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

Citation: *R. H. v Canada Employment Insurance Commission*, 2019 SST 1281

Tribunal File Number: AD-19-186 and AD-19-187

BETWEEN:

R. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 3, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, R. H. (Claimant), found short-term work at a X during a plant shutdown. She expected the job would last about three weeks. After several weeks had passed, she learned that layoffs were starting. She asked her supervisor to consider her for the first round of layoffs so she could return home and help her mother who was facing flooding on her property. Her mother also required some care. On May 12, 2018, her supervisor told her to "go home," so she understood that she was being laid off as part of a round of layoffs from the company. Even though her job was ending, the company had available work at other job sites. However, she did not know this because the company did not mention or offer her any alternative work. She did not return to work with this employer again after that.

[3] The Claimant applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim for benefits because it determined that she had initiated the layoff, that she had voluntarily left her employment without just cause and that voluntarily leaving was not her only reasonable alternative. The Commission also determined that she was not available for work because she was unavailable to work during the summer. The Commission did not change its mind when it reconsidered the issues of just cause and availability.[1] The Claimant appealed the Commission's reconsideration decisions to the General Division, but it dismissed both appeals.

[4] The Claimant is now appealing the General Division's decisions on both issues, mostly because she says that the General Division member failed to observe a principle of natural justice. The Claimant alleges that the member was brash and biased towards her during the videoconference hearing, to the point that she felt uncomfortable and was unable to present her case properly. She claims that she did not get a fair hearing. She maintains that she did not

[1] See the Commission's reconsideration decisions, dated October 3, 2018, at GD2-8, and October 5, 2018, at GD3-37 to GD3-38, of appeal file number AD-19-186.

voluntarily leave her employment, but that the employer issued a layoff notice to her. She also maintains that she remained available for work but was unaware that her employer had other work available.

[5] I have to determine whether the General Division failed to observe a principle of natural justice. For the reasons that follow, I am not satisfied that the General Division member was biased or that she failed to provide the Claimant with a fair hearing. I am therefore dismissing this appeal.

ISSUES

[6] The following issues are before me:

Issue 1: Did the General Division member give the Claimant a fair hearing?

Issue 2: Was the General Division member biased?

GROUNDS OF APPEAL

[7] 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

(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.

[8] The Claimant argues that the General Division erred under subsections 58(1)(a) and (c) of the DESDA.

[9] In my leave to appeal decisions that I gave on May 29, 2019, I did not find that there was an arguable case that the General Division had based 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. The Claimant has not raised any additional arguments that would lead me to revisit the question of whether the General Division erred under subsection 58(1))c) of the DESDA. This appeal focusses on any alleged errors under subsection 58(1)(a) of the DESDA.

ANALYSIS

[10] The Claimant argues that the General Division member failed to observe a principle of natural justice.

[11] Natural justice requires a decision-maker to act fairly. This involves letting a party know the case against them and giving that party the right to be heard. It also means that the decision-maker will make decisions impartially without any bias. The Claimant argues that the General Division member was biased and that the member did not give her a fair hearing.

Issue 1: Did the General Division member give the Claimant a fair hearing?

(a) Having to start before she was ready

[12] The Claimant alleges that the member gave her only two to three minutes to organize herself at the beginning of the hearing, even though she said that she would give her a few minutes. The Claimant says that she needed more time to get organized because she had many documents.

[13] The audio recording indicates that at 1:25 of the hearing, the member offered the Claimant a few minutes. Then, at 1:36, the Claimant said, “Okay”. The audio recording suggests that approximately 11 minutes had passed. It is clear that after hearing the Claimant say “Okay,” the member believed that the Claimant was ready to proceed. The member said that she would be making some introductory remarks and would explain her role, the appeals process and the issues, after which she would turn the hearing over to the Claimant so she could explain her appeal. The Claimant did not object or state that she required any additional time.

