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

Citation: *N. D. v Canada Employment Insurance Commission*, 2019 SST 1262

Tribunal File Number: AD-19-285

BETWEEN:

N. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: September 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] N. D. is the Claimant in this case. He worked as a X for roughly a year over 2017 and 2018. However, things changed in the summer of 2018. According to the Claimant, his supervisors often told him that he needed to be more productive and that his work was full of mistakes. On his last day of work, a supervisor called him stupid and lazy. The Claimant alleges that others in the office could have overheard these comments.

[3] The Claimant quit his job a few days later and applied for Employment Insurance (EI) regular benefits. However, the Canada Employment Insurance Commission denied his application. It concluded that the Claimant was disqualified from receiving EI benefits because he had voluntarily left his job without just cause.[1]

[4] The Claimant challenged the Commission's initial decision, but he has been unsuccessful so far, including at the Tribunal's General Division. The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division.[2]

[5] I have concluded that the General Division failed to apply the correct legal test. To fix this error, I will give the decision that the General Division should have given: the disqualification that the Commission imposed on the Claimant should be removed.

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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.
[2] I have already granted leave (or permission) to appeal in this case.

ISSUES

[6] As part of my decision, I asked and answered the following questions:

a) Did the General Division commit an error of law when considering the Claimant's allegations of harassment?

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

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

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).[3]

[8] In this case, I focused on whether the General Division committed an error of law or failed to exercise its jurisdiction. Based on the wording of the DESD Act, any error of these types could justify my intervention in this case.[4]

[9] If I find that the General Division committed an error, then the DESD Act also describes the powers that I have to try to fix that error.[5]

Issue 1: Did the General Division commit an error of law when considering the Claimant's allegations of harassment?

[10] Section 30 of the *Employment Insurance Act* (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 left his job voluntarily. Instead, the General Division focused on whether he had just cause for quitting his job when he did.

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[3] 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.
[4] DESD Act, s 58(1)(b).
[5] These powers are set out in section 59(1) of the DESD Act.

[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.[6] Section 29(c) of the 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 maintains that he was harassed at work, which provided him with just cause for leaving his employment.[7]

[13] The Federal Court of Appeal has taught us that, in cases of alleged harassment, the Tribunal must clearly decide whether the person was harassed or not.[8] Only afterwards can the Tribunal consider the reasonable alternatives available to that person. This is logical, since a finding of harassment will influence the reasonable alternatives analysis. In other words, whether a person was, in fact, harassed at work will affect the reasonable alternatives available to that person.

[14] In this case, however, the General Division seemed to make few (if any) findings concerning the circumstances that led to the Claimant's decision to quit his job. Rather, the General Division noted some of the Claimant's evidence, borrowed significantly from the Commission's written submissions, and then came to this conclusion (at paragraph 14 of its decision):

> I have carefully considered the submissions before me. I accept and assign more weight to the submissions of the [Commission]. I find that the [Claimant] did not show just cause when he left his employment. The reason is that the [Claimant] had reasonable alternatives. Reasonable alternatives to leaving would have been to report the incident to the employer, exploring the option of a transfer and looking for other employment before quitting. The [Claimant] failed to demonstrate he took any action to rectify the conflict before making the decision to leave. He also confirmed he did not leave his employment due to any health concerns.

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[6] *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.
[7] Section 29(c)(i) lists sexual or other harassment as a relevant circumstance to consider when deciding whether a person had just cause to leave their employment.
[8] *Bell v Canada (Attorney General)*, A-450-95; *Mcfarlane v Canada*, 1997 CanLII 5163 (FCA). See also *JG v Canada Employment Insurance Commission*, 2018 SST 23 (AD).

[15] I am troubled by this paragraph because:

a) the Tribunal normally assigns weight to the evidence and not to submissions;

b) the General Division did not really explain why it preferred the Commission's submissions to those of the Claimant, nor did it explain why it rejected the Claimant's evidence; and

c) contrary to the teachings of the Federal Court of Appeal, the General Division considered the Claimant's reasonable alternatives without first deciding whether he had been harassed.

[16] Based on Federal Court of Appeal decisions, the General Division was required to first decide whether the Claimant had been harassed at work, but it failed to do so. Instead, it skipped straight to the reasonable alternatives analysis. As a result, the General Division made an error of law by misapplying the correct legal test.

[17] The Commission argues that this error is irrelevant because the General Division was right to conclude that the Claimant had reasonable alternatives to leaving his job.

[18] I cannot accept this argument. As highlighted by the Federal Court of Appeal, the General Division was not entitled to skip the harassment question and jump immediately to the reasonable alternatives analysis. If the Claimant was harassed, that should influence the assessment of the reasonable alternatives that were available to him in all the circumstances of his case.

