



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. S. v Canada Employment Insurance Commission*, 2020 SST 2

Tribunal File Number: AD-19-425

BETWEEN:

A. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 2, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. S. (Claimant), a financial analyst, is appealing the General Division's decision.

[3] The General Division determined that the Claimant had quit his job at a financial institution without just cause and that he had reasonable options to quitting. It concluded that he was therefore disqualified from receiving any Employment Insurance benefits. The Claimant denies that he quit his job. He claims that his employer dismissed him.

[4] The Claimant argues that the General Division made a legal mistake. He claims that it failed to consider whether he had just cause for leaving his job under subsection 29(c) of the *Employment Insurance Act*. The Claimant also argues that the General Division based its decision on a factual error that it made in a perverse or capricious manner or without regard for the material before it.

[5] For the reasons that follow, I am allowing the appeal.

FACTUAL BACKGROUND

[6] The Claimant first started working for his employer on December 11, 2017.¹ He was on rolling contracts. On July 18, 2018, his employer offered him another contract position, starting July 23, 2018, with a termination date of October 31, 2018.²

[7] On July 23, 2017, the Claimant asked for an unpaid leave of absence from work so that, in two weeks' time, he could go on a religious pilgrimage. The trip would take him to Mecca, Saudi Arabia from August 7, 2018 to August 30, 2018. His immediate supervisor agreed at first

¹ See Record of Employment, dated August 27, 2018, at GD3-16 to GD3-17.

² See employer's letter dated July 18, 2018, at GD3-23.

that he could take a leave of absence. The Claimant relied on this and immediately went ahead and booked his trip.³

[8] A week later, on July 30, 2017, the Claimant's employer changed its mind. It refused to let him take a leave of absence. It cautioned him that it would treat an unauthorized leave of absence as job abandonment.⁴ The employer did not set out its position in writing at the time. The Claimant denies that his employer told him it would treat his absence as job abandonment. But, he still understood that if he went on his trip as planned, his employer would dismiss him from his job.⁵

[9] On August 3, 2018, the Claimant protested to his employer. He reminded his employer that it had already given him approval to take time off, but then it changed its mind a week later.⁶ The Claimant wrote that he would be coming back. The Claimant did not specify, but I understand this to mean that he meant returning to work. The employer did not respond to the Claimant's email.

[10] The Claimant still went ahead with his trip on August 7, 2018, although he no longer had his employer's approval to take a leave of absence.

[11] Days later, the employer wrote a letter dated August 10, 2018 to the Claimant.⁷ The employer deemed that the Claimant had abandoned his employment. It prepared a Record of Employment saying that he quit his job. In its letter, it wrote that the Claimant had not mentioned during the interview that he would be unable to meet his commitments under the three-month contract. It confirmed that it had denied his request for a leave of absence. The bank had operational needs. It considered the length of the Claimant's request for time off excessive.

[12] The Claimant denies that he quit his job. He argues that his employer discriminated against him for his religious beliefs. He argues that he did not have any alternative but to go on the trip because of his religious and familial obligations. His sister was not allowed to travel

³ See Supplementary Record of Claim dated October 18, 2018, at GD3-18.

⁴ See employer's letter dated August 10, 2018, at GD3-20.

⁵ See Request for Reconsideration, at GD3-27.

⁶ See Claimant's email dated August 3, 2018, at GD2-7 and GD2-8.

⁷ See supra note 4.

unaccompanied for religious reasons, so he had to go with her. He claims that he was unable to postpone the trip.

[13] The Claimant applied for Employment Insurance benefits. He provided a redacted copy of his passenger itinerary/receipt to the Commission. The redacted itinerary/receipt did not show where he was travelling, which airline he flew, what flights he took, or how much the flights cost. The itinerary/receipt did show that flight tickets were issued to the Claimant on July 23, 2018. This was the same day that his employer approved his leave of absence.⁸

[14] The Commission denied the Claimant's claim for benefits, finding that he had voluntarily left his job on August 7, 2018, without just cause.⁹

[15] The Claimant asked the Commission to reconsider its decision. The Claimant gave copies of his boarding passes to the Commission. The boarding passes showed that the Claimant left Canada on August 7, 2018 and that he travelled to Saudi Arabia. He returned from overseas and re-entered Canada on August 30, 2018. The Commission did not change its mind on reconsideration.¹⁰

[16] The Claimant appealed the Commission's reconsideration decision to the General Division. He maintained that he did not quit his job. He claimed that he told his employer several times where and why he was going and how long he would be away. He confirmed that his manager had, at first, approved his request for a leave of absence but that his manager's superior later revoked the approval. He stated that, by then, it was "too late."¹¹ Indeed, the Claimant testified that he had not purchased cancellation insurance.¹²

[17] The General Division decided that the Claimant had voluntarily left his employment because he had a choice to stay or leave his job. The General Division rejected the Claimant's arguments that he was under any obligation to care for his sister. It found that he did not have just cause for that reason. The General Division also found that the Claimant did not have just

⁸ See Passenger Itinerary/Receipt issued on July 23, 2018, at GD3-22.

