but there was no evidence of that before the General Division.

[31] In the *Hernandez* case before the Federal Court of Appeal, Mr. Hernandez claimant left his employment because he feared dangerous work conditions. He left because he felt that was the only reasonable alternative. However, he left his job without even discussing the working conditions with his employer. He did not explore the possibility with his employer that the nature or conditions of work at his employment could be changed in response to his concerns. The Federal Court of Appeal wrote, "The physical evidence in the record does not contain anything submitted by [Mr. Hernandez] on the basis of which it could be concluded that in departing the claimant had "no reasonable alternative".

[32] The Claimant says that he approached everyone, including the floor supervisor, at work about safety and working excess hours, but that no one would listen to him. However, the evidence on these points is contradictory. Apart from the seemingly contradictory evidence regarding whether he worked as a labourer or as a machine operator on equipment for which he had not been trained, the employer denied the Claimant's assertions about working undocumented excess hours. The employer denied that the Claimant had ever expressed any concerns about the work or the hours.[10] While the employer acknowledged that there was occasional overtime, the employer strongly denied the Claimant's allegations that it forced employees to work excessive hours or that it paid cash for overtime work. He also stated that it would have been impossible to pay cash, given the company's accounting system.[11]

[33] Irrespective of whether the Claimant approached his employer with any concerns he might have had, the General Division identified other alternatives to leaving work. The Claimant says that he looked for work before quitting, but he did not provide the General Division with

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[9] *Lakic v. Canada (Attorney General)*, 2013 FCA 4 and *Canada (Attorney General) v. Hernandez*, 2007 FCA 320.
[10] See Supplementary Record of Claim, dated December 13, 2018, at GD3-39.
[11] See Supplementary Records of Claim, dated December 14, 2018 and December 20, 2018, at GD3-48 and GD3-61.

any evidence of his efforts. There were no supporting copies of any applications or documents to show that he tried to look for work.

[34] There was also no supporting documentary evidence that he tried to speak with his employer to resolve his concerns about his working conditions, the change in work duties, any modification of terms and conditions in wages or salary, harassment, the long work hours or the employer's practices.

[35] In short, I do not see any legal or factual errors in the General Division's analysis on the issue of whether the Claimant had reasonable alternatives available to him before leaving his job, having regard to his circumstances.

[36] The Claimant also argues that he is young, did not know what was required of him, and is having a hard time financially, so should be given a chance and relieved of being responsible for a sizeable overpayment. However, I do not have any authority to provide the kind of relief from overpayment that the Claimant is seeking. The Claimant could formally make a request of the Commission for a waiver or reduction of the overpayment. Failing that, his other option would be with the Federal Court of Canada.

Issue 2: Did the General Division fail to observe a principle of natural justice by failing to provide the Claimant with a full and fair opportunity to present his case on the issue of just cause?

[37] The Claimant states that he and the General Division member spoke for a long time before the member started recording the hearing. The Claimant alleges that the General Division member told him off the record that he was "not on [the Commission's] side … He's there to help [the Claimant]." The member also reassured him and allegedly told him not to worry (about the outcome) because the Claimant had already given several reasons to prove that he had just cause for voluntarily leaving his employment.

[38] Because of these off-the-record discussions, the Claimant alleges that the member misled him into believing that he had already proven his case, so he did not feel that he had to say anything else after the member started recording the hearing. In fact, he stated that the hearing

lasted only about 10 minutes,[12] although later when asked about this, he stated that he did not know how long the hearing actually took. He stated, "I don't know how long it actually took, how long we were actually in there, but like, what I felt, we had a better and longer discussion before we even hit record and really went into the actual, the actual part of his job or whatever."[13]

[39] If the General Division hearing lasted approximately 10 minutes or so, that would suggest that the Claimant did not get a fair opportunity to fully present his case. However, the audio recording of the hearing indicates that it lasted almost 45 minutes, with the focus on the issue of whether the Claimant had just cause for voluntarily leaving his employment.

[40] I find it improbable that the General Division member would have spoken with the Claimant for anywhere approaching or exceeding 45 minutes before starting the recording device or before starting the hearing itself, although that is not to say or to suggest that discussions could not have taken place before the hearing started. There is no question though that it is highly inappropriate for any decision-maker to hold discussions of a substantive nature with a party before a hearing starts, particularly in the absence of any other parties.

[41] I accept that some discussions took place before the hearing started, but I do not accept the Claimant's assertions that any pre-hearing discussions were lengthy and were considerably longer than the hearing itself, or that they touched on any of the substantive issues. Clearly, the Claimant is under the impression that he had only a very brief chance to give evidence and make any arguments during the hearing, but after listening to the audio recording of the General Division hearing, it is obvious that the hearing lasted considerably longer than the Claimant recalls. More importantly, the audio recording reveals that the General Division member set out the case that the Claimant had to meet, and that the member gave the Claimant a full and fair chance to present his case on the issue of whether he had just cause for voluntarily leaving his employment.

