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

Citation: *A. K. v Canada Employment Insurance Commission*, 2020 SST 499

Tribunal File Number: AD-20-257

BETWEEN:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 16, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Claimant's appeal is allowed.

OVERVIEW

[2] The Appellant, A. K. (Claimant), quit her job because her employer was unwilling to release her from some work shifts. The Claimant needed the time off so that she could take a week-long contract with another employer. When the Claimant applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim. The Commission found that the Claimant had voluntarily left her employment without just cause. This meant that she was disqualified from receiving regular benefits. The Commission refused to change its decision when the Claimant asked it to reconsider.

[3] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal but the General Division dismissed her appeal. The Appeal Division granted her leave to appeal and she is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division made an error of law by failing to consider all the circumstances when it found that the Claimant had no reasonable alternative to leaving her employment. I have made the decision the General Division should have made and I have found that the Claimant had just cause for leaving her employment.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[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* (DESD 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.

ISSUE

[6] Did the General Division make an error of law by failing to consider all the circumstances when it found that the Claimant had no reasonable alternative to leaving her employment?

ANALYSIS

All the circumstances

[7] The law says that reasonable alternatives must be assessed having regard to all the circumstances.[2] One of the circumstances that must be considered, where it is found to exist, is whether a claimant has experienced "a significant modification of terms and conditions respecting wages or salary."

[8] The General Division made an error of law. The General Division considered only whether the Claimant had "a reasonable assurance of another employment in the immediate future."[3] It made no finding as to whether the changes to the Claimant's hours represented a significant change to the terms and conditions of her wages, and did not consider how that circumstance affected the Claimant's reasonable alternatives.

[9] The Commission argued that it was not an error for the General Division to focus its analysis on whether the Claimant had "a reasonable assurance of another employment in the immediate future." The Commission argued that the General Division is only required to consider those circumstances that a claimant expresses as his or her reason for leaving. According to the Commission, the reason the Claimant left her employment was to accept a temporary, short-term contract.

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[2] Section 29(c) of the *Employment Insurance Act* (EI Act).
[3] EI Act, section 29(c)(vi).

[10] I agree with the Commission that the Claimant left her job when she did because of the offer of other work. The Claimant had stated in her application for benefits that she quit to take another job,[4] and it is true that money was a concern for the Claimant. She expressed on a number of occasions that she feared she would not have enough to live at her regular job. She expected the short-term contract to pay much better.

[11] However, I disagree with the Commission that the Claimant's stated reason for leaving is the only circumstance that the General Division must consider. The law says that the General Division must have regard to "all the circumstances." It does not say that it must have regard to all the "reasons". A claimant who leaves his or her employment will usually be able to give some reason for leaving. However, that does not mean that the claimant can explain how every employment circumstance played into the decision to leave. It does not mean that the claimant has turned his or her mind to all of the alternatives to leaving that the Commission might find reasonable. Or, that the claimant has analyzed how every work circumstance might influence the availability of each of the possible alternatives.

[12] Where there is evidence of circumstances under which a proposed alternative is not reasonable, the General Division cannot confirm that the alternative is reasonable heedless of the evidence. The General Division is required to consider all of the circumstances to determine if there was no reasonable alternative to leaving. It must even consider circumstances that a claimant does not cite as the reason, or principal reason, for leaving.

[13] I accept that the Claimant needed to make more money than she was getting at her permanent job. The evidence shows that she was working fewer hours at her permanent job. She needed to make more money because she was earning less money, at least in part. There was evidence that the reduced hours and earnings influenced her decision to quit her job and to accept the temporary contract. In a statement attached to her request for reconsideration, the Claimant said that her employer had hired her in April (2018)[5] to work four days per week at minimum wage.[6] In the same statement, she said that she had only worked two days a week in previous

[4] GD3-10.
[5] The Claimant wrote that this was April 2019, but this appears to have been a slip. Her record of employment states that she began in April 2018, and quit at the end of January 2019.
[6] GD3-32.

weeks and that she was very worried about it. She also said that sales were down in January (2019) and that the employer was cutting back everyone's hours. In an earlier statement, the Claimant told the Commission that it cut hours for part-time staff to two or three days per week in January.[7] The employer confirmed this.[8] She recalled that the employer had stated that it might not schedule part-time staff at all [9](although this final point was denied by the employer).