⁹ See Commission's letter dated November 9, 2018, at GD3-25 to GD3-26.

¹⁰ See Commission's reconsideration decision dated January 14, 2019, at GD3-39 to GD3-40.

¹¹ See Notice of Appeal – Employment Insurance – General Division, at GD2-3.

¹² See General Division decision, at para. 18.

cause for leaving, although his employer had initially approved his leave of absence. The General Division found that suffering some financial loss (from being unable to cancel his trip) was still a reasonable alternative to losing his job altogether.

[18] The Claimant is now appealing the General Division's decision.

ISSUES

[19] The issues before me are as follows:

- (a) Can the Appeal Division accept the Claimant's new materials?
- (b) Did the General Division make an important factual error?
- (c) Did the General Division fail to consider whether the Claimant had just cause for leaving his job under subsections 29(c)(iii), (x), or (xiv) of the *Employment Insurance Act*?

ANALYSIS

(a) Can the Appeal Division accept the Claimant's new materials?

[20] The Claimant filed additional materials in support of his appeal.

[21] The Claimant relies on his employer's record of earnings and deductions.¹³ His employer issued the record on August 30, 2018. It described a payment to the Claimant as "termination payment." The Claimant says that the record proves that he did not quit his job and that his employer dismissed him.

[22] The Claimant also relies on a letter dated June 10, 2019, from his Imam.¹⁴ The Imam explained why the Claimant had to go on the pilgrimage in 2018 and why the Claimant could not delay his trip. The Imam also commented on the length of the Claimant's trip.

¹³ Record of Earnings and Deductions issued on August 30, 2018, at AD2-2.

¹⁴ Letter dated June 10, 2019, at AD8-3.

[23] This information is new. The General Division did not have this information. As a general rule, the Appeal Division does not consider new evidence. There are exceptions. For instance, if new evidence helps to understand the issues relevant to the appeal but does not add new evidence on the merits, or if it highlights defects in the evidence that was before the General Division, then the Appeal Division might be able to accept it. But, the Claimant's new evidence does not fall within any of the exceptions to the general rule against accepting new evidence.¹⁵ As such, I cannot accept the Claimant's new materials.

(b) Did the General Division make an important factual error?

[24] The Claimant argues that the General Division made an important factual error. He claims that the General Division was wrong to agree with his former employer that he was going to be away on his trip for one-third of the length of his employment contract. The Claimant calculates that he would have been away for less time than that. The Claimant argues that the General Division should have realized his absence was going to be less than one third of the length of his employment contract, and that the employer was using this as an excuse to dismiss him, when it was really dismissing him because of his religion.

[25] Even if the General Division misstated the evidence, I find that nothing turns on whether the employer overstated the length of the leave of absence. The General Division referred to the employer's letter in which it described that the Claimant requested four weeks off. But this was irrelevant to the General Division's assessment into whether there was just cause. The length of the Claimant's absence did not matter.

[26] What mattered was the fact that the Claimant took an unauthorized leave of absence. This was important because his employer had denied his request for a leave of absence. What was also important was whether the Claimant had reasonable alternatives to leaving his employment.

(c) Did the General Division fail to consider whether the Claimant had just cause for leaving his job under subsections 29(c)(iii), (x), or (xiv) of the *Employment Insurance Act*?

¹⁵ See *Marcia v Canada (Attorney General)*, 2016 FC 1367.

[27] Under subsection 29(c) of the *Employment Insurance Act*, just cause for voluntarily leaving a job exists if a claimant had no reasonable alternative to leaving, having regard to all the circumstances, including any of the following:

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

...

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

...

(xiii) undue pressure by an employer on the claimant to leave their employment ...

Subsection 29(c)(iii) of the *Employment Insurance Act*

[28] In his application to the Appeal Division – Employment Insurance, the Claimant argues that the General Division failed to consider whether he faced discrimination from his employer.

[29] The General Division did in fact examine whether the Claimant faced discrimination on a prohibited ground. The General Division also examined whether the Claimant’s employer made any discriminatory comments and whether it discriminated against him by denying his request for leave without any attempt to accommodate.

Subsection 29(c)(x) of the *Employment Insurance Act*

[30] The Claimant also argues that the General Division failed to consider whether there was antagonism with his supervisor. He claims that his employer made his work environment unbearable for him “all because of [his] religious faith and performing [his] religious obligation Hajj.”¹⁶ He felt that he had religious obligations that he had to fulfil the first chance he got. He felt that he did not have any choice but to go on the pilgrimage. He also felt that he had a duty to accompany his sister, who was also going.

¹⁶ See Claimant’s explanations at AD1-6.

[31] The Claimant felt that his employer treated him unfairly for changing its mind so soon after it had given him approval to take a leave of absence. The Claimant testified he felt this way because there were several times when his employer said it should not have hired him, supposedly in connection with his request for a leave of absence.¹⁷

[32] The Claimant states that he had not taken out any cancellation insurance and would lose more money if he had not gone on the trip. He states that what he had already spent on the trip was far more than what he would have earned for the length of the 3-month employment contract. He suggests that the financial losses he would have had if he had not gone on the trip contributed to the antagonism.

[33] While that may be so, this represents new evidence that the General Division did not have. There are no supporting documents to show what the Claimant paid for the trip and what he would have earned for the remaining time left on his employment contract. The Claimant did not give any oral evidence either about what losses he would have had if he had not gone on the trip. Indeed, the Claimant did not mention any concern over financial losses in his closing arguments to the General Division.¹⁸

[34] Nevertheless, there was some evidence that the Claimant perceived antagonism towards him for requesting the leave of absence so soon after he was hired on the latest contract, and for telling the employer that it was unfair for it to withdraw approval after he had already booked flights.

[35] The General Division did not examine whether there was antagonism with a supervisor. As such, I find that the General Division made an error. It should have considered whether there was any antagonism with a supervisor because it could have meant that the Claimant might have had just cause for voluntarily leaving his job.

Subsection 29(c)(xiii) of the *Employment Insurance Act*

¹⁷ At approximately 49:30 of the audio recording of the General Division hearing.

¹⁸ See Claimant's closing statements from approximately 56:00 to 59:11 of the audio recording of the General Division hearing.

[36] The Claimant claimed that he faced undue pressure to leave his job. He asserts that he suffered mentally because “multiple managers had already threatened to terminate [his] employment multiple times.”¹⁹ He argues that the General Division failed to consider whether there was undue pressure on him to leave his job.

[37] The Claimant testified that his employer pressured him to quit his job.²⁰ The General Division also noted the Claimant’s evidence in this regard, at paragraphs 4 and 12. Despite this evidence, the General Division did not examine whether the Claimant was under any pressure to leave his employment. For this reason, I find that the General Division made an error. It should have considered whether there was undue pressure by the Claimant’s employer because it could have meant that the Claimant had just cause for voluntarily leaving his job.

REMEDY

[38] I find that the General Division failed to consider whether the Claimant had just cause to leave his employment under subsections 29(c)(x) and (xiii) of the *Employment Insurance Act*. Now I have to decide the appropriate remedy for this matter.

[39] Section 59 of the *Department of Employment and Social Development Act* allows me to give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind, or vary the General Division in whole or in part.

[40] Although there are gaps in the evidence, the record from the General Division is substantially complete. I see no reason not to give the decision that the General Division should have given.

¹⁹ See Claimant’s Application to the Appeal Division – Employment Insurance, Explanations, at AD1-7, para. 16.

²⁰ At approximately 12:00 of the audio recording of the General Division hearing.

Subsections 29(c)(x) of the *Employment Insurance Act*

[41] The Claimant obtained his employer's approval for a leave of absence. He relied on his employer's approval that he could take time off. He then booked airline tickets to attend a religious pilgrimage in Saudi Arabia.

[42] It is unclear whether the Claimant incurred any accommodations or other travel-related expenses for his trip. For whatever reason, the Claimant did not offer this information, or even the cost of his flights. The Claimant would have benefitted by being more forthcoming with information about his flight and other travel costs.

[43] The Claimant testified at the General Division that he did not have cancellation insurance. So, he risked losing out on some costs if he did not go ahead with his travel plans.

[44] The employer does not dispute that it had at first approved the Claimant's travel request. However, within a week, it changed its mind and decided against letting the Claimant take a leave of absence.

[45] The Claimant sensed that his employer discriminated against him by changing its mind. The General Division rejected the Claimant's claims that his employer made discriminatory remarks against him. It did not find the claims credible because there was no early documentary evidence of these allegations.

[46] I accept the General Division's findings about the alleged discriminatory remarks. Even so, I find that antagonism arose after the Claimant requested a leave of absence.

[47] Clearly, the employer found the Claimant disrespectful and insensitive to the employer's business needs. It found the length of his request excessive. The employer wrote in its August 10, 2018 letter that the Claimant should have mentioned that he would be unable to fulfil his commitments. The employer noted that, even so, the Claimant requested time off.²¹ The employer confirmed that it had denied the Claimant's request on July 30, 2018. Notably, it failed to mention in its letter that it had approved the Claimant's request early on.

²¹ See supra note 4.

[48] The employer did not accept any financial liability or responsibility for putting the Claimant to undue expense. It did not offer to reimburse the Claimant any of his costs that he incurred after relying on the employer's approval.

[49] The Claimant felt that his employer was being unfair by changing its mind. After all, the employer had given its approval at first, so the Claimant went ahead and booked flights. But, if he did not go on the trip, he would have been out of pocket for these expenses because he did not take out cancellation insurance. He may not have incurred these expenses if his employer had told him upfront that he could not take a leave of absence.

[50] I do not see under what circumstances the Claimant—or anyone for that matter—would be happy to personally swallow the loss of several hundreds of dollars because of their employer, particularly when they are on only a three-month contract. Facing cancellation of a trip that likely cost at least several hundreds of dollars that his employer had said at first that he could take, was no doubt galling. This was coupled with the fact that the Claimant felt that there was a religious obligation for him to go on his trip.

[51] When the employer told the Claimant that he could no longer take a leave of absence, the Claimant did not accept the employer's about-face. Nor did he accept the prospect of having to cancel his trip, having been told that he could take a leave of absence. It prompted him to write to his employer to remind it that it had approved his leave of absence in the first place. He indicated that he would be going on the religious pilgrimage after all but that he would be returning. He felt that he had to write to the employer, so that there would be a written record this time of what he said. The employer did not respond to the Claimant before he left on his trip.

[52] On its face, one alternative for the Claimant might have been to seek a shorter leave of absence. But, the Claimant already felt that the employer had acted unfairly. The Claimant understood that his employer was inflexible about the length of his trip. Largely because of this, the Claimant did not look into whether he might have been able to shorten his trip.²² Hence, asking the employer for a shorter leave of absence was not particularly realistic.

²² At approximately 12:08 to 12:40, 38:19 to 40:42 and at 49:30 of the audio recording of the General Division hearing.

[53] On its face, another alternative for the Claimant might have been to remain employed and not take a leave of absence, even if this meant a financial loss. However, the Claimant's feelings of mistrust were already entrenched. By now, he felt he had to communicate in writing with his employer. The Claimant also thought his employer discriminated against him on religious grounds when it changed its mind and would no longer approve his leave of absence.

[54] The work situation would not have improved over time. The Claimant would have missed out on his trip. And, if he missed his trip, it meant that he was out the cost of his flights. It was unreasonable to expect the Claimant to stay at his job. The Claimant detected ill will and antagonism. He felt he was being mistreated.

[55] Given the evidence that was before the General Division, I find that the Claimant had just cause for voluntarily leaving his employment because of antagonism. Antagonism arose with his supervisor once she rescinded her earlier approval for a leave of absence. The Claimant relied on that approval when he booked flights to Saudi Arabia. He did not take out cancellation insurance, since he had his employer's approval at that time.

[56] The Claimant felt that his employer was unfair when it rescinded its approval. It would mean he would be unable to go on his religious pilgrimage and, at the same time, would mean losing out on the cost of his flights. This was vastly different than what happened to the claimant in *Jamieson*.²³ In that case, Mr. Jamieson never received any approval for time off from his employer. He never faced losing the cost of flights. Here, the Claimant had his employer's approval for a leave of absence. He could not have anticipated that his employer would suddenly change its mind after he had already booked flights.

Subsection 29(c)(xiii) of the *Employment Insurance Act*

[57] Having determined that the Claimant had just cause for leaving his job under subsection 29(c)(x) of the *Employment Insurance Act*, I do not have to consider whether the Claimant also had just cause under subsection 29(c)(xiii) of the *Employment Insurance Act*.

²³ See *Jamieson v. Canada (Attorney General)*, A-457-10, cited by the General Division at para. 24. The facts in that case are distinguishable because the employer never approved Mr. Jamieson's request for time off work.

However, I would have adopted the General Division’s analysis at paragraphs 46 to 49 of its decision.

[58] The General Division examined whether the employer made discriminatory remarks. These remarks were the basis for the Claimant’s feelings that his employer was pressuring him to quit his job. The Claimant alleged that the employer said, “if we knew you were passionate about Islam, we would not have hired you. You need to quit.”²⁴ He also alleged that the employer said, “We will not accommodate your faith and quitting is the best option for you.”²⁵

[59] The member found that the employer did not make these discriminatory remarks. The Claimant did not mention the alleged discriminatory remarks until well into his claim for Employment Insurance benefits. I agree with the General Division’s conclusions on this point. As such, because the employer did not make these precise comments, the Claimant did not feel pressure from the employer to quit his job.

CONCLUSION

[60] I am satisfied that the Claimant had just cause to voluntarily leave his job because of antagonism. I am therefore allowing the appeal.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	A. S., Appellant Sandra Doucette (counsel), Representative for the

²⁴ General Division decision, at para. 19.

²⁵ *Ibid.*

	Respondent
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