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

Citation: *A. H. v Canada Employment Insurance Commission*, 2019 SST 1465

Tribunal File Number: AD-19-851

BETWEEN:

A. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 23, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

[2] The Applicant, A. H. (Claimant), made an application for Employment Insurance benefits on July 3, 2016. On July 4, 2016, he started a new job which lasted until July 15, 2016. The Claimant based his application for benefits on his previous employment so it took some time before the Respondent, the Canada Employment Insurance Commission (Commission) discovered that the Claimant had held a job briefly in July 2016. The Commission determined that the Claimant left that July job voluntarily and that he did not have just cause for doing so. It declared an overpayment for the benefits it had already paid the Claimant.

[3] The Commission maintained its original decision when the Claimant asked it to reconsider. The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed his appeal. The Claimant is now seeking leave (permission) to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. He has not made out an arguable case that the General Division made any error of law and I have not discovered any relevant evidence that the General Division ignored or overlooked.

PRELIMINARY MATTER

[5] The Claimant has also appealed the General Division decision that concerned the separate issue of whether he made false statements on his Claim reports, as well as the warning that the Commission imposed as a penalty. That decision on that leave to appeal application (file AD-19-864) will be issued separately.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[6] To allow the appeal process to move forward, I must find that there is a "reasonable chance of success" on one or more of the "grounds of appeal" found in the law. A reasonable chance of success means that there is a case that the Claimant could argue and possibly win.[1]

[7] "Grounds of appeal" means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:[2]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[8] Is there an arguable case that the General Division made an error in law in finding that the Claimant,

a) left his employment voluntarily?
b) did not have just cause for leaving his employment?

ANALYSIS

Voluntary leaving

[9] When the Claimant appealed to the General Division he argued that he had not voluntarily left his employment. He stated that the employer offered him an opportunity to retake a training evaluation that he had failed. He intended to take the re-test, but his employer hired someone else to fill his position before he could do so.

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[1] This is explained in a case called Canada (Minister of Human Resources Development) v Hogervorst, 2007, FCA 41; and in Ingram v Canada (Attorney General), 2017 FC 259.
[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

[10] The Claimant attached to his leave to appeal application another copy of a statement that had also accompanied the notice of appeal that he sent to the General Division. This statement is the Claimant's explanation of the circumstances under which he left his employer. However, neither this statement, nor anything else in the Claimant's application for leave to appeal, identifies why he believes the General Division made an error of law when it assessed whether he left his job "voluntarily".

[11] The Federal Court of Appeal set out a test for voluntary leaving that is very simple. The question is whether a claimant has a choice to stay or to leave.[3] Essentially, the test affirms a plain language meaning of "voluntary leaving".

[12] The General Division did not refer to any case authority when it found that the Claimant left his position voluntarily. However, I accept that the General Division implicitly applied the test when it found that it was the Claimant's *decision* to not attend or reschedule his re-test that led to his separation from employment.

[13] There is no arguable case that the General Division made an error of law when it found that the Claimant lost his job as a result of his own decision.

Just cause

[14] The General Division correctly set out the legal test for "just cause".[4] Section 29(c) of the Employment Insurance Act says that a claimant will have "just cause" for leaving employment if the claimant has no reasonable alternative to leaving, when all the relevant circumstances are considered. Section 29(c) has a number of subsections that describe circumstances that must be considered when they appear to be present. Those subsections are not meant to list all of the possible circumstances that could be considered relevant.

[15] The only circumstance arising from the evidence was the Claimant's dissatisfaction with his treatment by his employer. This dissatisfaction was based on his shock in having failed an evaluation exercise and his perception that the employer was acting disrespectfully by whispering about him in front of him. The General Division considered whether the treatment of

[3] *Canada (Attorney General) v Peace*, 2004 FCA 56
[4] General Division decision, para. 28

the Claimant should be considered harassment, which is one of the circumstances included in section 29(c). It found that the Claimant was not harassed.