[14] The Claimant confirmed all of her earlier statements in her testimony to the General Division. She said that that the employer held a staff meeting after Christmas to tell staff that they should expect their hours to be cut. According to the Claimant, the employer said that the part-time staff (which she was) would be the first to have hours cut, and that part-time employees should not be surprised if they received no hours at all. The Claimant also testified that she had been worried that she would not be able to pay her bills if there was no work, or just the two shifts a week.[10]

[15] The Commission characterized the Claimant's reason for leaving as a desire to "improve her financial situation" and cited *Graham* [11]to support its argument that this does not establish just cause. I do not accept that *Graham* is applicable to these facts. In my view, *Graham* and the authorities followed in *Graham* that also consider a claimant's "financial situation",[12] are concerned with claimants who seek to improve their financial situation from the normal terms and conditions of their wages or salary. These decisions do not describe claimants who had been hired to work certain hours or for certain wages but had their hours or wages cut by the employer. If the "financial situation" represented by hour or wage cuts cannot possibly justify a claimant's decision to leave employment, it would make little sense for the EI Act to identify a "significant modification of terms and conditions respecting wages or salary" as a circumstance that must be considered.

[16] The General Division made an error of law when it found that the Claimant had the reasonable alternative of remaining employed without considering all the relevant circumstances.

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[7] GD3-25.
[8] GD3-26.
[9] GD3-25.
[10] Audio record of General Division hearing from timestamp 13:50 forward.
[11] *Canada (Attorney General) v. Graham*, 2011 FCA 311
[12] *Canada (Attorney General) v. Richard*, 2009 FCA 122 ; *Canada (Attorney General) v. Lapointe*, 2009 FCA 147.

The General Division did not consider the Claimant's significant reduction in hours and earnings. This is clearly relevant to whether staying with the employer was a reasonable alternative.

[17] I have found that the General Division made an error of law. That means I must consider the appropriate remedy.

REMEDY

Nature of remedy

[18] I have the authority to change the General Division decision or make the decision that the General Division should have made.[13] I could also send the matter back to the General Division to reconsider its decision.

[19] I accept that the General Division has already considered all the issues raised by this case and that I can make the decision based on the evidence that was before the General Division. I will make the decision that the General Division should have made.

New decision

Relevant circumstances

[20] A claimant who leaves with a reasonable assurance of another employment in the immediate future may sometimes be found to have just cause for leaving their employment. However, the prospective job must be of some permanence.[14]

[21] I find that the Claimant left when she did because her employer would not give her leave to accept a short-term opportunity to work. I accept that she had a reasonable assurance of employment and that she would, in fact, have accepted and worked for the contract employer if she had not gotten sick.

[22] However, I find that the offer of a short-term temporary contract did not, in itself, give the Claimant just cause for leaving her employment. The initial contract was not sufficiently

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[13] My authority is set out in sections 59(1) and 64(1) of the DESD Act.
[14] *Canada (Attorney General) v. Langlois*, A-75-07.

permanent. It was only expected to last one[15] or two weeks.[16] While the Claimant expected that the short-term contract would lead to other work, she did not have start dates or even know for certain there would be other work. She did not have a reasonable assurance of any of that other work in the immediate future. The Claimant knew when she left her permanent job to take the short-term contract that she would likely be unemployed within one or two weeks. This means that it was likely that she would have to burden the employment insurance system at the end of the contract.

[23] Even so, I place significant weight on the fact that the Claimant experienced "a significant change in the terms and conditions respecting her wages or salary", which is a circumstance identified as relevant by the EI Act. I accept that the employer hired the Claimant to work for four shifts per week, but still considered the Claimant a part-time employee. I accept the evidence from both the Claimant and from her former employer that the employer reduced store hours and cut shifts and hours for all staff. I also accept the Claimant's un-contradicted evidence that the employer reduced her own shifts to three, but that it had actually scheduled her for only two shifts in the weeks leading up to the week that she quit. Furthermore, the employer did not tell the Claimant or the Commission when, or even if, the Claimant could expect to receive four shifts a week again. I note that the Claimant left in the month of January, and that the employer said that their busy months were during the period from September to December.[17] This was not for another seven months at the time the Claimant left.

