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

Citation: *D. S. v Canada Employment Insurance Commission*, 2019 SST 1296

Tribunal File Number: AD-19-524

BETWEEN:

**D. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 31, 2019

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Appellant, D. S. (Claimant), is appealing the General Division's decision. The General Division decided that the Claimant did not have just cause for voluntarily leaving his employment with an X in September 2018. He was therefore disqualified from receiving Employment Insurance benefits.

[3] The Claimant argued that the General Division made an important error regarding the facts. He claims that the assistant general manager—his boss—was harassing him. He claims that he reached out to his employer for help but did not get any response. He argues that he had to leave his job because his work situation became very toxic and he did not feel safe working in that environment anymore. He maintains that he had just cause for leaving his job.

[4] For the reasons that follow, I am dismissing the appeal.

### PRELIMINARY MATTERS

[5] The Social Security Tribunal originally scheduled a videoconference hearing of this appeal for October 23, 2019. Both parties were prepared to attend the hearing. The Tribunal however had to reschedule the hearing to October 30, 2019, a date that was mutually convenient for both parties. Ultimately, however, the Claimant was unable to attend the hearing on October 30, 2019. The Claimant requested that the Appeal Division render a decision on the record. A representative for the Respondent, the Canada Employment Insurance Commission (Commission), who attended by teleconference, was fine with having a decision made on the record.

[6] I granted leave to appeal because I found that there was an arguable case that the General Division may have overlooked some of the evidence and because the Claimant may not have received notice of the hearing before the General Division. If the Claimant did not receive notice

of the hearing and the General Division went ahead with the hearing anyway, this would have been a breach of the principles of natural justice.

[7] I invited the Claimant to address the issue regarding notice of the hearing. I do not see any evidence or submissions from the Claimant on this issue. Plus, the Claimant did not raise this issue as a matter for appeal in the first place. I therefore will not be considering this issue. Instead, I will focus on whether the General Division based its decision on any factual errors.

**ISSUE**

[8] Is there an arguable case that the General Division based its decision on any factual errors when it decided that the Claimant did not have just cause to leave his employment?

**ANALYSIS**

[9] The Claimant argues that 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. He claims that his boss harassed him over "numerous weeks"[1] and that he tried to reach out to the company's human resources department for help. He says that the company's chef and general manager were both aware that his boss was harassing him. Despite this, the company did not respond or help him. The Claimant says that the work environment became very toxic and he no longer felt safe working there anymore, prompting him to leave his job.

[10] Although the Claimant claims that both the company's chef and general manager support his claims and agree that his boss had harassed him at work, there was no evidence of this before the General Division. The General Division simply could not have known whether the company's chef and general manager would have backed up what the Claimant said about the work environment. In this regard, I note that the Claimant does not suggest that the General Division overlooked any evidence relating to the company's chef or general manager.

[1] See Application to the Appeal Division – Employment Insurance.

[11] The General Division knew about the Claimant's allegations that his boss was harassing him. Unfortunately for the Claimant, very little relating to the harassment claims was documented, except possibly for text messages between the Claimant and his boss.

[12] The General Division gave little weight to the text messages, because it found that they were "doctored" and that they were missing dates and times.

**(a) "doctored" text messages**

[13] The Claimant did not give any submissions on this point. The Commission says that the General Division was not biased when it indicated that the Claimant had "doctored" documents. The Commission argues that it is clear to see that the Claimant intentionally modified the text messages: he altered and pieced them together, thus not showing the whole story.[2]

[14] Even if the Claimant did not present the text messages in chronological order and even if there are gaps (e.g. the text messages jump from August 16, 2018 to September 6, 2018), I am unconvinced that the pages of text messages necessarily show that the Claimant altered them to convey a certain story.

[15] However, it is unclear what the General Division member meant when she described the text messages as "doctored," and whether she was in fact trying to suggest that the Claimant intentionally modified the text messages. I queried whether the General Division's use of the word "doctored" might have suggested bias.

[16] The Supreme Court of Canada set out the test for a reasonable apprehension of bias.[3] It referred to Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*:

> [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."

---

[2] See Representations of the Commission to the Social Security Tribunal – Appeal Division, at AD2-3.
[3] See *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394.

[17] It would seem that use of a particular word, on its own, would be insufficient to support a finding of bias. There would need to be more compelling evidence, such as the broader context, to show evidence of bias. The General Division considered the evidence and properly applied the law to the facts. I find that the General Division's overall decision does not suggest any bias.

**(b) missing dates and times on the text messages**

[18] The Claimant argues that text messages between him and his boss showed that she harassed him.

[19] Copies of the text messages appeared in two difference places in the General Division hearing file. They appeared at document numbered GD3[4] and in the Notice of Appeal to the General Division.[5] The copies of text messages are not very legible in document GD3, but they are much more legible in the Notice of Appeal. For instance, the dates and some of the times when the Claimant and his boss exchanged text messages are clear in the Notice of Appeal.

[20] The Commission argues that General Division was not suggesting that there were no dates or times on the text messages. Rather, the member was saying that some dates or times were missing. While that is perhaps one plausible interpretation of the General Division's findings, I find in this case that the General Division determined that there were no dates at all, otherwise the member would have examined the text messages.

