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

Citation: *B. U. v Canada Employment Insurance Commission*, 2020 SST 16

Tribunal File Number: AD-19-762

BETWEEN:

B. U.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 13, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made in error in arriving at its decision. I have corrected this error and made the decision the General Division should have made, but I still reach the same decision as the General Division.

OVERVIEW

[2] The Appellant left his employer because he was dissatisfied with a number of the terms and conditions of his employment. When he applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim. When it was asked to reconsider, the Commission maintained that the Claimant had just cause for leaving.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his claim. The Appeal Division granted leave to appeal the General Division decision, and the Claimant's appeal is now before the Appeal Division.

[4] The appeal is dismissed. The General Division made an error of law when it failed to consider the Claimant's evidence and arguments that his job duties had changed significantly. I have made the decision that the General Division should have made. I considered whether the Claimant had reasonable alternatives to leaving taking into account all the circumstances, including his change in job duties. I have concluded that he still had reasonable alternatives to leaving his 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.

[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.*

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

[6] Did the General Division make an error of law by:

a) not considering whether there had been a significant change in the Claimant's work duties, or;
b) finding the Claimant to have reasonable alternatives without considering all of the circumstances.

[7] Did the General Division make an important error of fact by:

a) finding that the Claimant left his job because he found another job;
b) accepting any part of the evidence from G., the Claimant's former manager; or,
c) ignoring the WorkSafeBC safety inspection report?

ANALYSIS

[8] A claimant is disqualified from receiving benefits if the claimant leaves his or her job without having just cause.[2] Just cause is defined as having no reasonable alternative to leaving having regard to all the circumstances.[3]

[9] The *Employment Insurance Act* (EI Act) also sets out a list of "included" circumstances that must be considered when assessing a claimant's reasonable alternatives. Of course, a circumstance must first exist before it may be considered.

[2] Section 30 of the *Employment Insurance Act*
[3] Section 29(c) of the *Employment Insurance Act*

Failure to consider a significant change in work duties

[10] The Claimant argued to the General Division that one of the reasons he left his employment was that he had experienced a significant change in his work duties. In his submissions to the General Division, the Claimant quoted the Commission representative as follows: "The Claimant was employed by [the employer] until July 22, 2019, at which time he voluntarily left his employment and he states it was because of his wages and duties."[4] Referring to the Commission's argument, the Claimant argued to the General Division that he had listed, "more than just wages *and duties*."

[11] The General Division record establishes that the Claimant repeatedly raised his concern with changes in his work duties as one of the reasons that he left his job. In his application for benefits, the Commission claimed that he left his job because of a change in work duties.[5] He later told the Commission that he understood a change in work duties could be just cause for leaving.[6]

[12] There was evidence before the General Division to support the Claimant's argument that he was not given the job duties of the position to which the agency referred him. There was also some evidence that the employer gave him additional job duties after he started working there.

[13] In his application, the Claimant said that the employer gave him the physical job of unloading heavy boxes.[7] He said that the employer had him working as a picker originally but added different duties such as offloading containers, loading trucks, and taking out garbage[8]. He asserted that he was promised a job working on a computer, and not picking orders and offloading containers.[9]

[14] The Claimant supplied the offer letter from the employment agency. The offer described the position to which it referred him as a "CSR/shipper".[10] The Claimant told the Commission that he was hired as a CSR/shipper[11] and he explained to the Commission that "CSR" stood for "customer service representative". He said that a shipper does not have to unload heavy items.[12]

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[4] AD1B-4 repeated from GD6-4; a citation of GD4-1
[5] GD3-10
[6] GD3-49
[7] GD3-10, 11
[8] GD3-11, GD3-4
[9] GD3-10
[10] GD3-32
[11] GD3-36
[12] GD3-43

[15] The General Division's determination that the Claimant had reasonable alternatives did not consider whether the "significant changes in work duties" circumstance affected his reasonable alternatives. This was because the General Division failed to make a finding as to whether the Claimant's circumstances involved a significant change in work duties.

[16] I find that the General Division erred in law by failing to make a required a finding of fact.

Failure to consider all of the circumstances together

[17] The Claimant argued that the General Division did not consider the effect of all of his circumstances together, when it found that the Claimant had no reasonable alternative to leaving.

