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

Citation: *C. C. v Canada Employment Insurance Commission*, 2019 SST 1329

Tribunal File Number: AD-18-768

BETWEEN:

C. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 7, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, C. C. (Claimant), lost her position as a result of restructuring at her employer. The Claimant was given the opportunity to "line-pick" alternative lines (a particular group of shifts) under the terms of the Collective Agreement between her union and her employer. She chose a particular line but that shift was given to another employee with more seniority. Her second choice was "lay-off", and the employer therefore accepted that second choice. This was communicated to the Claimant in a December 1, 2017, letter, shortly after the Claimant went on sick leave.

[3] The employer offered to recall her to alternative lines, and informed her that her lay-off would become permanent if she did not accept any of the alternatives that it offered. The Claimant did not accept any of the alternatives, and the employer told her that her lay-off would become permanent effective January 19, 2018.

[4] The Claimant applied for Employment Insurance benefits and the Respondent, the Canada Employment Insurance Commission (Commission), initially approved her claim. However, it reversed its decision and denied her claim after the employer requested a reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She is now appealing the General Division decision to the Appeal Division.

[5] The Claimant's appeal is dismissed. The General Division erred in law by failing to consider whether the alternative positions offered to the Claimant would have represented a significant change in work duties. I have corrected this error, but this does not change the decision that the Claimant had reasonable alternatives to leaving her employment.

PRELIMINARY MATTERS

Rescind and Amend application to the General Division

[6] The Claimant filed a Rescind or Amend application to the General Division asking the General Division to consider the Minutes of Settlement and an amended Record of Employment.

[7] This appeal was held in abeyance pending the General Division decision (in GE-19-1067). The General Division dismissed the application on May 24, 2019, finding that the new information was not decisive of whether the claimant voluntarily left her employment without just cause.

[8] The General Division decision dated May 24, 2019, does not form part of the record of this appeal and is not under appeal here.

ISSUE(S)

[9] Did the General Division fail to observe a principle of natural justice?

[10] Did the General Division err in law by reversing the onus of proof?

[11] Did the General Division overlook or misunderstand the significance of evidence related to a breach of the Collective Agreement?

[12] Did the General Division err in law by finding that the Claimant had reasonable alternatives without regard to all the circumstances?

ANALYSIS

[13] 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).

[14] The grounds of appeal are described below:

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.

Issue 1: Did the General Division fail to observe a principle of natural justice?

[15] There is nothing on the face of the file to suggest that the General Division failed to observe a principle of natural justice.

[16] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Claimant has not raised a concern with the adequacy of the notice of the General Division hearing, with the pre-hearing exchange or disclosure of documents, with the manner in which the General Division hearing was conducted or the Claimant's understanding of the process, or with any other action or procedure that could have affected her right to be heard or to answer the case. Nor has she suggested that the General Division member was biased or that the member had prejudged the matter.

[17] I find that the General Division did not fail to observe a principle of natural justice under s. 58(1)(a) of the DESD Act.

Issue 2: Did the General Division err in law by reversing the onus of proof?

[18] I am not persuaded that the General Division required the Appellant to prove that she did not voluntarily leave her employment.

[19] The General Division was explicit that the Commission had the burden of proof to show that the Claimant left her employment voluntarily.[1] It then noted that the applicable legal test was whether the Claimant had a choice to stay or to leave. The General Division ultimately found that the Claimant had such a choice, based on the employer's undisputed evidence that it had offered her alternative lines and she had declined to accept any of the offered lines. According to section 29(b.1)(i) of the *Employment Insurance Act* (EI Act), the refusal of employment that is

[1] General Division decision, para. 11

offered as an alternative to an anticipated loss of employment is included within the definition of voluntarily leaving. Therefore, the choice to refuse the alternative lines is a choice to voluntarily leave. I appreciate that the Claimant objected to the legitimacy of the employer's offer, but she did not deny that she could have accepted one of the offered lines.

[20] I find that the General Division did not err under section 58(1)(b) of the DESD Act because the General Division did not place the onus of proof on the Claimant to prove that her leaving was not voluntary.

Issue 3: Did the General Division overlook or misunderstand the significance related to a breach of the Collective Agreement?

[21] The Claimant argued that the employer illegally laid her off while she was on sick leave, and that the recall options were ineffective because the Claimant would have to be laid off before she could be recalled.

[22] I understand that the Claimant believes the employer to have acted illegally. However, the Claimant has not alleged that the employer's actions represented a breach of the Canada Labour Code or any other law of general application. Instead, the Claimant has argued that the employer violated the terms of the Collective Agreement. This agreement describes a voluntary contractual relationship between the employer and the Claimant's union (and, by extension, its membership).