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] I have concluded that I have the ability and the information needed to make a final decision in this case.[9] 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 on the Claimant?

[21] No, the disqualification imposed by the Commission on the Claimant should be lifted.

[22] The Claimant was one of two X working for the employer. Starting in the summer of 2018, the Claimant says that the volume of information that he was expected to process increased, while technical problems caused his productivity to decrease.[10] A supervisor started telling him that he was falling behind and that he needed to work harder.

[23] One day, a second supervisor called the two X into her office, where they were told to increase their productivity or they would face disciplinary action. Indeed, the employer later fired the other X. The employer's accountant also spoke to the Claimant regularly about his productivity.

[24] On one occasion, the Claimant says that his supervisors falsely accused him of making a mistake. On other occasions, the Claimant's supervisors refused to provide him with examples of the mistakes that they accused him of making. According to the Claimant, all of this contributed to a very stressful and toxic work environment.

[25] On his last day of work, a Friday, the Claimant says that his supervisors asked him a series of demeaning questions, told him that he was doing only half the work his job required, and called him lazy and stupid. The Claimant and his supervisors were alone in a room when this

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[9] 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.

[10] In his reconsideration request, the Claimant provided a detailed explanation of the circumstances that led him to quit his job (see pages GD3-33 to 35).

conversation. However, the Claimant felt that some of his co-workers could have overheard the conversation.[11]

[26] The Claimant finished his regular shift on that day but says that he felt sick and stressed all weekend. The Claimant never returned to work following this event. Instead, he submitted his resignation the following Wednesday.

[27] The Claimant acknowledged that he is particularly sensitive to stress, having previously required psychological therapy following a traumatic incident, and because of a medical condition that is made worse by stress.

[28] The Claimant says that he did not look for other work before quitting his job because he did not expect things to deteriorate in the way that they did. He also says that he never raised his concerns with his employer because it was a small company with no human resources department, no formal reporting system, and no complaints procedure of which he was aware. Finally, he says the employer is a small family-run business, that his former supervisors are sisters, and that both are related to the owner through marriage.

[29] There is no significant dispute concerning the facts of this case. For the employer's part, the owner said that the Claimant had been spoken to regarding his productivity but that he had never been disciplined for this reason. The owner also said that the company had a policy about treating everyone with respect.[12]

[30] According to the Claimant, he quit his job primarily because he was being harassed at work, though some of his allegations could also fit within other circumstances under section 29(c) of the EI Act.[13]

[31] Harassment is not defined in the EI Act, nor has it been interpreted by the courts. As a result, I can decide how it should be interpreted.

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[11] GD3-46.

[12] GD3-28.

[13] See, for example, section 29(c)(x), antagonism with a supervisor if the claimant is not primarily responsible for the antagonism, and section 29(c)(xiii), undue pressure by an employer on the claimant to leave their employment.

[32] The Claimant is the only party who has advanced a possible definition of harassment. In particular, he relies on the definition provided in chapter 6.5.2 of the *Digest of Benefit Entitlement Principles* (Digest).[14] It defines harassment in this way:

> Harassment is generally defined as any improper behaviour by a person that is directed at and offensive to another person and which the first person knew or ought reasonably to have known would be unwelcome. Harassment may take the form of reprehensible comments, actions or displays which humiliate degrade or embarrass another person. Harassment may come from an individual or a group of persons, managers or employees, creating a hostile and poisoned work environment that quickly becomes intolerable.
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> Harassment also includes abuse of power through the injurious exercise of authority for the purpose of compromising a person's employment, damaging performance at work, endangering means of subsistence or interfering with that person's career in any other way. Acts such as intimidation, threats, blackmail and coercion also constitute a form of harassment.
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> Whether sexual or non-sexual in nature or committed once or many times, harassment is reprehensible and cannot be tolerated. [Footnote omitted]

[33] In addition, it is expected that the following definition of harassment will soon be added to the *Canada Labour Code*:[15]

> ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment….

[34] Although I am not bound to follow these definitions, they share many common features that I find persuasive. Based on these definitions, I extracted the following key principles:

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[14] The Digest is not part of the law, but it contains principles that the Commission applies when deciding claims for EI benefits. It is available online at this address <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html>.

[15] Bill C-65, *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1*, 1st Sess, 42nd Parl, 2018, cl 0.1 (assented to 25 October 2018), SC 2018, c 22.

a) harassers can act alone or with others and do not have to be in supervisory or managerial positions;

b) harassment can take many forms, including actions, conduct, comments, intimidation, and threats;

c) in some cases, a single incident will be enough to constitute harassment; and

d) there is a focus on the alleged harasser, and whether that person knew or should reasonably have known that their behaviour would cause offence, embarrassment, humiliation, or other psychological or physical injury to the other person.

