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

REVISED DECISION – corrections integrated into main text of the original decision.

Citation: *M. M. v Canada Employment Insurance Commission*, 2020 SST 20

Tribunal File Number: AD-19-631

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: ~~December 9, 2020~~ January 9, 2020 **Corrigendum issued: January 15, 2020**

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, M. M. (Claimant), resigned her job shortly after her employer presented her with a letter of expectation. When she applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), refused her claim. It found that the Claimant had voluntarily left her employment without just cause, and it maintained this decision after the Claimant requested a reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed her appeal. The Claimant is now appealing the decision of the General Division to the Appeal Division.

[4] The appeal is allowed. I have made the decision the General Division should have made and I find that the Claimant had just cause for leaving her employment.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] To allow the appeal, I must find that that the General Division made one of the types of errors described in the grounds of appeal. The "grounds of appeal" are outlined below:[1]

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.

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[1] 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.*

ISSUES

[6] Was the General Division finding (that the Claimant was primarily responsible for the antagonism with her supervisor) made in a perverse or capricious manner?

[7] Did the General Division base its decision on any error?

[8] Did the General Division err in law by failing to consider the existence of antagonism with a supervisor where the Claimant was not primarily responsible?

[9] Did the General Division err in law by requiring that the Claimant show physical or mental harm to prove she had no reasonable alternative to leaving?

ANALYSIS

[10] Section 29(c) of the *Employment Insurance Act* (EI Act) states that a claimant will have just cause for leaving an employment if the claimant has no reasonable alternative to leaving, having regard to all of the circumstances. A list of included circumstances follows in section 29(c)(i) through to section 29(c)(xiv). These are not the only circumstances that can be relevant, but the circumstances that are included in this list must be considered if they are present.

Responsibility for the Claimant's antagonism with her supervisor

[11] One of the circumstances included in the list is section 29(c)(x). This circumstance concerns, "antagonism with a supervisor if the claimant is not primarily responsible for the antagonism".

[12] The General Division acknowledged that there was antagonism between the Claimant and her supervisor.[2] As a result, section 29(c) of the EI Act would require that it take this circumstance into consideration, but only if "the Claimant was not primarily responsible". Therefore, the General Division needed to determine whether the Claimant was primarily

[2] General Division decision para. 22

responsible before it could assess whether this circumstance was present, and if it supported the Claimant's assertion that she had no reasonable alternative to leaving.

[13] The General Division made only one finding related to who was responsible for the antagonism. It found that "the antagonism was a product of the Claimant's actions."

[14] The Commission referred to the General Division's statement that the Claimant was acting in good faith, and it argued that the General Division did not suggest or imply that the Claimant acted willfully to aggravate her supervisor. I recognize this. This is the exact reason that the General Division's finding that the claimant was responsible for the antagonism was a "perverse or capricious" finding.[3]

[15] If even the Claimant's innocent actions can cause her to be the one primarily responsible for her antagonism with her supervisor, as the General Division suggests, then it is difficult to imagine circumstances in which claimants could be found not to be primarily responsible for the antagonism. Under such an interpretation, the existence of antagonism with a supervisor would almost never be relevant.

[16] However, I may have mistaken the Commission's argument. The Commission may be arguing that the General Division did not mean that the Claimant was primarily responsible for the antagonism, when it found that the "antagonism was a product of the Claimant's actions".

[17] That is not how I interpret the General Division decision. I accept that the General Division found the Claimant to be primarily responsible through her actions. However, if the General Division had not found the Claimant primarily responsible for the antagonism, then the General Division would have failed to make a finding on her whether she was primarily responsible. This is a finding that it was required to make, and a failure to make a required finding of fact is an error of law.

[3] From Section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).

Did the General Division decision base its decision on any error?

[18] The Commission has argued that the General Division decision was not based on the supervisor's antagonism. It argues that the decision was based on the Claimant's failure to complete the proposed action plan.

[19] To find that there is no "just cause" for voluntarily leaving required a finding that there is a reasonable alternative to leaving. In this case, the General Division found that one such alternative was "completing the action plan." However, for the General Division to identify any alternative as a reasonable one, it must first consider all the circumstances.

[20] If the evidence established that the Claimant experienced antagonism with a supervisor that was not primarily her fault, the General Division would have to consider the antagonistic relationship. It could not determine whether "completing an action plan" was a reasonable alternative without considering the effect of the antagonism.

[21] Failing to consider all the circumstances is an error of law that would undermine the General Division's finding of reasonable alternatives, on which the decision is based.

Failure to consider the application of section 29(c)(x) of the EI Act.

[22] The General Division did not explicitly consider the circumstance of section 29(c)(x) of the EI Act in its analysis of the reasonable alternatives because it related the supervisor's antagonism to the Claimant's own actions. If the antagonism was primarily the Claimant's responsibility, section 29(c)(x) would be inapplicable.