[23] I do not accept that the General Division misunderstood the Claimant's arguments or failed to understand the Collective Agreement or its implications. The General Division had to determine whether the Claimant voluntarily left her employment. For this purpose, the General Division did not need to interpret the Collective Agreement or resolve the question of whether the employer violated the Collective Agreement.

[24] Section 29(b.1)(i) of the EI Act expands the definition of "voluntary leaving" to include the case where a claimant refused employment offered as an alternative to an anticipated loss of employment. There was no dispute that the Claimant was offered alternative lines prior to her permanent lay-off, and that she refused them.

[25] Therefore, it does not matter whether she was laid off at the same time that she was presented with a choice of recall to alternative lines (when her choice could have prevented her permanent lay-off). And it does not matter whether she was *not* actually laid off until the lay-off became permanent (at which time she no longer had any alternatives).

[26] Regardless of whether the Claimant ought not to have been laid off, she was. Regardless of whether the employer should not have offered her recall options before her lay-off was made permanent, it did. The Claimant was offered alternatives to losing her employment. The Claimant may not have liked the options the employer offered, but she could have chosen any one of them and still remained employed. The date of her lay-off, and whether the lay-off process was in accordance with the Collective Agreement, are not relevant for the purpose of determining whether she left her employment voluntarily.

[27] The essential question for Employment Insurance purposes is whether the Claimant had a choice to stay or to leave. Section 29(b.1) of the EI Act makes it clear that the choice to stay is a choice to remain employed, but not necessarily to continue in the same line or even position. To determine whether her leaving was voluntary, the question before the General Division was whether the Claimant had a choice to either accept or refuse the alternative lines that were offered to her in anticipation of her permanent lay-off.

[28] Therefore, I find that the General Division did not err under section 58(1)(c) of the DESD Act by ignoring or misunderstanding evidence intended to establish that the employer's actions violated the Collective Agreement.

Issue 4: Did the General Division err in law by finding that the Claimant had reasonable alternatives without regard to all the circumstances?

[29] Section 29(c) of the EI Act states that a claimant will have just cause for leaving an employment where he or she has no reasonable alternative to leaving, *having regard to all the circumstances*.

[30] The General Division is required to consider any relevant circumstance that is supported by evidence and that might bear on a claimant's reasonable alternatives to leaving. However, section 29(c) lists a number of circumstances that are specifically said to be included. The listed

circumstances are always relevant and must be considered, providing they are supported by the evidence.

[31] The Claimant argued that it was an error of law for the General Division to have concluded that the Claimant did not have just cause because it disregarded evidence of the following circumstances from the list:

- Harassment;
- Significant modification of terms and conditions respecting wages or salary;
- Antagonism with her supervisor for which the Claimant was not primarily responsible, and;
- Practices of the Employer which were contrary to law.

[32] I will review each of these circumstances to determine whether they were effectively considered and, if not, whether they should have been.

Harassment, and Antagonism with her supervisor for which the Claimant was not primarily responsible

[33] The Claimant asserts that she was harassed. She states that she was subjected to illegal or improper conduct that should have been considered as harassment.

[34] The Claimant asserts that her lay-off while on sick leave, her premature recall, and the employer's appeal of her Employment Insurance benefits are evidence of harassment. However, there was no evidence before the General Division that the employer was acting in bad faith in its interpretation of the Collective Agreement or in its exercise of its right to seek reconsideration of the Claimant's Employment Insurance claim. The General Division could not simply presume these actions to be evidence of harassment.

[35] The Claimant also asserted that she experienced antagonism from her supervisor. At the Appeal Division hearing, she said that the stress was bad between her and her supervisor, and said that this was not new evidence.

[36] I note that the General Division made reference to the fact that the Claimant told a Commission agent that she was on stress leave because she was bullied by the employer.[2] According to the record of that conversation, the Claimant did not explain what she meant by bullying, and there is no record that she raised the topic with the Commission again. She did not mention either bullying or harassment in the lengthy reasons for appeal that she attached to her Notice of Appeal to the General Division. The General Division is also correct that the Claimant did not testify about the bullying, or whether any attempts had been made with the employer to deal with this situation

[37] The Claimant is correct that the General Division did not consider whether any of the Claimant's circumstances amounted to harassment. It appears that the General Division did have regard to the *possibility* that she might have been bullied when it assessed her reasonable alternatives,[3] but it did not find that she had been bullied.

[38] In my view, there was little in the evidence before the General Division to even hint at harassment from the employer, or to suggest that the Claimant was experiencing antagonism from her supervisor that was not primarily her responsibility. Therefore, the General Division did not err in law by not having regard to circumstances amounting to harassment or to antagonism with a supervisor.

Significant modification of terms and conditions respecting wages or salary

[39] The General Division specifically considered this circumstance. It found as fact that the Claimant could have accepted either of the two full-time lines without a significant change in her wages or salary. It is not my role to reassesses or reweigh the evidence.[4] I can only intervene if the General Division ignored or misunderstood the evidence before it, or the finding was otherwise perverse or capricious. I have not heard any argument that addresses these points, and it is not apparent to me that the General Division erred in this way.