[16] The Claimant did not argue that he left because of anything else, and there was no evidence on which the General Division could have found that any of the other section 29(c) circumstances were applicable.

[17] Having considered the relevant circumstances, the General Division found that the Claimant had reasonable alternatives to leaving. It decided that that the Claimant did not have just cause.

[18] The Claimant has not made out an arguable case that the General Division failed to apply, or misapplied, the test for "just cause" in section 29(c) of the EI Act.

Findings of fact

[19] "Error of law" is the only ground of appeal selected by the Claimant in his application for leave to appeal. However, the Claimant supplied a statement in which he asserted that the employer let him go because the Claimant missed a re-test.

[20] In decisions such as *Karadeolian v. Canada (Attorney General)*[5], the Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. Therefore, I will presume that the Claimant meant to argue that the General Division made an error of fact when it found that the Claimant initiated the separation by not showing up for a re-test, or attempting to reschedule it.[6] The General Division found that the Claimant's decision to miss the retesting was effectively a decision to leave the employment.[7]

[21] I have reviewed the appeal record searching for an arguable case that the General Division may have ignored or overlooked evidence, or made findings of fact that were inconsistent with the evidence when it found that the Claimant decided to leave. I have also

[5] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.
[6] General Division decision, para.24
[7] General Division decision, para. 35, 38

looked for any evidence that was overlooked or ignored by the General Division when it found that the Claimant had no reasonable alternative to leaving.

[22] I have not found an arguable case that the General Division made any important error of fact. The General Division reviewed all the evidence, including the Claimant's written statements and testimony, and the evidence from the employer. The General Division acknowledged the Claimant's testimony that he was passionate about his job, wanted to return to work, and tried to reschedule his retest after he missed it. However, the General Division noted that this was inconsistent with his earlier statement that he had quit because he did not like how the management behaved, did not feel welcomed, and because the job was not the "right fit".[8] The General Division chose to prefer the Claimant's earliest statement to the Commission. The General Division explained that the Claimant made the earlier statement before he had received a negative decision, that it was consistent with the employer's evidence, and that the Claimant's more recent evidence was missing important details.

[23] However, I have discovered that the General Division misstated one piece of evidence. The General Division said that the Claimant *testified* that the employer had said it would give the Claimant another chance, *as he was leaving the office*. In fact, the Claimant testified that he was told he was being let go, left the office, and later received a call offering him a re-test.[9] The General Division may have mistaken the source of the evidence it cited, because the Claimant said something different in the written statement he gave to General Division with his Notice of Appeal.[10] In that statement, the Claimant did say that he was offered the re-test before he left the office.

[24] I do not find an arguable case that the General Division's mistake was significant to the General Division's finding that the Claimant voluntarily left his employment. The Claimant's testimony on this point was actually contradicted by his own written submissions that were prepared for and submitted to the same appeal. The General Division decision expresses other concerns with the Claimant's different versions of events:[11] One more inconsistency would have

[8] Statement to the General Division, December 14, 2019: GD3-14
[9] Audio recording of General Division hearing, timestamp 29:30
[10] GD2-9
[11] General Division decision, para. 22

been unlikely to have assisted the Claimant to a different result. More importantly, the General Division decision on voluntary leaving does not analyze or refer to the timing of the offer of re-test. Instead, it relies on the Claimant's own prior statement that he quit because of his concerns about his working environment, and of the employer evidence that corroborated that prior statement.

[25] Having determined that the Claimant voluntarily left his employment, the General Division found that the Claimant left for personal reasons and not because he was harassed. The General Division member had to weigh all the evidence to make its decision. I know that the Claimant disagrees with how the General Division weighed or assessed the evidence. However, I have no ability to re-weigh or reassess the evidence[12] to find that the whispering should have been considered harassment, or that it left him with no reasonable alternative to leaving.

[26] The Claimant has not made out an arguable case that the General Division based its decision on an important error of fact that misunderstood or ignored the evidence, or that was unsupported by evidence.

[27] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

[28] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	A. H., Self-represented

[12] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.