[21] While some of the times on the text messages in the Notice of Appeal are illegible, the dates on the text messages are legible. More importantly, the dates of the text messages appear as September 6, 7, and 9, 2018—a couple of weeks before the Claimant left his job. The Claimant relied on these text messages. They could have been particularly relevant, given that they were written close to the time that the Claimant left his job.

[22] Assuming that the General Division was aware of the dates of these text messages, I do not see how the General Division could have avoided examining these text messages. It was

[4] See pages GD3-47 to GD3-51.
[5] See Notice of Appeal, at GD2.

evident that the Claimant relied on the text messages to prove that his boss had been harassing him.

[23] The General Division member determined that the text messages did not merit assigning any weight to them. She likely came to this conclusion because she did not refer to the text messages in the Notice of Appeal and failed to see or appreciate how timely they were to the Claimant's allegations.

[24] By overlooking the copies of text messages in the Notice of Appeal, the General Division disregarded the text messages altogether. I find that, although there were copies of the text messages in the general hearing file, the General Division should have also reviewed the text messages in the Notice of Appeal because they provided legible dates and times.

**DISPOSITION**

[25] The Claimant argues that the text messages prove that his boss harassed him over several weeks. As a result, he felt unsafe.

[26] The Claimant knew his boss from a previous job. They became friends and "hung out as friends."[6] He claims that she was looking for a deeper relationship with him but he was uninterested. According to his boss, the Claimant had been living with her and her mother. The Claimant does not deny this, but it is apparent from their text messages that his boss was disappointed that their relationship did not progress into something more. He acknowledges that his boss cried because he was not invested in the relationship.

[27] The Claimant does not explain how he found the text messages threatening and harassing. Given the context of the Claimant's personal relationship with his boss, I do not find that the text messages were threatening or harassing (even if the Claimant's boss uttered some profanities and insulted the Claimant). The initial message indicates that the Claimant's boss was holding out hope for a deeper relationship with him. The Claimant's boss even waited for the Claimant to return to her home. However, within a couple of days, the Claimant's boss accepted that the Claimant simply was uninterested in pursuing anything. As unhappy as she may have been over

[6] See Supplementary Records of Claim, dated March 21, 2019, at GD3-45.

this, it is clear that she was severing any ties with the Claimant and would no longer be in contact with him.[7] Indeed, the evidence shows there was no further contact between the Claimant and his boss after September 9, 2018, even though the Claimant remained at work until September 20, 2018.

[28] Even if I am mistaken, and the text messages were or could be seen as harassing, or if there were other harassing incidences, up until the Claimant left his job on September 20, 2018, the Claimant would still have to show that he did not have any reasonable alternatives to leaving his job.[8] After all, it is not enough to justify leaving one's job because there was harassment, if there were reasonable alternatives to leaving. In short, an applicant also has to show that they did not have any reasonable alternatives to leaving their job.[9]

[29] The General Division appropriately required the Claimant to show that he did not have any reasonable alternatives to leaving his job. At paragraph 20, it found that if the Claimant was being harassed, he had reasonable alternatives to leaving. The General Division then set out some of the alternatives the Claimant had to leaving.

[30] The Claimant said that he tried to reach out to his human resources department. The General Division found that when the Claimant did not get a response, he could have attempted to contact other management personnel. Or, he could have personally visited the human resources representative, emailed that representative, or continued to attempt to call the representative again until he managed to make contact.[10] The General Division also found that the Claimant could have continued working and could have delayed his move until he found another position. Or, he could have asked for a leave of absence.[11]

[31] The fact that the Claimant was found to have reasonable alternatives to leaving his job was fatal to his appeal.

---

[7] See final text messages of September 9, 2019, at GD2-6.
[8] See leave to appeal decision dated August 12, 2019, at paras. 21 and 22.
[9] See subsection 29(c) of the *Employment Insurance Act*.
[10] See General Division decision, at para. 20.
[11] See General Division decision, at para. 15.

[32] For the most part, the Claimant disagrees with the General Division's assessment that his boss harassed him at work. Essentially, the Claimant is asking me to reconsider the General Division's decision and to give a different decision that is favourable to him. However, subsection 58(1) of the *Department of Employment and Social Development Act* does not allow for a reassessment of the evidence or a rehearing of the matter.

## CONCLUSION

[33] Although the General Division overlooked the more legible copies of the text messages contained in the Notice of Appeal, I am dismissing the appeal. The General Division properly required the Claimant to show that, even if his boss had harassed him, that he did not have any reasonable alternatives to leaving his job. The General Division then properly applied the facts to the law when it found that the Claimant had reasonable alternatives to leaving.

Janet Lew
Member, Appeal Division

| | |
|---|---|
| HEARD ON: | October 30, 2019 |
| METHOD OF PROCEEDING: | On the record |
| APPEARANCES: | D. S., Appellant (written submissions only)<br><br>Angèle Fricker, Representative for the Respondent (by teleconference and written submissions) |