[14] The Claimant argues that the timestamps for the audio recording of the General Division hearing are inaccurate. She denies that the member provided her with 8 to 10 minutes and insists that the member provided her with "probably less than a few minutes"[2] to get organized. She also explained that she was speaking to herself and she said, "Okay" as she was looking through her documents and getting things organized.[3] She claims that when she said "Okay," she was not trying to suggest to the member that she was ready to proceed. The Claimant says that once the General Division member began making introductory remarks, she did not speak up and ask for any additional time to organize herself because she felt intimidated by what she felt was a formal process. Plus, she did not want to interrupt as she was trying to be respectful and as accommodating as possible. I note, however, that although the Claimant suggests that she was trying to be respectful and was afraid to speak up, there were other occasions during the hearing when she freely spoke up and asked for extra time.[4] Indeed, when she asked for extra time (e.g. "Give me a sec. here"), the General Division member said, "Sure."

[15] When the Claimant said "Okay", it is clear that the member understood that the Claimant was ready to go ahead with the hearing. The member's interpretation of "Okay" seems reasonable. After all, according to the audio recording, several minutes had already passed. But, if the Claimant was not ready and needed more time, she should have immediately raised an objection and asked for extra time, especially because she had given the impression that she was ready. That would have been the appropriate time for her to object.

(b) A missing document

[16] The Claimant mentioned that she was missing a letter, but the member said, "Leave it for now."[5] The Claimant suggests that she did not receive a fair hearing because she did not have all of the documents and therefore did not fully know the case against her.

[17] In particular, the Claimant claims that there is a letter dated September 15, 2018, which she did not have. The Commission's reconsideration decision dated October 5, 2018, referred to

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[2] At approximately 11:00 of Appeal Division hearing.
[3] At approximately 10:48 of Appeal Division hearing.
[4] Examples of when this happened: at approximately 11:45 & 11:57 of General Division hearing.
[5] At approximately 11:24 of General Division hearing.

a "decision that had been communicated to her on September 15, 2018."[6] The Claimant states that she was unaware that she could have asked the Commission about the decision that had been communicated to her on September 15, 2018.

[18] The General Division member speculated that the Commission could have verbally communicated its decision to the Claimant on September 15, 2018. While that is possible, more likely than not the reference to a September 15, 2018 decision is a typographical error. Typically, the Commission renders an initial decision. If a claimant asks the Commission to reconsider its initial decision, the Commission then makes a reconsideration decision. In this case, the Commission made its initial decision by letter dated August 15, 2018.[7] The Commission likely typed "September 15" instead of "August 15" in its reconsideration decision.

[19] In its initial decision of August 15, 2018, the Commission said that it could not pay benefits from May 13, 2018, because the Claimant said that she was not available for work. The Commission reconsidered its decision in a letter dated October 5, 2018. It said that it was changing its initial decision on the availability issue and that it was unable to pay the Claimant benefits from May 14, 2018 to September 7, 2018, because she had not proven her availability for work.

[20] When the Commission summarized the history of proceedings, it referred to both the initial and reconsideration decisions. There was no other decision to which it referred. This too suggests that there was no missing letter dated September 15, 2018.

[21] Even if there was a document dated September 15, 2018, the Claimant has not tried to get a copy of this document. More importantly, she did not ask the General Division to adjourn the hearing so she could try to get a copy of this document.

[22] Setting these considerations aside, I do not think that anything turns on any decision(s) that pre-dated the reconsideration decision because it is the reconsideration decision that the Claimant appealed. The reconsideration decision set out the issues that were in dispute, so the Claimant would have known from the decision what the issues were that she had to address.

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[6] See Commission's reconsideration decision dated October 5, 2018, at GD3-37 to GD3-38.
[7] See initial decision dated August 15, 2018, at GD3-24 to GD3-25.

Indeed, in her Notice of Appeal to the General Division, she argued that she did not quit her job and that she was available for work, so she was aware of the issues in dispute and the case that she had to meet.

(c) Having to prove that she was looking for work

[23] The Claimant argues that the General Division acted unfairly when it asked her to prove that she had been looking for work "day to day every day".[8] The Claimant says that this was unjust "as life does happen in spite of looking for work as well—[her] time at [her] mother's place on the X River is off the grid and [she] cannot be looking for work then."[9]

[24] As I have noted above, natural justice is concerned with matters of procedural fairness and ensuring that a claimant receives a fair hearing with a full opportunity to present their case, free of bias or the reasonable apprehension of bias. The Claimant's arguments in this regard do not speak to issues of procedural fairness.