[18] I find that those reasonable alternatives identified by the General Division are still reasonable, even when all of those circumstances that the General Division found to exist are considered together. This does not include consideration of modifications to the terms of his wages. The General Division found as fact that the employer had not agreed to pay the Claimant any more than he was being paid.

[19] However, I have already found that the General Division should have considered whether the Claimant's work duties had changed significantly. This was not factored into the reasonable alternatives.

[20] There are also other circumstances that may not have been properly considered. I cannot determine from the General Division's reasons if it found that the work conditions were actually a danger to the Claimant's health or safety. The General Division accepted that the employer had not followed certain WorkSafeBC requirements and it therefore concluded that the Claimant had "valid safety concerns". The safety concerns included a hazardous ladder and non-compliance with some other safety regulations. It is unclear whether the General Division viewed those concerns as dangerous to the Claimant at the time that he left his employment.

[21] The General Division also found that the Claimant did not get along with a supervisor. Again, I cannot determine whether the General Division thought that this was significant. The General Division did not determine who was primarily responsible for "not getting along", or in what way this affected the Claimant. The EI Act requires the General Division to consider "antagonism with a supervisor that is not primarily the responsibility of the Claimant", but the General Division

did not assess who was primarily at fault. Therefore, I cannot determine whether it was properly considered when the General Division found that the Claimant had no reasonable alternatives.

[22] For these reasons, I agree with the Claimant that the General Division did not identify reasonable alternatives that took all of the circumstances into account.

The Claimant's other job

[23] The Claimant argued that the General Division made an important error of fact when it found that he had left his job because he found another job. However, the General Division made no such finding. It considered only whether the Claimant had looked for other employment before quitting and it found that he did not.[13]

The evidence of the former manager

[24] The Claimant argued that the General Division should not have accepted any of the evidence of his former manager. He said that the manager lied when he said that the Claimant started at $15.00 per hour, so none of the manager's evidence should be trusted. This would include the manager's evidence that the Claimant had not been promised a raise to $20.00 per hour.

[25] The employer's manager told the Commission that the Claimant started at $15.00 per hour in the same conversation that he denied promising $20.00 per hour. The General Division did not accept the manager's evidence that the Claimant started at $15.00 per hour. It found that the Claimant earned $16.00 per hour as soon as he started working for the employer through the agency. The General Division relied on the Claimant's evidence and on the corroborating evidence of an email to the Claimant from the employment agency.

[26] The Claimant is correct that the General Division did not accept that there had been a promise of $20.00 per hour. However, the General Division did not rely on the manager's denial alone. The General Division explained that there was "no clear evidence" about whom the Claimant spoke to about the $20.00 per hour rate, and no written confirmation that the employer had offered it.

[27] The Claimant told the General Division that his employer promised $20.00 per hour, and he provided a letter from the employment agency that confirmed that this is what the Claimant told the

[13] General Division decision, para. 23

agency. However, the Commission file also includes a record of a conversation between the Commission and the Claimant in which the Commission asked the Claimant several questions about his expectation of $20.00 an hour. The Claimant told the Commission that he made a deal with his agency (not the employer) and that he expected the employer to honour the deal. He confirmed that he did not check with the employer to see if the employer would pay him $20.00 an hour.[14]

[28] I do not find that the General Division made an important error of fact when it found that the Claimant had not been promised $20.00 an hour by the employer. The General Division is allowed to reject part of a statement and accept another part. This is not an error in itself.

[29] I recognize that the Claimant has also asserted that the Commission's notes misrepresent what he told Commission agents. He argues that his other evidence should be preferred over these misrepresentations. However, it is the job of the General Division to assess the reliability and credibility of the evidence and to weigh all the evidence. It is not the job of the Appeal Division to second-guess that assessment.[15]

[30] The Claimant has not pointed to any evidence that was ignored or misunderstood by the General Division regarding the terms of his salary or wages. The General Division's conclusion that the employer did not offer him $20.00 an hour is not inconsistent with the evidence.

The WorkSafeBC safety inspection report

[31] The Claimant argued that the General Division did not consider the WorkSafeBC report. That is not accurate. The General Division referenced the WorkSafeBC report and its findings.[16] It appears that the Claimant's objection is to that the General Division did not give enough weight to the report evidence. As I mentioned above, this is not an objection that I am authorized to consider.