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[2] General Division, para 37 – apparent reference to GD3-25
[3] General Division, para. 50
[4] *Bergeron v. Canada (Attorney General)*, 2016 FC 220; *Hideq v. Canada (Attorney General)*, 2017 FC 439; *Parchment v. Canada (Attorney General)*, 2017 FC 354

[40] The General Division had due regard to this circumstance. It did not err in law by finding that the circumstance was inapplicable.

Practices of an employer that are contrary to law

[41] The Claimant argues that it was illegal for the employer to lay her off while she was on sick leave, or to recall her before her permanent lay-off. To support her argument, she submitted labour arbitration decisions in support of her interpretation of the Collective Agreement.

[42] The employer may have breached a term or terms of its contract with the union and/or its employees as members of the union. However, there was no suggestion that the employer's practices were otherwise contrary to law.

[43] I do not accept that the *Employment Insurance Act* intends that the circumstance identified in section 29(c)(xi) as "practices of an employer that are contrary to law" should capture breaches of the private agreements between parties, even Collective Agreements with unions. Wages and work duties are two fundamental terms in virtually any employment agreement, but the *Employment Insurance Act* evaluates these circumstances independently under section 29(c)(vii), "significant modification of terms and conditions respecting wages or salary" and section 29(c)(ix), "significant change in work duties." If the EI Act had intended "practices contrary to law" to be so broad as to include practices contrary to the employment contract, there would have been no need to single out these other circumstances.

[44] There is no evidence or argument that the employer's practices are illegal in any other sense. Therefore, I do not accept that there was evidence of unlawful practices, within the meaning of section 29(c)(ix). That means that the General division did not err in law by failing to consider this circumstance.

[45] The General Division is still required to consider "all the circumstances", whether mentioned in section 29(c) or not, but they must still be relevant circumstances. The Claimant believes the employer breached the Collective Agreement when it laid her off while she was on sick leave, and by putting her recall options to her when it did. However, the circumstances under which she was laid off or recalled do not suggest a breakdown in her relationship with her

employer, or that it had somehow become intolerable for her to remain employed. There is no evidence that would suggest the offer of alternative lines was not a good faith offer. Therefore, the breaches of the Collective Agreement asserted by the Claimant are not relevant to whether she had just cause for leaving her employment.

[46] I find that the General Division had regard to all the circumstances even if it did not consider the evidence that the employer was in breach of the Collective Agreement. I also find that it was not an error of law for the General Division to make no finding on whether the Claimant's lay-off or recall was in compliance with the Collective Agreement. The kinds of breaches that the Claimant asserted would not have changed the availability of reasonable alternatives to refusing the alternative lines that the employer proposed.

Significant changes in work duties

[47] So far, I have considered the circumstances that were particularly argued by the Claimant. However, these are not the only section 29(c) circumstances listed suggested by the evidence. It is clear on the face of the decision that the General Division understood the Claimant to have rejected one of the options because it offered only part-time hours. The General Division accepted that this would represent a significant modification to her hours and therefore her wages, and that the Claimant would have "just cause" for refusing the part-time line.

[48] The General Division also accepted that the Claimant had reasonable alternatives to not accepting either of the other two lines that were full-time night shifts.

[49] The Claimant has consistently objected to the full-time lines *because* they were night shifts. She testified that the full-time midnight shifts were not the same as her former scheduled shifts,[5] which had involved mixed shifts between 7 a.m. and 3 p.m. She stated that her objection was to the time of the shift; that it was a midnight shift.[6]

[50] However, the General Division did not consider whether the offer of full-time *night shifts* suggested a "significant change in work duties" from the Claimant's usual day shift schedule. The General Division examined the Claimant's objection to night shifts in some detail in an

[5] Audio recording of General Division hearing, timestamp 1:08:23
[6] Audio recording of General Division hearing, timestamp 1:13:53

attempt to sort out whether her aversion to the 11 p.m. to 7 a.m. shift (night shift) was health-related or whether it was related to how working nights would affect her self-employment activities. However, there was no question that Claimant had rejected the night shift line *because* it was a night shift, whatever her reasons for not wanting to work the night shift.

[51] As previously stated, the General Division is required to consider those of the circumstances listed in section 29(c) of the EI Act that arise out of the evidence. The General Division failed to *have regard to all the circumstances* under section 29(c) because it did not consider whether the change from day shifts to the night shift represented a significant change in work duties under section 29(c)(ix) of the EI Act.

[52] This is an error of law under section 58(1)(b) of the DESD Act.

REMEDY

[53] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division with or without directions, or confirm, rescind or vary the General Division decision in whole or in part.

