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

Citation: *S. M. v Canada Employment Insurance Commission*, 2020 SST 27

Tribunal File Number: AD-19-776

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 17, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made an error in how it arrived at its decision. I have corrected this error but I still reach the same conclusion.

OVERVIEW

[2] The Appellant, S. M. (Claimant), is a truck driver. When his regular truck was damaged, the Claimant's employer assigned him a truck that he considered unsafe to drive. On October 25, 2018, he told his employer that he refused to drive the truck and to call him when they had one available that he could drive. Then he left the job site. His employer did not call him to come back to work. In February 2019, the Claimant discovered that the employer had put "quit" on the Claimant's Record of Employment, as his reason for leaving.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), refused his claim for Employment Insurance benefits on the basis that he had voluntarily left without just cause. It maintained this decision on reconsideration so the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal and he is now appealing to the Appeal Division.

[4] The appeal is dismissed. I have found that the General Division made an important error of fact. However, once I correct for the error, I find that the Claimant did not have just cause for voluntarily taking leave from his employment. The Claimant will still be disqualified from receiving benefits.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] 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]

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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.

[6] "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.

ISSUE

[7] Did the General Division fail to consider the Claimant's evidence of the employer's usual layoff and recall practices?

ANALYSIS

Usual layoff and recall

[8] The Claimant did not formally resign his employment. When he left, the Claimant told his employer's batcher that the employer should call him when his regular truck was repaired. The employer did not call him back and the Claimant did not contact the employer. According to the Claimant, he only learned that the employer considered him to have quit when he received the Record of Employment in February. Because the Claimant had not followed up with the employer after he left, the General Division inferred that the Claimant had quit.

[9] Leave to appeal was granted on the basis that the General Division may have drawn this inference without considering the Claimant's evidence of the employer's usual lay off and recall practices. The Commission argues that the General Division did not ignore his evidence because the General Division asked questions about the layoff and recall practices.

[10] The Question and Answer format that the General Division followed in hearing the Claimant's original appeal posed a total of fourteen questions to the Claimant, which the General

[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.*

Division presumably considered to be relevant to determine the matter. Two of those questions related to the Claimant's experience with the employer. He was asked if he would "normally" be laid off for the winter months. The Claimant answered that he was usually laid off from December to April but that, in 2018, he was laid off until June because another employee was driving the truck assigned to him.

[11] The Claimant was also asked if something similar had occurred in the past. In his response, the Claimant again referred to the time he informed his employer that he was available at the end of his regular layoff period but was not called back until June 2018.

[12] When questioned about why he assumed he was laid off after he left his workplace on this occasion, the Claimant stated that he was not contacted with an alternate truck or start date, and that he was on-call year round. He also noted that "[The layoff] is just assumed as in previous years, and this time as well. If they don't call you with a start time, it usually means you are off."

[13] The Commission suggests that the General Division considered this evidence because it asked about the Claimant's experience in its written questions. I do not accept this argument. The fact the General Division sought out evidence does not necessarily mean that it considered the evidence provided in response. I appreciate that the Federal Court of Appeal has said that the General Division is not required to refer to each and every piece of evidence, and may be presumed to have considered all the evidence.[3] However, I do not interpret this to mean that I can never find the General Division to have ignored relevant evidence.

[14] The General Division should have analyzed the evidence of the Claimant's experience with his employer's layoff and recall practices. This evidence is relevant to whether the Claimant might have reasonably understood that he was laid off without having to confirm it with his employer. Therefore, it is also relevant to whether his failure to follow up with his employer supports the inference that he quit his job. The General Division's reasons do not reveal such an

[3] This was acknowledged in the case of *Simpson v Canada (Attorney General)*, 2012 FCA 82.

analysis or even reference the Claimant's evidence. Its failure to consider this evidence is an important error of fact.[4]

[15] Having found that the General Division made an error, I must now decide what is the proper remedy.

REMEDIES

[16] I have the authority to change the General Division decision or make the decision that the General Division should have made.[5] I could also send the matter back to the General Division to reconsider its decision.

[17] 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.