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[14] GD3-42
[15] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[16] General Division decision, para. 17

Summary of errors

[32] I have found that the General Division made an error of law by failing to make findings of fact that were necessary for it to properly consider all the circumstances. This includes a failure to find whether the Claimant's job duties had significantly changed.

REMEDY

[33] I have the authority to change the General Division decision or make the decision that the General Division should have made.[17] I could also send the matter back to the General Division to reconsider its decision.

[34] 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.

Changes in work duties

[35] I accept that the Claimant was hired to work as a CSR/shipper. The only evidence of the work duties associated with the position of CSR/shipper was that of the Claimant. The Claimant said that the employer told him he would be working on a computer.[18] He also said that the shipper aspect of his job should only involve packing and shipping smaller boxes and not heavy ones.[19] The Claimant said that his actual duties at the employer required him to personally unload and load heavy boxes from containers or trucks.[20] The employer did not deny that the Claimant was hired as a CSR/shipper or define the duties of a CSR/shipper. He said only that the Claimant was very unhappy with working with heavy boxes and with the physical nature of the job expected of him.[21]

[36] It is unclear whether the employer ever limited the Claimant's duties to those of a CSR/shipper, as the Claimant understood the position. However, I accept that "significant

[17] My authority is set out in section 59 of the DESD Act.
[18] GD3-10
[19] GD3-43
[20] GD3-10, 43
[21] GD3-45

changes in work duties"[22] includes the situation where the work duties are significantly different from the duties for which a claimant is hired. It does not require that a claimant necessarily be working with a particular set of duties and then have them change during his employment. I rely on the Federal Court of Appeal decision of *Chaoui v Canada (Attorney General).*

[37] The facts in *Chaoui* were similar to those of the Claimant's case. In *Chaoui*, the appellant had been hired as a machine operator, but was instead employed as a packager. He was unsatisfied with the process by which the employer would move him into the machine operator position, and quit after eight days as a packager. The appellant's work duties did not change while he was working, but he was not given the duties that he had been hired to do. The Court in *Chaoui* held that the Umpire (and the Board of Referees) [23] should have considered whether the facts would support a finding that there had been "significant changes in work duties". [24]

[38] I accept that the Claimant's duties were significantly different from those of a CSR/shipper. Therefore, I find that the Claimant experienced a significant "change" in work duties. I must consider this circumstance and I will have to re-evaluate whether the Claimant had reasonable alternatives to leaving.

Other work circumstances

[39] The General Division failed to make clear findings on whether the following circumstances existed:

- His working conditions were a danger to his health and safety, and
- He experienced antagonism with a supervisor that he was not primarily responsible for.

Danger to health and safety

[40] There was some evidence before the General Division that was relevant to the hazard posed to the Claimant by his work conditions. The evidence includes the Claimant's statement that he had

[22] For the purposes of section 29(c)(ix)
[23] The Board of Referees was the decision making body at the first level of appeal the former Employment Insurance appeal system. The Umpire was a higher level of appeal.
[24] *Chaoui v Canada (Attorney General)*, 2005 FCA 66.

fallen from a damaged ladder at work,[25] and the WorkSafeBC inspection report of October 1, 2019. WorkSafeBC discovered a damaged 4-foot step ladder that had not been removed from service or identified as unusable.[26] The WorkSafeBC inspection report also identified other contraventions of the Workers Compensation Act and Regulations, including the employer's failure to:

a) appoint a health and safety representative,
b) maintain current first aid certification,
c) update written first aid procedures,
d) hold regular safety meetings,
e) ensure all electrical panel switches are clearly marked, and
f) maintain unimpeded access to emergency exits.

[41] WorkSafeBC issued specific orders to the employer requiring the employer to bring its workplace into compliance. The Claimant wrote of having to climb ladders with 100 pound boxes,[27] but WorkSafeBC noted the employer's denial that it required its workers to carry heavy or bulky objects up or down a ladder, or that it had certain other unsafe work practices.[28] None of its orders concerned the practices denied by the employer. With the exception of the order to discard the broken ladder, the orders do not suggest that WorkSafeBC considered the workplace to be dangerous. The broken ladder was discarded immediately and WorkSafeBC gave the employer a month to prove that it had addressed each of its orders. The orders did not require the employer to cease operations in the meantime.