[54] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

[55] I have not discovered an error that would justify my intervention in the General Division's assessment of the evidence. I confirm the General Division's finding that the part-time lines offered to the Claimant represented a significant change to the terms or conditions of wages or employment, and that the Claimant had no reasonable alternative to refusing these lines. I also accept the General Division's findings that the Claimant had multiple reasons for rejecting the night shift including her health and lifestyle, but that her primary reason was that working nights would conflict in some way with her self-employment activities.

[56] However, the General Division did not consider whether the change from daytime to night shifts representing a significant change in work duties.

[57] I find that it does. Even if the essential duties of her shirt were unchanged and she had the same number of hours per shift, there is a significant, qualitative difference between working

days and working nights. If I may take judicial notice of the obvious, humans are not naturally nocturnal.

[58] I am not bound by decisions of the former Umpire, but I am supported by the reasoning of the Umpire reported in the Canadian Umpire Benefit as CUB .[7] This decision concerned a case where a claimant left his job because of a change to a night shift. The Umpire found that "changing an individual's employment hours from day time to nights, unilaterally, constitutes a significant alteration of the terms of employment sufficient to bring section 29(c)(ix) into play."

[59] I find that the Claimant would experience a significant change in work duties if she accepted the 11 p.m. to 7 a.m. night shift line.

Reasonable Alternatives

[60] The remaining question is whether the Claimant had reasonable alternatives to refusing the offered full-time night shifts, having regard to all of the circumstances. A consideration of all of the circumstances must now include this significant change in work duties.

[61] The Claimant testified that night shifts were difficult for her because of stomach upset and sleep problems. I do not doubt that the Claimant would have difficulty adapting to working the night shift or that working night shifts could possibly have an adverse effect on her psychological or physical health. However, I agree with the General Division that there was no medical evidence to confirm that night shift was not medically suitable. There was no medical evidence to relate any past health complaints to working night shifts, or any medical recommendation that she be restricted from working night shifts. Furthermore, there was no corroborative evidence that the Claimant had such health complaints when she worked night shift in the past.

[62] The Claimant has not established that the potential health effects of working night shift would have meant that she had no reasonable alternative to rejecting a night shift line. Before refusing the night shift line, the Claimant could have sought medical support that the line was medically unsuitable. If she could not obtain medical support in advance, she could have

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[7] 79453

accepted the position and then sought medical attention and appropriate accommodation in accordance with her doctor's recommendation. If her doctor did not consider that the position put her health in immediate jeopardy, then a reasonable alternative would have been to take the night shift line and waited for alternative placements to become available, or to seek employment elsewhere.

[63] However, the effects on her health were not the only reason she rejected the night shift line or even the primary reason, as the General Division noted. The General Division found that the primary reason had to do with her own X business.

[64] The Claimant gave conflicting evidence about the effect that working night shift would have on her business. When she testified, she said that her refusal of the night shift had nothing to do with her X business,[8] and that she did not start the business until after she was laid off.[9] However, in a statement to the Commission on April 12, 2018, she said something different. She said that she did not take the night shift because she needed to sleep at night to operate the X business during the day. She said that she had been operating the business for the past year.[10] On April 18, the Claimant added that did not have much business when she quit, but that she had an opportunity to take on clients from another X nurse. She said that she risked losing the opportunity by working nights and not being properly rested.[11]

[65] It is therefore unclear whether the Claimant had a foot-care business that was not yet well established or whether she had not yet started her foot-care business. However, the Claimant's evidence was consistent on this point: She hoped to increase her income through her X business.

[66] The General Division cited the decision in *Canada (Attorney General) v Langlois*[12] which said that improving one's financial situation was not "just cause", before it found that the Claimant had the reasonable alternative of looking for alternative work that did not interfere with

[8] Audio recording 1:11:55
[9] Ibid. 1:13:55
[10] GD3-36
[11] GD3-46
[12] *Canada (Attorney General) v Langlois*, A-75-07

her business. I agree that this would be a reasonable alternative in light of her desire to establish her own X business.

[67] I have considered all the circumstances, including those considered by the General Division as well as the additional circumstance that the Claimant would experience a significant change in work suites if she accepted the night shift line. However, I do not accept that the Claimant had no reasonable alternative to leaving. None of her circumstances, individually or collectively, would have prevented her from accepting the position on a temporary basis, so that she could determine the effect that it would have on her health and on her ability to grow her own business. If necessary she could seek medical support or accommodations, and she could seek a transfer, or different employment, at some another facility or with another employer.

[68] I find that the Claimant voluntarily left her employment because she refused employment that was offered in anticipation of loss of employment and because she did not have just cause for so refusing.

CONCLUSION

[69] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	October 23, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE: Submissions only	C. C., Appellant Josie Ponzo, Representative for the Appellant S. Prud'Homme, Representative for the Respondent