[25] While there is no doubt that the Claimant was unable to look for work while she was off grid at her mother's place, there was nothing unfair about requiring the Claimant to prove her availability for work. After all, a claimant is not entitled to be paid benefits for a working day for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.[10] The courts have consistently said that in order to be found available for work, a claimant must:

1. Have a desire to return to the labour market as soon as a suitable employment is offered;

2. Express that desire through efforts to find a suitable employment; and

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[8] See Claimant's letter dated May 13, 2019, at AD3-2. At approximately 18:53 of the General Division hearing, the member said that one of the questions she had to examine was whether the Claimant had proven that she was available for work. She stated that a person would have to prove "each day that they were capable of and available for work but unable to find a job." She said that that would be something the Claimant would have to prove "day by day" when claiming Employment Insurance regular benefits.
[9] See Claimant's letter dated May 13, 2019, at AD3-2.
[10] See section 18(1)(a) of the *Employment Insurance Act*.

3. Not set personal conditions that might unduly limit their chances of returning to the labour market.[11]

[26] Despite the Claimant's personal circumstances, the General Division had to determine whether the Claimant was available for work. I do not see that the General Division member failed to observe a principle of natural justice by asking the Claimant to show that she was available for work.

(d) Getting the same question twice

[27] The Claimant suggests that she could not have gotten a fair hearing because the General Division member "bullied" her by asking the same question twice, when she asked why the Claimant was unable to work for her employer over the summer.[12] In particular, she claims that the member twice asked her, "What were the reasons that you couldn't work for them over the summer?"

[28] The questions might have appeared similar and they might have elicited the same response, but they were in fact different. Both dealt with the Claimant's availability.

[29] In the lead up to the two questions, the General Division member asked the Claimant to tell her about an email that she sent to her employer. The Claimant testified that this was about the exact same time that she had gotten a phone call from her mother telling her that she needed some help at home and that flooding was going on. The Claimant testified that she spoke with her direct supervisor about her home situation. The Claimant knew that layoffs were already happening and she figured that this would be a good time to ask the employer to place her on the first layoff list.[13] The member then sought clarification about whether there was a specific end date for the job. The Claimant responded that the employer simply did not provide detailed information about her employment. She referred to her mother's phone call again and how this fit into her request that her employer place her on the first layoff list because of the problems at home.

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[11] See, for example, *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA). The General Division also referred to this decision of the Federal Court of Appeal – see approximately 19:50.
[12] At approximately 45:37 of General Division hearing.
[13] At approximately 38:09 and again at 39:56 of General Division hearing.

[30] For the first question, the General Division member asked the Claimant to talk about what was going on at home.[14] Minutes later, the member asked the Claimant to tell her about her obligations. The member noted that when the Claimant first applied for the job, she said, "I can't work … over the summer."[15]

[31] For the second question, the member asked the Claimant what the reasons were that she was unable to work for her employer over the summer.[16] The Claimant responded, "As I stated earlier, if mum needs help during the summer, she has no friends nearby or anyone that can help her ..."[17]

[32] Even if there was some overlap between the two questions, there is nothing inherently unfair when a decision-maker repeats a question or asks the same question twice, even if slightly modified. In this case, even if they had been the same question, the member may have needed clarification or may have thought that the answer was incomplete.

[33] As well, having listened to the General Division member's questions, I do not find that they are "bullying" or that the member asked them in a bullying manner.

(e) Filing documents after the General Division hearing

[34] The Claimant argues that the member acted in a threatening manner because she said that she did not want to have to wait for the Claimant to provide additional documents after the hearing. The hearing took place on Thursday and the member stated that if the Claimant did not file the documents by Monday, she would proceed with her decision. The Claimant found this unnecessarily threatening and unreasonable and it made her feel uncomfortable.

