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

Citation: *H. H. v Canada Employment Insurance Commission*, 2019 SST 967

Tribunal File Number: AD-19-293

BETWEEN:

H. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: September 9, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] H. H. is the Claimant in this case. He applied for regular Employment Insurance (EI) benefits in October 2018. However, the Canada Employment Insurance Commission decided that he had voluntarily left his job without just cause, and disqualified him from receiving EI benefits.[1]

[3] The Claimant challenged the Commission's decision several times, but he has been unsuccessful so far. However, the Commission now accepts that I should allow the appeal. The main questions left for me to decide are whether I should give the decision that the General Division should have given, and, if so, should I maintain the Claimant's disqualification from receiving EI benefits.

[4] I am allowing the appeal and giving the decision that the General Division should have given: the disqualification that the Commission imposed against the Claimant is lifted. These are the reasons for my decision.

ISSUES

[5] As part of my decision, I considered these issues:

a) Did the General Division commit relevant errors of fact?

b) Should I give the decision that the General Division should have given?

c) Should I maintain the disqualification that the Commission imposed against the Claimant?

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[1] In this context, "just cause" has a very specific meaning. It is defined in section 29(c) of the *Employment Insurance Act* (EI Act). Section 30 of the EI Act establishes the Commission's powers to disqualify claimants from receiving EI benefits.

[6] The Claimant also alleged that the General Division was biased. For the reasons described below, however, I have decided to reassess the Claimant's case. As a result, I do not need to consider the issue of the General Division's bias.

ANALYSIS

[7] Before I can intervene in this case, the Claimant must convince me that the General Division committed at least one of the three possible errors described in the *Department of Employment and Social Development Act* (DESD Act).[2]

[8] In this case, I focused on whether the General Division based its decision on an important error concerning the facts of the case. Critically, not all factual errors can justify my intervention in a case.[3] For example, I cannot intervene in a case because the General Division made an error concerning some irrelevant detail. However, I can intervene in a case if the General Division based its decision on a factual finding that is clearly contradicted by the evidence or has no evidence to support it.[4]

Issue 1: Did the General Division commit relevant errors of fact?

[9] Yes, the General Division decision contains relevant errors of fact.

[10] Section 30 of the EI Act disqualifies claimants from receiving benefits if they voluntarily left a job without just cause. There is no question in this case that the Claimant quit his job voluntarily. Instead, the focus at the General Division was on whether he had just cause for quitting his job when he did.

[11] Proving just cause can be difficult. The Claimant had to establish that, in all the circumstances of his case, he had no reasonable alternative but to quit.[5] Section 29(c) of the

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[2] Section 58(1) of the DESD Act describes the three possible errors (also known as grounds of appeal) that would allow me to intervene in this case.
[3] More specifically, section 58(1)(c) of the DESD Act allows me to intervene in a case if 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.
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[5] *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.

Employment Insurance Act (EI Act) lists a number of relevant circumstances that the Tribunal should consider in cases like this one, but it must consider other relevant circumstances too.

[12] In this case, the Claimant worked for a food services company operating out of a large event and recreation facility. He was a salaried employee and was not entitled to overtime pay. Instead, he was meant to get additional time off. By all accounts, the Claimant was an extremely dedicated and loyal employee.

[13] Over the years, however, the Claimant said that his workload became unbearably heavy. His employer's business grew, meaning that there were extra demands on his time. Plus, as other workers left the company, the Claimant was often asked to take on some of their duties, meaning that his responsibilities grew too. According to the Claimant, the situation worsened to the point that he was unable to take all of his vacation time, let alone any of the hours that he had accumulated for working overtime.

[14] The General Division was not especially sympathetic to the Claimant's situation. The General Division decided that the Claimant did not have just cause for quitting his job when he did. In particular, the General Division found that the Claimant "happily" accepted his additional duties. The General Division also identified these reasonable alternatives that the Claimant could have pursued instead of quitting his job:

a) he could have asked to be paid for the overtime hours that he had accumulated;

b) he could have discussed his concerns with his employer; and

c) he could have waited to find another job before quitting the one that he had.

[15] The Claimant argues that the General Division was wrong to make these findings. For example:

a) he never said that he "happily" took on all of these additional duties;

b) the Claimant did ask to be paid for his unused vacation and overtime hours, but his requests was denied;[6]

c) the Claimant asked that someone be hired to support him, but that request was denied too;[7]

d) based on the Claimant's experience, a downturn in his employer's profitability, and a recent round of layoffs, the Claimant knew that his workload would be getting even heavier in the month or so after he quit. The Claimant felt that he could not wait any longer before quitting his job, both to minimize disruption to his employer's business and to preserve his health.

[16] Respectfully, the Commission's concession is not entirely clear from its written submissions.[8] At the hearing before me, however, the Commission accepted that the General Division made the errors of fact alleged by the Claimant in his application to the Appeal Division.

[17] I agree. The General Division decision was based on the findings described in paragraph 14 above. However, the General Division made those important findings without evidence or in the face of contradictory evidence (as described above). The General Division also failed to deal with the contradictions in the evidence, which is another error.[9]

[18] As a result, I have the power to intervene in this case.[10]

Issue 2: Should I give the decision that the General Division should have given?