[24] The Claimant and the employer disagree about what the employer said about future prospects for the part-time workers. According to the Claimant, the employer told the part-time staff that the full-time staff get priority and that it might not schedule part-time staff at all.[18] The employer denied that it told the part-time staff that they might not get hours in some weeks. It stated that full-time staff get priority but that cuts are even.[19]

[25] It is possible that the Claimant did not fully appreciate what the employer said or implied when it explained to staff how it was dealing with the slowdown. At the same time, I do not see

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[15] GD3-23.
[16] GD3-37.
[17] GD3-26
[18] GD3-25.
[19] *Supra*, note 17.

how cuts can be "even," as claimed by the employer, while the full-time staff get "priority" at the same time. The employer spoke to the staff in an environment of a "bad economy", during a seasonal slow period, after reducing store hours, and after reducing the Claimant's shifts from four shifts per week to two or three shifts.[20] Whatever the employer actually told the staff, I accept that the Claimant understood the employer to be saying that it might further reduce her shifts, even to where she might receive no shifts in some weeks.

[26] The Commission's argued at the General Division that the Claimant could have remained employed as a reasonable alternative. It reminded the Appeal Division that she had told the Commission that her employer was not intolerable. [21] This is true. When the Commission asked her if her employer was intolerable, she responded, "No. I needed enough money to pay bills." I don't accept that the Claimant meant that her wage conditions were not intolerable or to concede that she could have remained in the job, since she qualified her response by saying that she was not earning enough to pay her bills.

[27] At the time the Claimant left the employer, the employer had been giving the Claimant half as many shifts as had been agreed when the Claimant accepted the job. I infer from this that she was making no more than half the money she had expected to earn at her permanent job by the time she left. At the same time, she was offered a short-term contract as a geologist that she expected to pay her as much in one week as she would have made in six weeks at her permanent employer. She also thought the short-term contract would lead to long-term work because that was how the oil industry worked.[22]

[28] Having regard to all the circumstances, I find that the Claimant had no reasonable alternative to leaving her employment. I have considered that the terms and conditions of her wages significantly changed. The Claimant earned minimum wage at her permanent job and I have no reason to disbelieve her claim that she could not pay her bills when her shifts had been cut to two shifts. There is no evidence that the employer expected circumstances to improve in the short to medium term, and it seemed to the Claimant that they could deteriorate even more.

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[20] *Ibid.*
[21] GD3-23.
[22] *Ibid.*

[29] I have considered that she had an immediate opportunity that would temporarily relieve the financial pressure. Even though that opportunity could not guarantee that the Claimant would not need Employment Insurance benefits after the contract was complete, I accept that continued employment at her permanent employer was unsustainable. It would not be reasonable for the Claimant to remain employed for some indefinite period while she presumably depleted her savings or accumulated more debt. This is particularly true at a time when another opportunity could offer immediate financial relief and a good prospect of a longer-term financial solution.

[30] I have also considered the Claimant's evidence that, when she was hired, she informed the employer that just this sort of temporary contract opportunity might arise. She said that she would need to go, but would be happy to come back. I accept that the employer encouraged the Claimant to believe that it would accommodate this sort of request. The Claimant said that the employer had no objection and "sounded accommodating."[23] Hers is the only evidence on this point, and it seems plausible. She is a professional geologist accepting a minimum wage job outside of her field. I would expect that she might want to have an up-front discussion with her employer about the possibility that she would leave, or take leave, if work in her profession came along. I acknowledge that the Commission did not question the employer about the terms on which the Claimant was hired. However, there is still no evidence that the employer disputed the Claimant's recollection of their initial arrangements.

[31] The Claimant expected that the employer would accommodate her request when she asked for a leave of absence to accept the short-term contract. This would have been a reasonable alternative to leaving but the employer denied her request.

[32] Having regard to all the circumstances, I find that the Claimant had no reasonable alternative to leaving her employment and that she therefore had just cause for leaving.

CONCLUSION

[33] The Claimant's appeal is allowed.

Stephen Bergen

[23] GD3-32.

Member, Appeal Division

HEARD ON:	June 2, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. K., Appellant Josée Lachance, Representative for the Respondent