[35] According to the audio recording, the member asked the Claimant what she considered a reasonable timeframe to send a job search record to her. The Claimant offered to provide it once the hearing ended. The member stated, "I don't want to keep waiting for it, so I'll say if I don't have it by Monday, I'll proceed as if I haven't received it, okay? So Monday will be the deadline

[14] At approximately 40:17 of General Division hearing.
[15] At approximately 45:28 of General Division hearing.
[16] At approximately 45:30 of General Division hearing.
[17] At approximately 45:39 of General Division hearing.

for getting that in."[18] But the member then stated that, "if for some reason, you can't get it in, call the [Social Security] Tribunal and explain what's going on, so that [I know] to keep waiting for it. Otherwise, [I'll] expect it by Monday."[19] The Claimant confirmed that she would send the document to the Tribunal that same day.

[36] As the Claimant had already offered to provide additional documents immediately after the hearing, it was certainly unwarranted for the member to have responded, "I don't want to keep waiting for it…" As unnecessary as the comment was, however, I do not find that it was threatening.

[37] While the Claimant felt uncomfortable when the member set a deadline for her to provide her job search record, there was no suggestion otherwise that the member did not give her a chance to provide this evidence. Indeed, the member made it clear that she was prepared to extend the deadline for providing this evidence, if the need arose. The member provided the Claimant with an opportunity to file additional documents after the hearing. I do not find that the member deprived the Claimant of a chance to present her case when she imposed a deadline for filing the records.

Issue 2: Was the General Division member biased?

[38] The Claimant argues that the General Division member was "very brash and did not conduct herself in an unbiased manner."[20] The Claimant argues that the member's tone and demeanour showed that she could not have been independent and impartial. The Claimant claims that the member "sided with the employer and [the Commission] and … made [her] feel uncomfortable."[21]

[39] The Claimant argues that the General Division member showed bias when she failed to acknowledge the Claimant's frustration. The Claimant cited numerous examples throughout the

[18] At approximately 1:14:50 of General Division hearing.
[19] At approximately 1:15:06 of General Division hearing.
[20] Claimant's email dated May 14, 2019, at AD3-1.
[21] See Application to the Appeal Division – Employment Insurance, at AD1-3.

General Division hearing where she claims that the member exhibited bias. They can be grouped into three general categories:

(1) When the member raised the tone of her voice or her tone sounded judgmental,

(2) When the member made certain statements (e.g. "let me tell you what the employment insurance legislation has to say about these issues so you know where I have to start from …"[22]), and

(3) When the member frequently said "um", "hum", or "okay" instead of acknowledging her response or frustration.

[40] The Supreme Court of Canada described the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*:[23]

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[41] Having carefully listened to the audio recording, I do not find anything untoward in the General Division member's tone or demeanour, or in her statements, the manner of her questioning, or in the questions themselves that would meet the test. I also do not find that there was any bias or any reasonable apprehension of bias when the member did not "acknowledge" the Claimant's responses or frustration in the way that the Claimant expected.

[42] The Claimant argues that the member demonstrated bias when she set a deadline for her to file a job search record, although she had already advised the member that she would provide it immediately after the hearing. I do not find that this shows bias. Although her remark "I don't

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[22] At approximately 15:42 of General Division hearing.
[23] *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394.

want to keep waiting for it," was unnecessary in light of the Claimant's offer to file the documents after the hearing, the member acted appropriately in setting a deadline to ensure the process kept moving forward.

CONCLUSION

[43] In *Ayub v. Canada (Minister of Citizenship and Immigration)*,[24] the applicant stated that the tribunal there had wrongfully treated her, to the point that a breach of natural justice occurred. After "an extensive reading of the transcripts from the hearing,"[25] the Federal Court stated that it did not believe that a breach of natural justice had occurred. The Federal Court found that the applicant had every opportunity to explain her side of the story and to respond to the tribunal's questions. I find that that was the case with the Claimant in the proceedings before the General Division and, and as such, find that the General Division provided the Claimant with a fair hearing. And, despite the Claimant's perception of the General Division member, and despite one questionable remark, I find that the member was even-handed and impartial.

[44] Having found that the General Division member provided the Claimant with a fair hearing and having found that the member did not display any bias, I am dismissing the appeal.

Janet Lew
Member, Appeal Division

HEARD ON:	August 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. H., Appellant S. Prud'Homme, Representative for the Respondent (written submissions only)

[24] *Ayub v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411.
[25] *Ayub*, at para. 21.