[19] Yes, it is appropriate in this case to give the decision that the General Division should have given.

[20] On the one hand, the Commission encouraged me to return the matter to the General Division for a new hearing. The Commission argued that there were more alternatives that

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[6] GD3-50.
[7] GD2-4; GD2-29; GD3-50; audio recording of General Division hearing.
[8] AD2-4.
[9] See, for example, *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at paras 3 and 7.
[10] More specifically, section 58(1)(c) of the DESD Act is the authority that I am relying on to intervene in this case.

needed to be explored before deciding whether the Claimant had just cause for quitting his job when he did. For example, the Commission submitted that the Claimant could have complained to the Labour Board before quitting his job, though it was a bit unclear as to what the Labour Board might have done in the circumstances of this case.

[21] The Commission also accepted that the nature and tone of the General Division member's questions might have prevented the Claimant from fully presenting his case.

[22] The Claimant, on the other hand, argued that I should give the decision that the General Division should have given. He submitted that all of the information needed to make a decision was in the record already.

[23] Since the Claimant is not challenging the fairness of the hearing, the Commission is essentially asking me to send the matter back to the General Division so that it can reargue and strengthen its case. In my view, that is not a good reason for sending the matter back to the General Division. The Commission must make its best case from the very beginning.

[24] I have concluded that I have the ability and the information needed to make a final decision in this case.[11] In addition, I have reviewed all of the material in the file and listened to the recording of the General Division hearing. As a result, I see little benefit in returning the matter to the General Division.

Issue 3: Should I maintain the disqualification that the Commission imposed against the Claimant?

[25] No, the Claimant had just cause for leaving his employment when he did. As a result, the Commission should not have disqualified him from receiving EI benefits.

[26] In my view, the additional responsibilities assigned to the Claimant and the fact that he worked a large number of overtime hours for which he was never compensated in terms of pay or additional time off are relevant circumstances in this case. These circumstances fall within or

[11] Section 59(1) of the DESD Act establishes my power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal's decision in *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16-18.

are similar to those described in sections 29(c)(viii) and 29(c)(ix) of the EI Act.[12] As a result, I must consider whether the Claimant had reasonable alternatives to quitting his job when he did.

[27] As I described above, the parties agree that the reasonable alternatives identified by the General Division were based on errors of fact.

[28] The Claimant did ask his employer for additional staff and for his accumulated overtime hours to be paid to him, but his requests were refused. His employer told him that there was no room in the budget. The Claimant also filed an annual report with the overtime hours that he had accumulated, yet the employer did nothing about this increasingly alarming figure.[13]

[29] The employer's representative said that the Claimant had two people working under him and that he was able to set his own hours. The Claimant denied that these workers could replace him and said that his employer preferred that he do any extra tasks because he was a salaried employee. If these employees were able to replace him, he asked, why then did his employer call him into work on his days off?

[30] According to the Claimant, the employer's representative with whom the Commission had spoken was relatively new to her position and was not fully aware of his circumstances. To the extent that the Claimant's evidence conflicts with that of the employer's representative, I prefer that of the Claimant. After all, he was the only witness who gave oral evidence under oath before the General Division. In contrast, the evidence of the employer's representative is found in notes of a telephone conversation, as recorded by one of the Commission's agents.[14] Nobody verified the accuracy of those notes, nor was the Claimant able to test their reliability.

[31] In the last year of his employment, the Claimant also explained that his employer was losing money, reducing the size of its staff, and replacing many of its managers. More responsibilities were falling on to the Claimant's shoulders with little or no chance of relief. In addition, the employer's busiest season was about to start. In short, the Claimant's conditions

[12] These provisions refer to excessive overtime work or refusal to pay for overtime work, and significant changes in work duties.
[13] Audio recording of General Division hearing.
[14] GD3-28; GD3-52.

were about to worsen. Continuing to work until the Claimant found a new job was not a reasonable alternative in the circumstances of this case.

[32] Overall, therefore, I have concluded that the Claimant had no reasonable alternative but to quit his job when he did. As a result, I am lifting the disqualification that the Commission imposed against the Claimant.

CONCLUSION

[33] The parties and I agree that this appeal should be allowed because the General Division decision contains errors of fact, as described in section 58(1)(c) of the DESD Act. These errors concern the reasonable alternatives identified by the General Division and go to the heart of its decision.

[34] I have also decided that this is an appropriate case to give the decision that the General Division should have given: the Claimant had just cause for leaving his employment when he did. As a result, the disqualification that the Commission imposed against the Claimant should be removed.

Jude Samson
Member, Appeal Division

HEARD ON:	August 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	H. H., Appellant Angèle Fricker, Representative for the Respondent

Relevant Sections of the Law

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

(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.

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Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Employment Insurance Act

Interpretation

29 For the purposes of sections 30 to 33,

[…]

(c) just cause for voluntarily leaving an employment or taking leave from 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:

[…]

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties…

Disqualification — misconduct or leaving without just cause

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless…