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

Citation: *N. D. v Canada Employment Insurance Commission*, 2019 SST 1443

Tribunal File Number: AD-19-368

BETWEEN:

N. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: December 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] N. D. is the Claimant in this case. In the summer of 2016, he worked for the Employer, X. The Claimant later applied for Employment Insurance (EI) regular benefits, telling the Canada Employment Insurance Commission that he had been laid off due to a shortage of work. The Commission approved the Claimant's application and paid him benefits.

[3] In July 2017, the Claimant applied for EI regular benefits once again. This time, however, the Claimant noted on his application form that he had quit his job with the Employer to return to university. Following a review, the Commission decided that the Claimant had voluntarily left his job with the Employer, and had done so without just cause.[1] As a result, the Commission disqualified the Claimant from receiving EI benefits and demanded that he repay some of the benefits that he had already received.

[4] The Claimant asked the Commission to reconsider, but it maintained its initial decision. The Claimant then appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. Next, the Claimant appealed the General Division decision to the Tribunal's Appeal Division, where he was successful. As a result, the file was returned to the General Division for reconsideration.

[5] The second General Division member decided the case afresh. She held a new hearing and, for a second time, upheld the Commission's decision to disqualify the Claimant from receiving EI benefits. The Claimant is now appealing the second General Division decision to the Tribunal's Appeal Division. Specifically, the Claimant argues that the two General Division

[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.

decisions contradict each other and that the second General Division member made important errors regarding the facts of the case.

[6] I am unable to accept the Claimant's arguments. As a result, I am dismissing his appeal. These are the reasons for my decision.

ISSUES

[7] In reaching this decision, I focused on the following questions:

a) Did the second General Division member commit an error of law by failing to adopt findings made by the first General Division member?

b) Did the second General Division member base her decision on an important error of fact?

ANALYSIS

[8] I must follow the law and procedures set out in the *Department of Employment and Social Development Act* (DESD Act). As a result, I can intervene in this case only if the General Division committed one or more of the errors listed under section 58(1) of the DESD Act.[2]

[9] In this case, I focused on whether the second General Division member committed an error of law or fact. Based on the wording of the DESD Act, any error of law could trigger my powers to intervene in this case.[3]

[10] The same is not true for factual errors, however.[4] For me to intervene based on this type of error, the second General Division member must have based her decision on a finding of fact that she made perversely, capriciously, or contrary to the evidence that was in front of her.

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[2] These errors are also known as grounds of appeal.
[3] DESD Act, s 58(1)(b).
[4] Section 58(1)(c) of the DESD Act defines relevant errors of fact.

[11] For example, I cannot intervene in a case just because the General Division got some irrelevant detail wrong. However, I can intervene if the General Division based its decision on a fact that is clearly contradicted by the evidence or has no evidence to support it.[5]

Issue 1: Did the General Division commit an error of law?

[12] No, the second General Division member did not commit an error of law by failing to adopt findings made by the first General Division member.

[13] In both decisions, the General Division found against the Claimant. Nevertheless, he argues that the first General Division member made important findings that were favourable to his case. According to him, the second General Division member should have adopted those findings in her decision.

[14] The Claimant stressed the importance of these findings in his first application to the Appeal Division.[6] The Commission later conceded that the first General Division decision contained errors.[7] However, it recommended that the matter be returned to the General Division for reconsideration.

[15] Although the first Appeal Division member had the power to give the decision that the General Division should have given, she decided instead to send the matter back to the General Division. Specifically, she said that the first General Division member's approach to fact-finding was incomplete, so she returned the file to the General Division for reconsideration.[8] The first Appeal Division member wrote that the General Division would have to consider contradictory evidence and make findings of fact.[9] However, she did not direct how the file should proceed once it had returned to the General Division.[10]

[16] In the circumstances, the second General Division member conducted a new hearing, which lasted over an hour. At several points during the hearing, the member explained to the

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[5] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[6] AD1-3 to 4.
[7] AD2.
[8] Appeal Division decision dated October 18, 2018, at para 19.
[9] Appeal Division decision dated October 18, 2018, at para 20.
[10] Appeal Division decision dated October 18, 2018, at para 21.

Claimant that she was reassessing the case from scratch, as though the first General Division decision did not exist.[11] Of course, she allowed the Claimant to give evidence about the points that he found important from the first General Division decision, and acknowledged the Claimant's arguments in her decision.[12]

[17] The second General Division member committed no error of law by proceeding in this way. The Claimant successfully challenged the first General Division decision. Nevertheless, he then wanted to cherry-pick those elements of the decision that were favourable to his case. To the contrary, the Appeal Division had set aside the first General Division decision and highlighted the need for the second General Division member to make her own findings of fact.

[18] Of course, it would be better if the General Division did not make contradictory findings of fact from one decision to another. But doing so does not amount to an error of law on the facts of this case. As I will explain below, however, I do not read the two General Division decisions as being as contradictory as the Claimant alleges.

Issue 2: Did the General Division base its decision on an important error of fact?

[19] No, the second General Division member did not base her decision on an important error of fact.

[20] In this case, the General Division was applying section 30 of the EI Act. That provision would disqualify the Claimant from receiving EI benefits if he voluntarily left his job with the Employer without just cause. This is a two-part analysis.[13] First, the Commission had to prove that the Claimant left his job voluntarily. If so, the Claimant then had to prove that he had just cause for leaving his job.

[21] In many disqualification cases, the first part of the analysis is clear. However, the second General Division member recognized that, in this case, that is where she needed to focus her attention.

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[11] Audio recording of second General Division hearing at approximately 8:40 to 10:40 and 18:25 to 19:30.
[12] General Division decision dated April 26, 2019, at paras 9 and 11-12.
[13] *Green v Canada (Attorney General)*, 2012 FCA 313 at para 49.

[22] The Claimant did not send a letter resigning from his job. But by returning to university, did the Claimant effectively leave his job? On this issue, the second General Division member relied on a similar case from the Federal Court of Appeal, where a person was found to have voluntarily left their job because they reduced their availability for work.[14]

[23] Here, the Employer hired the Claimant over the summer months. In September, however, the Claimant planned to return to university to complete the last year of a two-year teaching program. The parties presented conflicting evidence concerning the Claimant's availability for work after he had returned to university.

[24] On the one hand, the Employer said that they had additional work and would have continued to employ the Claimant, except for his plans to return to university.[15] The Employer said that they prioritized giving work to people who were willing to work full time.[16]

[25] The Claimant, on the other hand, argued that he was desperate for money and that he wanted to remain on the Employer's on-call list. He said that he was willing to miss school from time-to-time and would have even deferred his studies if he had been offered a "real" full-time job.[17]

[26] In support of his position, the Claimant noted that he had called the Employer twice to see if they had any work for him. If the Employer stopped giving the Claimant work because of his reduced availability, the Claimant argued that this was a misunderstanding on the Employer's part, and should not be held against him.

[27] The second General Division member weighed all the evidence, concluded that the Claimant had reduced his availability for work, and explained how she arrived at that conclusion.

[28] Nevertheless, the Claimant argues that the second General Division member made three important errors regarding the facts of his case.

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[14] *Canada (Attorney General) v Côté*, 2006 FCA 219.
[15] General Division decision dated April 26, 2019, at paras 14-15.
[16] GD3-47.
[17] Audio recording of second General Division hearing at approximately 50:40 to 51:45.

[29] First, the Claimant submits that, unlike the first General Division member, the second General Division member failed to recognize that he had called the Employer twice to look for more work. According to the Claimant, this is strong (if not conclusive) evidence that he did not quit his job.

[30] I cannot accept that the second General Division member made the error of fact that the Claimant is alleging. Instead, the second General Division member simply found this evidence to be less compelling than the Claimant had hoped.