[23] However, I have found that a finding that the Claimant was primarily responsible for the antagonism would be a perverse or capricious finding. The Claimant was primarily responsible and the General Division erred because it was required to consider section 29(c)(x) of the EI Act but it did not.

Failure to consider the underlying circumstances of the antagonistic relationship

[24] The General Division reviewed the evidence of antagonism to determine that "antagonism" was present in some general sense. Therefore, I have also considered whether the

General Division may have taken the evidence of the antagonistic relationship into consideration even without a finding that the Claimant was not primarily responsible.

[25] The General Division said that it accepted that the supervisor was rude and disrespectful, and it described her behaviour as abrasive. It accepted that the Claimant felt hurt and embarrassed as a result.[4] However, it said that this antagonism was "triggered" by the Claimant doing something that "prompted [the supervisor] to correct her" or, "that [the supervisor] considered unnecessary."[5]

[26] In the circumstances—as they were understood by the General Division—the obvious reasonable alternative to leaving would have been for the Claimant to just stop doing whatever it was that was antagonizing the supervisor. She would just need to get things right so she didn't need to be "corrected" and stop doing "unnecessary" things.

[27] However, even supposing that the supervisor's antagonism had nothing to do with personalities and was nothing more than a reaction to her perception of the Claimant's performance, the Claimant could not defuse the antagonism by simply improving her performance. She could not reasonably be expected to anticipate every decision or expectation of the supervisor. The General Division accepted that there was antagonism between the Claimant and her supervisor even though the Claimant was acting in good faith. The Claimant cannot be held responsible for the supervisor's response if she miscalculates again, in good faith.

[28] The General Division did not fully appreciate the Claimant's circumstances. It failed to recognize that the Claimant could not avoid the supervisor's antagonism by her own efforts alone,.

[29] The General Division failed to explicitly consider whether there was antagonism that was "not primarily the responsibility of the Claimant" per section 29(c)(x) when it assessed the Claimant's reasonable alternatives to leaving. It also failed to take into account all those circumstances on which it might have found the Claimant's antagonism with her supervisor to be a significant circumstance.

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[4] General Division decision, paras. 20–21
[5] *Ibid.*

Threshold for just cause

[30] The General Division also said that the Claimant's physical or mental health had not been affected. It said, "For that reason … the Claimant could have tolerated [the supervisor's] abrasive conduct." The General Division gave no other reason for finding that the Claimant could reasonably stay in her job and complete her action plan. This suggests that the General Division required the Claimant to prove that her work circumstances had not compromised her physical or mental health before it could find that the Claimant had no reasonable alternative to leaving.

[31] Section 29(c)(iv) of the EI Act specifically contemplates circumstances involving the health of a claimant. It describes, "working conditions that constitute a danger to health or safety." This particular circumstance does not necessarily require proof of actual harm. It may be found where there is a *danger*, or threat of harm. No one has suggested that the Claimant's working conditions were dangerous. But if there is no requirement of actual harm where the *only* circumstance under consideration is the health or safety of the claimant, there can be no *requirement* that a claimant establish actual harm to support the significance of a claim of harassment or an antagonistic relationship with a supervisor.

[32] The General Division erred in law when it required the Claimant to meet the threshold of actual harm before finding that she had no reasonable alternative.

Summaries of errors

[33] I have found that the General Division made a perverse or capricious finding that the Claimant was "primarily responsible" for the antagonism with her supervisor. I have also found that the General Division erred in law when it determined that the Claimant had reasonable alternatives to leaving without considering her antagonism with a supervisor that was not primarily her responsibility. Finally, I have found that the General Division erred in law by defining a reasonable alternative as one which does not cause actual physical or mental harm.

[34] Having found that the General Division made errors in arriving at its decision, I must now consider what the appropriate remedy should be.

REMEDY

[35] I have the authority to change the General Division decision or make the decision that the General Division should have made.[6] I could also send the matter back to the General Division to reconsider its decision.

[36] I will give the decision that the General Division should have given because I consider that the appeal record is complete. That means that I accept that the General Division has already considered all the issues raised by this case, and that I can make a decision based on the evidence that the General Division received.

Antagonism with a supervisor

[37] I accept the General Division's conclusions that the Claimant experienced an antagonistic relationship with her supervisor despite her good faith efforts to do her job, and I accept the General Division's characterization of the supervisor's behaviour as rude, disrespectful, and abrasive.

[38] I also accept that the specific examples given by the Claimant of her interactions with her supervisor, [7] (some of which were detailed in the General Division decision[8]), occurred in the manner reported by the Claimant. The General Division did not question the credibility or reliability of the Claimant's evidence and the employer did not provide the Commission with any evidence to the contrary.[9]

[39] I find that it is more likely than not that the Claimant experienced antagonism with her supervisor that was not primarily her fault.

Reasonable alternatives

[40] The Claimant made efforts to raise her concerns with her employer. This included a request to meet with her managers on December 28, 2018,[10] but the Claimant said that the

[6] See section 59 of the DESD Act.
[7] See GD3-11, 12, GD3-30, GD3-48
[8] General Division, para. 13, 16–17
[9] GD3-34
[10] GD3-13, 41

manager was already aware of the situation.[11] The Claimant met with her supervisor on January 16, 2019, to discuss her concerns in the presence of their manager, but she reported that the meeting did not resolve anything. She said that her supervisor's response was that the Claimant should not have sought "help" and that the Claimant was hurting the supervisor's reputation.[12]

[41] The Claimant's evidence is that nothing changed after the meeting, and that her supervisor continued to direct her work. On March 22, 2019, the Claimant's supervisor instructed her to process a post-dated cheque that had been mistakenly cashed by another employee. The Claimant refused. She believed that this would not be appropriate and that she would be blamed if she was the one who processed the cheque improperly.[13] About one week later, the employer gave the Claimant the letter of expectations. The Claimant believed she received this letter because of the incident with the cheque specifically,[14] but she also attributed it to "retaliation" by the supervisor because the Claimant had brought the employer in to sort out their relationship. The Claimant refused to sign the letter of expectations or to prepare an action plan. A few days after receiving the letter she resigned.

[42] The General Division found that a reasonable alternative would have been for the Claimant to complete her action plan and use that plan to reconcile with her supervisor. The action plan to which the General Division was referring, was the one required of the Claimant in the letter of expectations.[15] The action plan was to be directed at how the Claimant could change her own behaviour. The General Division's suggestion that the plan would assist the Claimant to "reconcile" with her supervisor is consistent with the General Division's view that the antagonism was a product of the Claimant's own actions.

[43] However, the reasonable alternative of "completing the action plan" does not address the Claimant's concern about antagonistic behaviour from her supervisor when that antagonism is not primarily her responsibility. The Claimant had been making a good faith effort to do her best without an action plan but she had still experienced an antagonistic relationship with her supervisor. There is little chance that the Claimant could unilaterally reset her relationship with

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[11] GD3-13
[12] *Ibid.*
[13] GD3-11, GD3-14, GD3-30
[14] GD3-29
[15] GD3-47

her supervisor through the kind of "action plan" that the employer required. "Reconciliation" was not the apparent goal of the letter of expectations.

[44] There was no evidence that the employer planned any action to address the supervisor's role in the antagonism, or that the supervisor's behaviour was likely to change. The employer appears to have considered the possibility of assigning the Claimant to a different branch to train or to get more hours.[16] However, neither the Claimant nor the employer appear to have considered this as a serious option, or as a means of addressing the Claimant's difficulties. There is insufficient evidence to evaluate if these were realistic prospects of if the Claimant could have avoided conflict with her supervisor by pursuing a reassignment.

[45] The reasonable alternative of continuing to work while she sought alternative employment does not consider that the Claimant was under threat of dismissal at the time that she left. Not only did the employer fail to take any action to reduce or mitigate the Claimant's conflict with the supervisor, but it took action against the Claimant. The employer gave the Claimant a letter of expectations that told her that she needed to change her behaviour immediately. The required changes were neither objective nor specific[17] but the Claimant was put on notice that she could be dismissed without notice if she failed to comply. The Claimant said that she was afraid she would not be able to get other work if she was fired.[18]

[46] The Claimant would not know for certain that she would actually be fired, or when. It is possible that she could have continued to work for a time under the same conditions. However, the Claimant had been hurt or embarrassed by her supervisor repeatedly. If she stayed in her employment, she could expect to work under the same supervisor and the same conditions, except that she had less reason to expect the employer would support or defend her. She was working under a threat of dismissal.

[47] The Claimant does not need to show that she has no alternative but to immediately leave. She only needs to show that she had no *reasonable* alternative to leaving, at the time that she left. In *Chaoui v Canada (Attorney General)*[19], the Federal Court of Appeal rejected the Umpire's

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[16] GD3-14
[17] *Supra,* note 4.
[18] GD3-48
[19] *Chaoui v Canada (Attorney General),* 2005 FCA 66.

findings that a claimant should work "until he found a job more consistent with his aspirations" and "that there was no evidence that the working conditions were intolerable." The Court said that "the Umpire went beyond the requirements of section 29(c) and imposed a burden that ultimately render[ed] that paragraph meaningless."

[48] I do not accept that using an action plan to reconcile or continuing to work while she looked elsewhere for employment are reasonable alternatives to leaving. I find that the Claimant had no reasonable alternative to leaving and that she had just cause for leaving her employment under section 29(c) of the EI Act.

CONCLUSION

[49] The appeal is allowed. I have given the decision that the General Division should have given. I find that the Claimant had just cause because she had no reasonable alternative to leaving her employment.

Stephen Bergen
Member, Appeal Division

HEARD ON:	December 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. M., Appellant Angeline Fricker, Representative for the Respondent