Voluntary leaving

[18] The Claimant left his workplace on October 25, 2019, because he was upset with the condition of the vehicle that the employer had asked him to drive. The employer still had work for drivers, and apparently had other trucks he could drive,[6] but the Claimant had not been happy with the vehicle he was asked to drive on October 25, 2019. He left his truck and keys with the employer's batcher, telling him that the employer should call him when his regular vehicle was repaired. The employer acknowledged that this is what the Claimant told the batcher.[7]

[19] I find that the Claimant did not quit because of his consistent evidence that he did not wish to sever his employment relationship with his employer. He told the batcher at the plant where he left his truck that the employer should call him when his regular truck was repaired so that he could return to work. Since then, has maintained that he waited to get his job and his truck back.[8] There is no direct evidence that the Claimant intended to quit his job. While the

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[4] More precisely, an error under section 58(1)(c) of the DESD Act.
[5] My authority is set out in section 59 of the DESD Act.
[6] GD3-24.
[7] GD3-32
[8] GD3-33

General Division inferred that the Claimant quit because he failed to follow up with the employer, this was not a necessary inference. Some other *possible* inferences are: that the Claimant wanted to pressure the employer to give in to his demand for his regular truck; that he wanted the employer to call him first to prove he was a valued employee; or, that he believed from experience that there was no point in trying to contact the employer before the employer was ready to recall him.

[20] I accept that the Claimant was entitled to treat the batcher as an agent for the employer and to expect that his message would be referred to the employer. A manager at the employer ("T"), told the Commission that she was the proper person to whom employees should communicate their concerns,[9] but the Claimant told the General Division that he had hardly spoken to T, since he started with the employer. He said that, "the batcher and dispatcher are considered [the drivers'] employer as [they] report to them and they relay messages if need be. [Drivers] advise them when [they are] are sick and can't come to work or what time [they] have to report to work."[10]

[21] I find that the Claimant was not fired. The employer wrote "quit" on the Claimant's Record of Employment as the reason that the Claimant left.[11] In addition, the Claimant did not hear back from the employer, which means the Claimant was not notified that the employer would consider him to have abandoned his job if he refused to drive alternative trucks. One would normally expect some such notification before a dismissal.

[22] The Claimant contends that he was laid off. He told the Commission that he returned to the employer about two weeks after he left and that he "heard" that he was taken off the employee board. He told the Commission that he did not see any point in talking to the employer because he was off the employer board. He assumed he was laid off.

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[9] GD3-32
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[11] GD3-16

Evidence of employer practises related to layoff and recall

[23] The Claimant also argued that it was a "norm" at his workplace to go home and wait for a truck to be assigned.[12] He told the General Division that was laid off seasonally in December and normally called back in April. However, in 2018, he called to inform his employer of his availability in April and had to wait another two months before he was called in to work, without any word from the employer in the meantime. He also stated that "it is usual to conclude you are off work when they don't call you to say that you are laid off", and that he assumed he was laid off as in previous years.[13]

Different circumstances in this case

Available work

[24] The circumstances were different on this occasion than in his experience with the seasonal layoffs. In the past, he was laid off from December to April, presumably because of a shortage of work. In this case, there was work when the Claimant first left and it was still at least a month until the time when he might usually be expected to be laid off.

Claimant's demands

[25] In addition, when the Claimant left the employer on this occasion, he was essentially refusing to drive any truck except his own repaired truck. He might have anticipated that this would not be received well, or be treated by the employer as a layoff due to shortage of work.

[26] I appreciate that the Claimant's response to the General Division questions asserts that he told the employer that the employer should call him when his truck was repaired *or the employer had a "suitable alternative truck."* However, I do not accept that this is accurate, because of other evidence that the Claimant told the employer to call him back when his truck was fixed, and that this is what he was waiting for to return to work.

[27] The Claimant made statements to this effect in his written statement of February 26, 2019,[14] and two oral interviews with the Commission on March 26, 2019, and another one on

[12] AD3-2.
[13] GD7-2.
[14] GD3-18,

May 29, 2019.[15] The employer acknowledged that it also understood that the Claimant told the batcher that the employer should call him only when his truck was fixed.[16]At one point, the Claimant acknowledged he told the employer this, stating explicitly that he said this because he "knew" the employer would not give him another truck.[17]

[28] In a second written statement, the Claimant did say he told the employer to call him when a "safe truck" could be provided.[18] However, at the same time, he noted that he was waiting for his (regular) vehicle to be repaired and then he would return to work.

[29] Whether the Claimant might have been willing to accept another suitable truck if it was offered, the preponderance of evidence is that he did not communicate this to the employer. I find that that the Claimant left the employer with instructions to call him back only when his truck was fixed.

