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

Citation: *Z. R. v Canada Employment Insurance Commission*, 2019 SST 970

Tribunal File Number: AD-19-443

BETWEEN:

Z. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 13, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, Z. R. (Claimant) was suspended from his employment on December 11, 2018, and scheduled to return to work on December 18, 2018. After the Claimant failed to report to work as scheduled, the employer considered the Claimant to have abandoned his position and issued him a Record of Employment, listing "quit" as the Claimant's reason for leaving. The Claimant applied for Employment Insurance benefits claiming that he had been terminated but the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant voluntarily left his employment. It also found that the Claimant was not entitled to regular benefits because he had left his employment without just cause. The Claimant requested that the Commission reconsider but the Commission maintained its original decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, arguing that he had not quit his employment and that he did not return to work after his suspension because he was sick. The General Division dismissed his appeal, and the Claimant now seeks leave to appeal to the Appeal Division.

[4] The appeal is dismissed. The General Division may have ignored or misunderstood some of the evidence, but its factual errors were not so significant that they would have affected any finding on which the decision was based.

PRELIMINARY MATTER

[5] Together with his leave to appeal application, the Claimant submitted a third doctor's note dated June 21, 2019. In the third note, the doctor adjusts the dates of the Claimant's medical excuse from his prior medical note of December 28, 2018. The June 21, 2019, note was not in

evidence before the General Division and is therefore new evidence. The Appeal Division is not authorized to consider new evidence and I will not be considering it.[1]

ISSUE(S)

[6] Did the General Division decide that the Claimant voluntarily left his employment based on an erroneous finding that the Claimant could have reported to work on December 27, 2018?

[7] Did the General Division decide that the Claimant voluntarily left his employment based on an erroneous finding that the employer did not consider the Claimant to have left his employment until January 5, 2019?

[8] Did the General Division decide that the Claimant had reasonable alternatives to leaving based on any finding that misunderstood the medical evidence or ignored his testimony that the employer told him he had lost his employment on December 27 or 28, 2018?

ANALYSIS

General Principles

[9] 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).

[10] The only grounds of appeal are described below:

> The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
> 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.

[1] *Mette v. Canada (AG)*, 2016 FCA 276)

Issue 1: Did the General Division decide that the Claimant voluntarily left his employment based on an erroneous finding that the Claimant could have reported to work on December 27, 2018?

[11] In the decision in which I granted leave to appeal, I found that the Claimant had an arguable case that the General Division ignored or misunderstood certain evidence and that the General Division may have based its decision on an erroneous finding of fact.

[12] The General Division found that the Claimant could have reported to work on December 22, 2018, and on December 27, 2018, which it said was "based on the medical evidence".[2] The Claimant stated that he could not work on December 22 insisted because it was a Saturday and insisted that he told the General Division that his employer was not open weekends, but I was unable to find any evidence on the record that the employer was not open Saturdays. However, the Claimant is correct that his medical note excuses him from work on December 27. The General Division was mistaken in its belief that the medical evidence supported the Claimant's capability to work on December 27, 2018.

[13] The General Division determined that the Claimant voluntarily left his employment. In this case, the Claimant's "voluntary leaving" was inferred from the circumstances: The Claimant failed to return to work following his suspension and he did not contact the employer and give the employer a copy of his medical excuse. The General Division concluded that the Claimant had a choice to remain employed because his employment would likely have continued if he had returned to work or contacted the employer.

[14] While the General Division was mistaken in finding that the Claimant could have returned to work on December 27, this finding plays a relatively small role in the General Division's broader finding that the Claimant could have reported in to his employer or given the employer his medical excuse. This is the finding on which the General Division actually concluded that the Claimant voluntarily left his job.

[15] It is not disputed that the Claimant was suspended on December 11, 2018, with an expected return to work date of December 18, 2018, and that he did not return to his employer. The Claimant said that he left messages that he was sick on both the employer's general

[2] General Division decision, para. 14.

voicemail, and on his supervisor's cell phone. However, he did not talk to his supervisor or anyone at his employer, and he did not drop off or send the employer a copy of the medical excuse note that he obtained on December 21, 2018.