[31] Indeed, the second General Division member accepted that the Claimant made these calls to his Employer. She even seems to have accepted that the Claimant maintained some availability for work. Nevertheless, she found it reasonable for the Employer to conclude that, once the Claimant had returned to school, he was less available than he had been before.[18] It was for the Employer, she held, to assess the requirements of its business.[19] In fact, the Employer demonstrated its belief by hiring someone to replace the Claimant before his last day of work and by quickly issuing his record of employment.

[32] The second General Division member made no relevant error in concluding as she did. After all, she did not find the Claimant to be unavailable for work, only that his availability for work was reduced. The fact that the Claimant called the Employer to ask for more work is not inconsistent with this finding.

[33] Second, the Claimant acknowledged that he provided different answers on his first and second applications for EI benefits. On the first, he noted that he had stopped working for the Employer because of a shortage of work.[20] On the second, he noted that he had quit so that he could return to university.[21]

[34] The Claimant explained that he put quit on the second application because he thought that he needed to be consistent with what the Employer had put on his record of employment.[22] The

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[18] General Division decision dated April 26, 2019, at para 16.
[19] General Division decision dated April 26, 2019, at para 18.
[20] GD3-7.
[21] GD3-21 to 22.
[22] GD3-33.

first General Division member accepted the Claimant's explanation and found the Claimant's first answer to be more believable. By not coming to the same conclusion, the Claimant argued that the second General Division member made an important error regarding the facts of his case.

[35] The General Division's job was to determine whether the Claimant had left his job voluntarily. On this issue, the second General Division member did not just accept what the Claimant wrote on his applications, what he reasonably believed to be true, or what the Employer wrote on the Claimant's record of employment.

[36] Instead, the second General Division member came to her own conclusion on this point. In particular, she gave weight to the Employer's statement that it would have continued providing work to the Claimant, were it not for his plans to return to university. The General Division was entitled to accept this evidence and to find, as it did, that the Claimant did not lose his job because of a shortage of work.[23] Instead, the General Division went on to find that it was the Claimant's reduced availability, which he provoked by returning to university, that caused his loss of employment.

[37] Third, the Claimant argued that the second General Division member made an error of fact when it referred to his practicum as a reason for limiting his work availability.[24] According to the Claimant, his practicum was irrelevant because it took place after he had finished receiving his EI benefits.

[38] The Claimant talked about his practicum during the second General Division hearing, but he did not mention that the timing of his practicum made it irrelevant to the issues in dispute.[25] To the contrary, the Claimant said that he would miss the occasional day of his practicum if the Employer had called him back to work. I cannot fault the General Division for not appreciating the timing of the Claimant's practicum if it is not something that he raised during the hearing.

[39] In any event, the second General Division member's larger point related to the Claimant being in the last year of his teaching program.[26] The second General Division member found it

[23] General Division decision dated April 26, 2019, at para 15.
[24] General Division decision dated April 26, 2019, at para 17.
[25] Audio recording of second General Division hearing at approximately 50:40 to 51:45.
[26] General Division decision dated April 26, 2019, at para 17.

unlikely that the Claimant would willingly leave the last year of his studies to "fill in" for someone over several weeks, doing a job that he described as the worst job in the oil patch.[27]

[40] In the circumstances, the second General Division member was not distinguishing between the Claimant's classes and his practicum. Her reasoning applied to both situations. They were both required to complete his program. If there is an error here, I do not see it rising to the level required to meet section 58(1)(c) of the DESD Act.

[41] Overall, therefore, the Claimant has not established that the second General Division member committed a relevant error of fact.

CONCLUSION

[42] I sympathize with the Claimant's circumstances. However, I was unable to find an error that would allow me to intervene in this case. As a result, I am dismissing the Claimant's appeal.

Jude Samson
Member, Appeal Division

HEARD ON:	November 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. D., Appellant M. Allen, Representative for the Respondent

[27] General Division decision dated April 26, 2019, at para 18.