



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 1047

Tribunal File Number: AD-19-211

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 19, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. M. (Claimant), a civil servant, asked his employer not to assign him any work that involved clients whose lifestyles and practices were contrary to his own religious beliefs. His employer would not grant his request. His employer told him that he had to respect client diversity and treat everyone fairly. Because he said he could not work on these types of files, his employer dismissed him.

[3] The Claimant applied for Employment Insurance regular benefits, but the Respondent, the Canada Employment Insurance Commission (Commission) denied his claim because it found that he had voluntarily left his employment without just cause and that voluntarily leaving was not his only reasonable alternative. The Claimant appealed the Commission's decision to the General Division, which also found that he did not have just cause for having voluntarily left his employment. The General Division also determined that the Claimant was disqualified from receiving any benefits.

[4] The Claimant sought leave to appeal the General Division's decision. This means that he had to get permission from the Appeal Division before he could move on to the next stage of his appeal. I granted permission to the Claimant because the General Division may have erred in law by overlooking some of the Claimant's arguments.

[5] The Commission responded that it agreed that the appeal should be allowed because the General Division had erred in law when it did not address the Claimant's arguments. The Commission also argued that there was conflicting or insufficient evidence to be able to decide one way or the other whether the Claimant quit or the employer dismissed the Claimant for misconduct. The Commission recommended that the Appeal Division allow the appeal and that it rescind the disqualification.

[6] The Social Security Tribunal served the Notice of Hearing on the parties.¹ The Commission notified the Tribunal that it would not be attending and would be relying on its written submissions.² The hearing of the appeal was scheduled to proceed by teleconference but the Claimant did not attend the hearing.

ISSUES

[7] The issues are:

- (a) Did the General Division err in law by overlooking the Claimant's arguments that there was a breach of his rights under the *Canadian Charter of Rights and Freedoms* and human rights legislation?
- (b) Did the General Division base its decision on an erroneous finding of fact that it made without regard for the material before it when it decided that the Claimant had voluntarily left his employment?
- (c) Does the evidence show that the Claimant either voluntarily left his employment or that his employer dismissed him for misconduct?

GROUND OF APPEAL

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

¹ The Proof of Service shows that the Claimant signed and received the Notice of Hearing on May 17, 2019.

² See Memorandum dated June 5, 2019

- (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.

PARTIES' POSITIONS

[9] The Claimant argues that the General Division failed to observe a principle of natural justice because it did not recognize that his employer discriminated against him because of his religious beliefs within the meaning of the *Canadian Human Rights Act* and the *Charter*. In particular, he claims that his employer should have exempted him from working on files that would have exposed him to individuals whose lifestyles and practices were contrary to his religious beliefs. He claims that his employer told him that he had to fulfill all of his responsibilities at work and serve everyone—irrespective of their sexual orientation, gender identity or expression, or marital status—or else he could no longer continue working there. In short, the Claimant denies that he voluntarily left his employment. He maintains that his employer dismissed him from his employment.

[10] The Commission argues that the reasons why the Claimant left his employment were unclear: Did his employer dismiss him or did he voluntarily leave his employment? The Commission argues that the evidence did not establish that the Claimant quit. At the same time, the Commission also concedes that there was not enough information to show that there had been misconduct, as defined by the *Employment Insurance Act*. For misconduct to be found, the Claimant's actions would not only had to have been conscious, deliberate, or intentional, but the Claimant would have had to have known or ought to have known that his conduct would impair the performance of his duties, and that because of his conduct, dismissal was a real possibility.

ANALYSIS

- (a) **Did the General Division err in law by overlooking the Claimant's arguments that there was a breach of his rights under the *Charter* and human rights legislation?**

[11] In the proceedings before the General Division, the Claimant argued that his employer breached his rights to freedom of religion under the *Charter* and human rights legislation

because it did not allow him to observe his religion in the workplace. He argues that his employer should have granted an exemption to him from serving clients whose lifestyles and beliefs contradicted his religious beliefs. He argues that the employer further breached his rights by dismissing him. The Claimant argues that the General Division erred in law by not addressing his arguments that his employer breached his rights because it meant that the employer did not have a valid reason to dismiss him.

[12] The Commission submits that the General Division erred in law by not addressing the Claimant's arguments about the breaches of his rights under the *Charter* and human rights legislation.

[13] I am prepared to accept the Commission's arguments that the General Division should have addressed this issue. If the General Division determined that the Claimant had voluntarily left his employment, it should have also examined whether he had just cause to leave his employment if he had no reasonable alternative to leaving, having regard to whether there was any discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*. Under subsection 29(c) of the *Employment Insurance Act*, just cause may exist if there is discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.

(b) **Did the General Division base its decision on an erroneous finding of fact that it made without regard for the material before it when it decided that the Claimant had voluntarily left his employment?**

[14] The General Division set out the Claimant's evidence: the Claimant felt that he had to choose between his existing job responsibilities and his conscience and religious beliefs. When he asked his employer to exempt him from serving a particular community of clients, his employer refused his request and told him that he could no longer work there. The Claimant maintains that he did not quit his employment.

[15] The General Division found that the Claimant could have continued with his employment after the employer refused his demand for a change in job responsibilities. The General Division found that the Claimant initiated the departure because he had a choice to stay or leave. His employment would have continued if he had not demanded a change in job responsibilities. Put

another way, he would have continued working there if his employer had granted his request and exempted him from working on certain files.