[16] The General Division accepted and relied on the employer's and union representative's statements that they had left the Claimant numerous messages to bring him back to work.[3] The General Division referred to the employer's statements and a copy of a December 27 text message from the employer that states, "Without immediate contact with [the employer], we shall consider you have quit."[4] The Claimant testified that he received no messages from anyone, but he is recorded as having initially acknowledged to the Commission that he received this particular text message.[5]

[17] The General Division was not convinced that the Claimant did not receive voice or text messages from the employer or the union representative. It determined that the Claimant could have made greater efforts to contact the employer if his own voicemail messages were not returned,[6] and it accepted that the employer communicated to the Claimant that it would presume him to have quit if he did not contact the employer.[7]

[18] In addition, the General Division noted that the Claimant was not prevented from having someone else contact the employer in person or deliver his medical notes to the employer, which the Claimant acknowledged he had done during a previous illness. There was no evidence that the Claimant was incapacitated by his illness, which he described to the General Division as stomach pain.

[19] In other words, the General Division found that the Claimant had many different opportunities to ensure that the employer understood the reason for his absence and his continuing intention to return to work. The General Division's misunderstanding that the

[3] General Division decision, para. 15, 24, 26.
[4] GD3-48
[5] GD3-54
[6] General Division decision, para. 29.
[7] General Division decision, para. 26

Claimant did not have a medical excuse from work that included December 27 is not a significant factor in its conclusion that the Claimant voluntarily left his employment.

[20] Section 58(1)(c) of the DESD Act states that the General Division commits an error when it **bases** its decision on an erroneous finding of fact. The General Division did not base its decision that the Claimant voluntarily left his employment on its finding that the Claimant could have returned to work on December 27. Therefore, it did not err under section 58(1)(c).

Issue 2: Did the General Division decide that the Claimant voluntarily left his employment based on an erroneous finding that the employer did not consider the Claimant to have left his employment until January 5, 2019?

[21] The General Division also understood that the Claimant's employer did not consider the Claimant to have abandoned his job until the January 5, 2019, letter was sent to him by registered mail. [8] The Claimant testified that he received a telephone call from his supervisor on December 27 or 28, 2018, telling him that the employer considered him to have quit. This was the reason he gave for not making further attempts to contact the employer. The General Division made no reference to this testimony.

[22] The General Division finding that the employer did not consider the Claimant to have voluntarily left until January 5, 2017, appears to accept that the employer or union representative had text messaged the Claimant and left him voicemail messages even after the telephone conversation of December 27 or 28. Evidence of the employer's willingness to discuss the Claimant's circumstances included the employer's statement that "after a week" he asked the union to contact the Claimant and ensure that he knew he was not fired.[9] It also includes the written statement of the union representative that he left a voicemail message with the Claimant in the first week of January 2019, to tell him that he was not in trouble but that he should contact himself or the employer.[10]

[8] General Division, para. 20.
[9] GD3-23
[10] GD3-50

[23] I accept that the General Division failed to consider the Claimant's evidence that he was told he had abandoned his job on December 27 or 28, 2018.[11] However, even if the General Division had preferred the Claimant's testimony on this point, the evidence would still support a conclusion that the Claimant had not spoken to any person at the employer or to the union in the shorter period from December 18, 2018, to December 27, 2019. Furthermore, there was no evidence that the employer ever acknowledged any message from the Claimant, or that it knew the Claimant was not reporting to work because he was sick. The General Division could still find that the Claimant had no contact with the employer from the time he was supposed to return to work until the December 27 or 28 discussion.

[24] Obviously, the longer the period in which the Claimant failed to explain his absence to the employer, the stronger the case for abandonment. If the employer found the Claimant to have abandoned his position on December 27 or 28, rather than January 5, this represents a narrower window in which the Claimant might have contacted the employer to secure his position.

[25] However, despite the "narrower window" that would have applied if the General Division had preferred the Claimant's evidence, I find that the General Division's understanding (that the employer did not consider the Claimant to have quit until January 5, 2019, as opposed to December 27 or 28, 2018) does not significantly affect the General Division's finding that the Claimant could have found a way to contact his employer about his illness if he had wanted to keep his job.