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[12] At approximately 23:25 of the audio recording of the Appeal Division hearing, the Claimant said that "… once [the General Division member] started recording everything, we only talked for like 10 minutes. We had more of a conversation before he was recording than we did after."

[13] At approximately 24:41 of the audio recording of the Appeal Division hearing.

[42] The Claimant argues that the General Division member misled him into believing that he had already proven his case on the issue of just cause, and that he therefore did not have to address the issue. I do not see that to be the case either.

[43] At the beginning of the hearing, the General Division member explained the process and his own role. He explained that he was independent and that it was his "role to take a fresh look at the evidence and the circumstances surrounding the evidence and the representations from both sides, then make a decision that is fair, unbiased, and in accordance with the law."[14] The member also explained what authority he had. The member asked the Claimant whether he had any questions, but the Claimant did not raise any questions at that point. The member invited the Claimant to testify and provide him with any information that might be helpful. The member also invited the Claimant to ask questions at any time.

[44] The General Division member went over the history of the proceedings. The member also identified the issues that the Claimant had to address. The member specifically went through each of the applicable provisions under subsection 29(c) of the *Employment Insurance Act*. The subsection interprets when just cause for voluntarily leaving an employment exists.

[45] It seems that the Claimant must have understood the issue or the case that he had to meet because he focused on and described why he felt that he had just cause for having left his employment.[15]

[46] I do not see that the General Division member ever stated or could have led the Claimant to believe that he was acting for him or that he had already proven his case. Throughout the hearing, the General Division member stated that he did not know what the outcome of the proceedings would be and that he would have to examine all of the evidence and any relevant case law. In his closing remarks, the member repeated this, saying that he was "not holding out any carrots"[16] and that he did not know the outcome, as he would be reviewing all of the circumstances.

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[14] At approximately 2:20 of the audio recording of the General Division hearing.
[15] Starting at approximately 6:33 to 13:45 and 14:22 to 17:00 of the General Division hearing.
[16] At approximately 44:43 of the General Division hearing.

[47] In submissions filed after the hearing of this appeal before me, the Claimant stated that he "hardly understood anything about the meeting and expected more explanation from [the General Division member] … I needed advice and took it from the wrong person being a division member."[17]

[48] I see that the General Division's introductory and ongoing remarks throughout the hearing adequately explained the process and the case that the Claimant had to meet. I do not see any indication that the General Division member suggested that he was acting for the Claimant and that he would advise him. I do not see that the member provided any inappropriate advice to the Claimant, or that any advice was relevant to the issues or detrimental to the Claimant's interests on the substantive issues that the General Division had to decide.[18]

[49] The Claimant suggests that he did not know what was required of him, but I see that the Claimant addressed the issue regarding just cause for leaving his employment. His evidence before the General Division was consistent with the explanations that he gave to the Commission. Indeed, the Claimant appeared to provide more detail information at the hearing.

[50] The Claimant argues that the General Division should have accepted his evidence and arguments and found that he had just cause for voluntarily leaving his employment. This however does not constitute a breach of the principles of natural justice.

[51] The Claimant is essentially asking me to reassess the evidence and rule in his favour but that is not the role of the Appeal Division. Besides, as I have noted above, there were reasonable alternatives that the Claimant could have looked into before leaving his employment.

CONCLUSION

[52] Although the General Division failed to consider whether subsection 29(c)(ix) of the *Employment Insurance Act* applied in the Claimant's circumstances, I find that the Claimant still

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[17] After the hearing on July 18, 2019, I asked the Claimant to clarify what evidence or arguments he would have made about the penalty and violation issues, if there had not been any pre-hearing discussion with the General Division member. The Claimant responded on August 14, 2019, at AD4. His comments seem to be directed towards the just cause issue.

[18] At approximately 34:05 of the General Division hearing, the member recommended that the Claimant contact Canada Revenue Agency to propose a repayment schedule, if the General Division decision was unfavourable to the Claimant.

had to establish that there were no reasonable alternatives to leaving his job. The General Division addressed this issue and found that there were reasonable alternatives. I do not see that it erred in law or that it misconstrued or overlooked any key pieces of evidence on this issue.

[53] The Claimant also argued that the General Division member failed to observe a principle of natural justice because it misled him into believing that he did not have to make out his case, for various reasons. I do not see any evidence of that. The General Division described the case that the Claimant had to meet and gave him a full and fair opportunity to present his case.

[54] I also do not see any evidence that the General Division member suggested or could have led the Claimant to believe that the member was acting on his behalf or that the Claimant had already proven his case before the hearing had started. The member made it clear that he had yet to decide the case and that he would be reviewing the evidence and the applicable case law.

[55] For these reasons, I am dismissing the appeal.

Janet Lew
Member, Appeal Division

HEARD ON:	July 18, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. M., Appellant S. Prud’Homme, Representative for the Respondent (by way of written submissions only)