[16] The Claimant has been consistent throughout that he did not voluntarily leave his employment. At the same time, he says he has never received a dismissal letter. In his Notice of Appeal filed with the General Division in February 2019, the Claimant wrote:

I asked to be exempted from making decisions on files that are against my religious believe [*sic*], but that request was not granted. In a meeting with the director and some of the officials of the organization, the issue was raised, and I had to chose between working for the organization, or staying with my religious believe [*sic*] and faith in God. I decided to hold on to my religious believe [*sic*], and I was told that I can no longer work there. My identification card was taken back, and I was walked out of the building, but I was not given a termination letter.³

[17] And, in his application requesting leave to appeal, he wrote, “I did not voluntarily leave the employment, I was informed that I can no longer work there because my request for an exemption on working on files that are contrary to my religious believe [*sic*] was not granted.”⁴

[18] In June 2018, the employer had in fact sent a dismissal letter to the Claimant, although the Claimant states that he never directly received it from his employer. (The dismissal letter forms part of the hearing file before me.) The letter reads, in part:

... you are hereby terminated during the probationary period ...

That said, you are relieved of all duties effective June 11, 2018, and should not report to the office from this date onward.⁵

[19] A couple of months later, the employer prepared a Record of Employment, citing “Dismissal/Termination within probationary period” as the reason it issued the record.⁶ When the Commission contacted the employer in November 2018, the employer confirmed that it had dismissed the Claimant for not following rules and for being rude with clients, although the

³ See Notice of Appeal, filed February 15, 2019, at GD2-6 at para. 4.

⁴ See Request for Leave to Appeal, filed on April 19, 2019, at AD1A-8 at para 2.

⁵ Employer’s letter dated June 11, 2018, at GD3-32 to 33. The letter also includes a section for the Claimant to confirm receipt of the letter, but that section is unsigned and undated.

⁶ See Record of Employment dated August 4, 2018, at GD3-17.

Claimant disputes that he was ever rude or that he failed to follow rules.⁷ The employer apparently stated that it had warned the Claimant multiple times that he had to improve, but he did not, so it dismissed him from his employment.⁸

[20] The Claimant does not dispute that his employer dismissed him, although he disagrees with the decision and says that his employer should have accommodated his religious beliefs.

[21] The General Division did not address much of this evidence. Yet, the evidence before the General Division suggests that the Claimant did not leave his employment, in that he would have stayed on the job if his employer had not taken his access pass and escorted him from the workplace. The General Division should have considered and addressed the Claimant's claims that he did not leave his employment. By failing to do so, it based its decision on an erroneous finding of fact that it made without regard for the material before it when it decided that the Claimant had voluntarily left his employment.

(c) **Does the evidence show that the Claimant either voluntarily left his employment or that his employer dismissed him for misconduct from his employment?**

[22] As the Federal Court of Appeal has held, "In the end, since the legal issue is a disqualification under subsection 30(1) of the [*Employment Insurance*] Act, the finding of the Board or the Umpire can be based on any of the two grounds for disqualification as long as it is supported by the evidence."⁹ In other words, claimants are disqualified from receiving any Employment Insurance benefits if they lose any employment because of their misconduct or because they voluntarily left their employment without just cause.¹⁰ It does not matter whether the Claimant left or was dismissed from his employment. As long as either of these two scenarios existed, then he would be disqualified from receiving benefits. However, the Claimant disputes that he voluntarily left his employment.

[23] The Commission argues that there is conflicting evidence on the reason for separation, so it has not met the burden of proving that the Claimant quit or that there was misconduct. I have

⁷ See Request for Leave to Appeal at AD1A-10.

⁸ See Supplementary Record of Claim, dated November 27, 2018, at GD3-30.

⁹ See *Canada (Attorney General) v. Borden*, 2004 FCA 176.

¹⁰ See subsection 30(1) of the *Employment Insurance Act*.

reviewed the evidence. As I noted above, for misconduct to be found, the Claimant's actions would not only had to have been conscious, deliberate, or intentional, but the Claimant would have had to have known or ought to have known that his conduct would impair the performance of his duties, and that because of his conduct, dismissal was a real possibility. Although the employer stated that it had warned the Claimant about his conduct, it is not readily apparent that the Claimant would have known or ought to have that because of his conduct, dismissal was a real possibility. The Claimant was on probation at the time, and possibly, he may have thought that he would have continued his employment until at least the end of the probationary period.

[24] The Commission recommends that the Appeal Division allow the Claimant's appeal and rescind the disqualification imposed under section 30 of the *Employment Insurance Act*. I agree that this is appropriate because of the conflicting evidence on the reason for separation and the fact that the Commission conceded that it has not proven that the Claimant either voluntarily quit or that there was misconduct. While the employer may have been justified in terminating the Claimant's employment, for misconduct to have occurred, it is not enough that the Claimant's actions (or omissions) were conscious, deliberate or intention. The Claimant would have had to have known or ought to have known that his conduct would impair the performance of his duties, and that because of his conduct, dismissal was a real possibility. The evidence falls short of establishing this requirement of proving misconduct. For this reason, I am allowing the appeal.

CONCLUSION

[25] The appeal is allowed and the disqualification is rescinded.

Janet Lew
Member, Appeal Division

HEARD ON:	June 25, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A, M., Appellant (written submissions only)

	Angèle Fricker, representative on behalf of Respondent (written submissions only)
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