[26] The General Division acknowledged the Claimant's evidence that he had left voicemail messages but it noted that he could not corroborate having left those messages, and that the employer denied receiving any messages.[12] It found that it would have been reasonable for the Claimant to follow up to confirm that any messages he may have left had been received. It also accepted that the Claimant knew that he needed to provide his medical excuse to the employer, but that he did not drop it off or have it delivered.[13] It accepted that the Claimant's medical condition did not prevent him from dropping off his excuse or making arrangements to have it

[11] Audio recording of General Division hearing at timestamp 1:01:55
[12] General Division decision, para. 16
[13] General Division decision, para. 15

dropped off. It relied on text message evidence that the employer warned the Claimant on December 27 that he would be considered to have quit if he did not immediately respond.[14]

[27] Even if the General Division had accepted that it was December 27 or 28 that the employer first told the Claimant he no longer had a job, the preponderance of evidence would still support the General Division's conclusion that the Claimant voluntarily left his employment. Therefore, I find that the General Division did not base its decision on an erroneous finding of fact related to the evidence of when the employer considered the Claimant to have quit.

[28] As noted, there were two factual errors in the General Division decision. One involved a single day, December 27, 2018, that the Claimant was mistakenly understood to be without medical excuse. The other error involved the General Division's failure to consider the Claimant's testimony that he learned that he had lost his job on December 27 or 28, 2018.

[29] However, on a balance of probabilities, I find that these errors did not have a significant effect on the General Division's findings or decision. The General Division decision that the Claimant voluntarily left his employment did not substantially rely on its finding that the employer did not consider the Claimant to have quit until January 5, 2019. The General Division did not err under section 58(1)(c) of the DESD Act.

Issue 3: Did the General Division decide that the Claimant had reasonable alternatives to leaving based on any finding that misunderstood the medical evidence or ignored his testimony that the employer told him he had lost his employment on December 27 or 28, 2018?

[30] One of the reasonable alternatives identified by the General Division is that the Claimant could have reported to work on December 22 and on December 27, and every scheduled day thereafter. This alternative is contrary to the medical evidence, at least in part. The Claimant's medical note of December 28, 2018, says he is excused from work over a period that includes December 27, 2018.

[31] However, the General Division decision that the Claimant did not have just cause for leaving his employment does not necessarily depend on the General Division's mistaken finding

[14] General Division decision, para. 29, 30

that he could have reported to work on December 27, 2018. Section 29(c) of the *Employment Insurance Act* says that a claimant will have just cause for leaving his or her employment if the claimant has "no reasonable alternative" to leaving. If the Claimant had even one reasonable alternative, the General Division could not have found that he had just cause for leaving.

[32] The General Division supported its decision with another reasonable alternative. It said that the Claimant had the reasonable alternative of maintaining contact with his employer. It suggested that the Claimant could have returned the calls of his union representative, replied to his employer's text message, and had someone deliver his medical excuse note to the employer on his behalf. If the evidence supported the existence of this other reasonable alternative, then it would not matter that the General Division made a factual error about the Claimant's ability to return to work on one particular day.

[33] When the General Division identified the other reasonable alternative, it did so without consideration of the Claimant's testimony that the employer told him on December 27 or 28, 2018, that his employment had ended. However, this would not have affected the General Division's conclusion that the Claimant could have taken steps to ensure the employer knew his circumstances as a reasonable alternative. Even if the Claimant's unexplained absence only lasted from December 18 to December 27, he could still have made sure that his employer was aware that he did not intend to abandon his job. This would still be a reasonable alternative to assuming that his employer knew that he was absent due to illness, or passively waiting for the employer to conclude that he would not return.

[34] The employer apparently lost patience with the Claimant's failure to communicate or to provide an excuse for his absence, and it considered the Claimant to have abandoned his job. Regardless of whether the employer communicated its final decision on January 5 when he sent the registered letter to the Claimant, or whether the employer informed the Claimant of its decision in a December 27 or 28 telephone call as the Claimant testified, the Claimant had the same "reasonable alternative" of contacting and updating the employer before the employer presumed him to have quit. If the Claimant did not want the employer to think that he had abandoned his job, he had the responsibility to ensure that the employer was aware of the reason

that he was not reporting for work. This is true regardless of whether the employer's patience was exhausted on December 27, 2018, or lasted until January 5, 2019.

[35] I find that it is more likely than not that the evidence that was overlooked by the General Division would not have affected its finding that the Claimant had the reasonable alternative to leaving of maintaining contact with the employer and justifying his absence. Therefore, I find that the General Division did not base its decision on an erroneous finding of fact and it did not err under section 58(1)(c) of the DESD Act

CONCLUSION

[36] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	September 10, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. R., Appellant