[42] The WorkSafeBC report was conducted two months after the Claimant quit his job. The Claimant asserted that he was the one that complained to WorkSafeBC, and that "all irregularities [he] reported were confirmed."[29] The presence of a broken ladder was confirmed and I do not doubt that the Claimant had reported his fall from a broken ladder to WorkSafeBC. However, if the Claimant had been aware of the other irregularities discovered by WorkSafeBC, he did not mention

[25] First and last paragraphs, GD6-6
[26] GD7-5
[27] GD6-6
[28] GD7-6
[29] GD6-6

them to the Commission. I do not accept that any of those other irregularities factored into the Claimant's decision to leave.

[43] There is insufficient evidence for me to find that the Claimant's working conditions represented a danger to his health or safety.

Antagonism with a supervisor

[44] The fact that the Claimant did not get along with his supervisor does not mean it must be considered in assessing the Claimant's reasonable alternatives. The EI Act identifies antagonism with a supervisor as relevant to the "just cause" determination but only where the supervisor bears at least as much responsibility for the antagonism as the Claimant. If the Claimant is the one primarily at fault, then he could be expected to change his ways and get along, rather than quitting his job.

[45] The General Division agreed that the Claimant did not get along with either his co-workers or his supervisor. However, it did not determine who was responsible for this. The Claimant said that his supervisor and co-workers used profane language, and that a supervisor told him he was not working hard. This was the only evidence before the General Division that could relate to either harassment or antagonism. This is not enough for me to find that the Claimant's relationship with his supervisor was even antagonistic, let along that the supervisor was equally or largely responsible. It is not enough evidence to find that the employer was harassing the Claimant, and it is not enough to find that the Claimant's work environment was intolerable as he claimed.[30]

Summary of other circumstances

[46] Other than the changes in the Claimant's work duties, none of the Claimant's circumstances, meet the definitions of circumstances that are specifically included by the EI Act. That does not mean that they are not relevant–only that they are not *necessarily* relevant.

[47] I accept that the Claimant was dissatisfied with his pay, that he had once fallen from a broken ladder, and that he did not like how his supervisors and co-workers communicated with him. These were undoubtedly factors in his decision to leave, and the Claimant may have acted reasonably in leaving. However, whether he acted reasonably is not the question. None of these circumstances

[30] GD3-10

independently or together are of such significance that they could excuse the Claimant from "deliberately caus[ing] or increas[ing] the risk" of his unemployment.[31]

[48] I do not accept that the Claimant's other circumstances individually or collectively would have had a significant effect on his ability to continue working while he sought out alternative employment. If they are relevant to the availability of reasonable alternatives to quitting, their relevance is marginal.

Availability of reasonable alternatives

[49] The Claimant has established that he had a significant change in his work duties. I appreciate that the Claimant was asked to do a job that was different from the job that he expected, and more physical. However, despite his dissatisfaction with the work duties, he demonstrated an ability to perform those duties during the five months he worked for the employer.[32]

[50] In the last part of his employment, the Claimant had transferred from the employment agency to work for the employer directly. On September 4, 2019, the Claimant told the Commission that a particular manager had promised him different work duties but that this manager had left three months before. The Claimant told the Commission that he never discussed this with anyone else in management.[33]

[51] In his application for benefits dated July 24, 2019, the Claimant also said that the manager had left three months earlier. Therefore, according to the Claimant's own evidence, the manager may have left as early as a few weeks after he first started at the employer through the agency. Or, the manager may have left about a week before the Claimant transferred to the employer, or somewhere around that time. In either event, I find that the Claimant started working for the employer directly without confirming with its then-current manager or management, that the employer would give him the duties that he expected. After the transfer, the Claimant worked for another six weeks before quitting.

[52] I do not accept that the change in work duties, or the defeated expectation of different work duties, was a circumstance that left the Claimant with no reasonable alternative but to quit. I find that

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[31] See *Tanguay v Unemployment Insurance Commission*, A-1458-84
[32] GD3-8
[33] GD3-48

the Claimant had the reasonable alternative of looking for alternative employment while continuing to work for the employer. I have also considered whether this would still be a reasonable alternative, in the context of all the other employment circumstances raised by the Claimant. However, I still find that this would have been a reasonable alternative in all of those circumstances.

CONCLUSION

[53] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	December 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. U., Appellant M. Allen, Representative for the Respondent