[35] Applying these principles, I find that the Claimant was harassed within the meaning of section 29(c)(i) of the EI Act. Indeed, nobody seems to have seriously denied that this incident occurred or that it was inappropriate.[16] The employer's owner said that he would not tolerate such words and that they were contrary to their respect in the workplace policy.[17] The Claimant's supervisors knew or should reasonably have known that such comments were likely to embarrass and humiliate the Claimant, especially if they were made within earshot of other employees.

[36] In addition, these comments were made in a climate where the Claimant's supervisors were regularly complaining about the quality of his work and threatening disciplinary action against him. Nevertheless, the employer later reported to the Commission that its concerns were related only to the Claimant's productivity and were not disciplinary in nature.[18]

[37] Keeping in mind that the Claimant was harassed at work, I must now consider whether the Claimant had any reasonable alternatives to leaving his job when he did.

[38] The Commission argues that, before leaving his job, the Claimant should have tried to resolve his concerns with his employer and should have made efforts to find a different job. Indeed, the courts have recognized that these are reasonable alternatives in many cases.[19]

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[16] GD4-3.
[17] GD3-28.
[18] GD3-28; GD3-48.
[19] *White*, *supra* note 6 at para 5.

[39] In contrast, the Claimant argues that the reasonable alternatives available to him were more limited since he was a victim of harassment. Once again, the Claimant relies on the Digest, which says this (under chapter 6.5.2):

> In general, claimants are fully justified in taking leave or leaving their employment in such circumstances of harassment, abuse and violence. It is their only reasonable alternative, especially since they tend to hide their circumstances from those around them and tolerate the situation, which deteriorates throughout their relationship with the originator of the harassment or violence until there are no other alternatives.
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> […]
>
> The fact that a person did not take any recourse or did not await the outcome of any remedy before voluntarily leaving their employment must not be considered against the claimant when the situation indicates intolerable harassment that could not have been resolved immediately or within a few days of the incident. However, if the company that employed the claimant had a credible, coherent and structured policy that the claimant could have used to resolve the situation immediately, the claimant must be asked to explain why they did not use that alternative, which on the surface appeared to be reasonable.

[40] I mostly agree with the Claimant's submission. In order to establish just cause, claimants do not need to show that they exhausted every possible alternative to leaving their jobs. Similarly, claimants do not need to establish that their working conditions were so intolerable that they had no choice but to quit immediately.[20] Instead, the question is whether, having regard to all the circumstances, they had no reasonable alternative to leaving their job when they did.

[41] Importantly, the Federal Court of Appeal recognized that resolving concerns with the employer and making efforts to find a different job are reasonable alternatives in some but not all cases.

[42] In all the circumstances of this case, I am satisfied that the Claimant had no reasonable alternatives to leaving his job when he did. The Claimant was harassed at work. It is not

[20] *Chaoui v Canada (Attorney General)*, 2005 FCA 66 at para 7; *SW v Canada Employment Insurance Commission*, 2017 SSTADEI 437, 2017 CanLII 97203 at paras 47–57.

reasonable to expect that he would continue to endure such conditions while looking for other work.

[43] Nor is it reasonable to expect that he would have reported his concerns to his employer. The Claimant was never made aware of any policies that his employer might have had for dealing with this sort of complaint. Indeed, there was no evidence that this sort of policy existed.

[44] In addition, the Claimant was being harassed by his direct supervisors. While the employer said that the Claimant's supervisor was actually a third person, that third person was the owner's wife, and in this small family-run business, they were both related to the Claimant's harassers.

[45] As for the possibility of a transfer within the company, the Claimant explained that he would not be able to escape the people who had harassed him and that there were no X roles at any of the other offices.[21]

[46] 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 on the Claimant.

CONCLUSION

[47] In this case, the General Division committed an error of law by misapplying the correct legal test. In particular, the General Division assessed the reasonable alternatives available to the Claimant without first deciding whether he had been harassed at work.

[48] As a result, I decided to intervene in this case and to give the decision that the General Division should have given. In brief, the Claimant had just cause for leaving his employment when he did, and the disqualification that the Commission imposed on him should be removed.

Jude Samson
Member, Appeal Division

[21] GD3-15.

HEARD ON:	August 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. D., Appellant S. Prud'Homme, Representative for the Respondent (written submissions only)

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:

> **(i)** sexual or other harassment,
>
> […]
>
> **(x)** antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
>
> […]
>
> **(xiii)** undue pressure by an employer on the claimant to leave their employment…

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…