Suspicions of employer motives

[30] Furthermore, the Claimant's own evidence was that he was suspicious that he might not be recalled as he had been in other years. He returned to the employer premises two weeks later, and learned from co-workers that he was off the employee board. He said that he "could not believe it" and that he was angry.[19] This suggests that he understood that there was available work but that the employer was not assigning it to him. He also said that he "assumed [the employer was] trying to force him out and [it] no longer wanted him."[20] He confirmed this in answer to the General Division's questions, saying that the employer had treated him badly and was trying to get rid of him.[21]

Conclusion on layoff

[31] I find that the Claimant was not laid off. There are significant differences in the circumstances of his prior layoffs from those surrounding the Claimant's leaving his employment

[15] GD3-21, GD3-24, and GD3-33,
[16] GD3-32,
[17] GD3-33,
[18] GD3-30
[19] GD3-34.
[20] GD3-33.
[21] GD7-2.

on this occasion. The employer's actions or inaction does not suggest that the Claimant was laid off.

[32] Furthermore, the Claimant knew or ought to have known that he was not laid off. He told the Commission that he found it odd that the employer did not inform him that he had been removed from the employee board,[22] which he discovered within two weeks of the date that he first left the workplace. The Claimant said that he suspected he had been taken off the employer board because the employer was trying to get rid of him. In these circumstances, one would expect that the Claimant would immediately want to know why the employer was not contacting him and would want to confirm his employment status. In a statement to the Commission, he said that he sat home for months waiting for his job and truck back after he left the employer at the end of October 2019.[23] It was not reasonable for the Claimant to assume that the truck repairs were taking a long time or that the repairs had transitioned into his usual seasonal layoff period. It was not reasonable for the Claimant to have taken no steps to confirm his employment status for months.

Voluntarily taking a leave

[33] I have found that he found that the Claimant was not laid off but I have also found that he did not intend to quit. However, a claimant does not have to quit outright to be disqualified from benefits. Claimants are also disqualified under the EI Act, where they do not have just cause for voluntarily taking a leave from employment.

[34] The Claimant says that he was not comfortable driving a standard transmission and that he felt the truck itself was unsafe, but this is not relevant to whether he left or took a leave voluntarily. The question is whether he had a choice to stay or to leave.[24] The Claimant had a choice. I have found that he knew or ought to have known that the employer had not laid him off. I accept that the Claimant chose to stay away from work until the employer offered him his regular truck to drive.

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[22] GD3-25.
[23] GD3-33.
[24] *Peace v Canada (Attorney General)*, A-97-3.

[35] I find that the Claimant voluntarily took an unauthorized leave of absence that had no fixed return date,[25] during the period that he was waiting for the employer to repair and reassign his regular truck to him.

Reasonable alternative to taking leave

[36] The Claimant asserted that the replacement truck he was given on October 25, 2019, was unsafe. He complained that it had a missing step, that the seat was wet because the window had been rolled down, and that it was a standard transmission truck. He said that he had not driven a standard transmission truck for six or seven years.

[37] Based on this evidence, I am not satisfied that his work conditions represented a danger to his health or safety. He said he did not like how this older truck shifted, but he did not suggest that his lack of recent experience driving a standard transmission truck actually caused him any problems when he drove the truck the 12-kilometre distance from one plant to another.[26]

[38] I do not know where the missing step was usually located on the truck, or if it could affect his ability to access or escape from the truck cab. I accept that a missing step could be a hazard but the evidence is insufficient to satisfy me that it is a significant hazard in this case. Therefore, I do not accept that the missing step represented a continuing danger to the Claimant once he was aware of it, such that his working conditions were a danger to his health or safety.

[39] As a reasonable alternative to taking an unauthorized leave, the Claimant could have chosen to stay and to drive the truck he had been given until he could ask the employer for a more suitable replacement truck.

[40] If I am wrong on this fact, and the first replacement truck was so unsafe that the Claimant would have been justified in refusing to drive it any further, this would not change my decision that the Claimant had reasonable alternatives to leaving. The Claimant could have asked to drive some other truck. The Claimant said that he knew there were no other trucks at the location to which he had just driven, but he did not say how he knew this or if he confirmed in any way.[27]

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[25] See JD v. CEIC, 2017 SSTADEI 429, where taking a temporary leave with a fixed return date was not considered to be voluntary leaving.
[26] GD3-32.
[27] GD3-33.

Furthermore, it was only a telephone call, or a 10-minute drive to the plant where he picked the truck up that morning,[28] for the Claimant to check if the employer could make some other truck available from another nearby location. Checking for alternative trucks would have been a reasonable alternative to walking off the job assuming that the employer would accept his decision and recall him when his regular truck was repaired.

[41] I find that the Claimant did not have just cause for taking leave from his employment.

CONCLUSION

[42] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers

[28] *Ibid.*