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

Citation: *CH v Canada Employment Insurance Commission*, 2020 SST 851

Tribunal File Number: AD-20-601

BETWEEN:

C. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 2, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, C. H. (Claimant), is appealing the General Division's decision.

[3] The General Division found that the Claimant did not have just cause for having voluntarily left his employment because he had reasonable alternatives to leaving. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division based its decision on factual errors, without regard for the material before it. In particular, he argues that the General Division overlooked key facts when it decided that it would have been reasonable for him to continue working. The Claimant maintains that he did not have any reasonable alternatives to leaving. He maintains that he had just cause because the working conditions were intolerable and unlikely to improve.

[5] The General Division made an error about changes to the Claimant's salary. But, the General Division identified some reasonable alternatives that the Claimant had to leaving his employment. Two of those alternatives were valid. Therefore, I am dismissing the appeal.

ISSUES

[6] The issues are as follows:

- Did the General Division make a factual error about the changes to the Claimant's salary?
- Did the General Division overlook key facts about whether the Claimant had reasonable alternatives to leaving his job?

ANALYSIS

[7] Under section 58(1) of the *Department of Employment and Social Development Act* (DESDA), the Appeal Division can intervene in the General Division's decision in very limited circumstances. The section does not give the Appeal Division any jurisdiction to conduct any reassessments.[1] The Appeal Division can intervene only if there has been a breach of natural justice, an error of law or if it based its decision on an error of fact.

[8] If there is an error of fact, it had to have been made in a perverse or capricious manner or without regard for the material before it.

[9] The Claimant argues that the General Division made mistakes under section 58(1) of the DESDA. He argues that it ignored key information or made perverse or capricious findings.

Background Facts

[10] The Claimant left his employment with a consulting firm. He had been with this firm since December 2005, working as a tax consultant. He submitted his resignation in May 2019. He remained with the firm until August 2019, to "close up certain clients".[2]

[11] The Claimant's salary was commissions-based. For "in-book clients," he earned commissions at a rate of 23.5%. For "out-of-book clients," he earned 14.5%.[3]

[12] Over time, the Claimant saw his client base grow. The workload became increasingly unmanageable. This led to undue stress and back pain. He voiced his concerns to his employer.

[13] The employer tried to address the Claimant's concerns about his expanding workload. At first, the employer reduced the Claimant's workload. It moved some of his clients to other staff. However, this turned out to be only a short-lived solution. This was because when colleagues left the firm, the Claimant had to share in any redistribution of work. The Claimant's workload went back up over time.

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[1] *Maung v Canada (Attorney General)*, 2020 FC 74, at para. 10.
[2] General Division decision, at para. 22.
[3] At approximately 1:02:40 of the audio recording of the General Division hearing. At various times throughout the hearing, the Claimant testified that he received 14% in commission for out-of-book clients.

[14] By March 2019, the Claimant found that his workload had again become too large to manage. He found that this compromised the level of service that he could offer clients. On top of that, the Claimant found that he did not have adequate office support. This meant that he had to perform duties for which he did not receive any compensation. This aggravated his stress.

[15] On its face, it appeared that the Claimant's compensation remained the same. But, the Claimant found that he had to work harder and longer hours to get the same level of compensation. This was due to the commission structure.

[16] Previously, the Claimant had earned 23.5% commissions on the client files that his employer removed. For the new files his employer gave him in March 2019, he earned 14.5% in commissions. The difference in the rate of commissions meant that he worked more hours to make the same amount of money he earned before. He estimated the loss at approximately $10,000 for the year. He estimated that this represented an extra two to three weeks of work.

[17] The Claimant found that his work situation was not going to improve. The Claimant found that his employer was unable to offer him sufficient accommodations. So, he felt he had no choice but to resign.

[18] The Claimant did not look for any work before leaving his employment. The Claimant had a 60-day non-competition clause in his employer contract.[4] The Claimant intended to look for work during these two months.

Did the General Division make a factual error about the changes to the Claimant's salary?

[19] The Claimant argues that the General Division made a factual error about the change in the terms and conditions regarding his salary. If there was a significant change in the Claimant's

[4] See Confidentiality, Non-competition, Non-solicitation and Proprietary Rights Agreement, at GD2-9 to GD2-19.

terms and conditions respecting his salary, he might have had just cause for leaving his employment.[5]

[20] The Claimant argues that the General Division made an error. It concluded that his salary increased because he received an additional seven out-of-book clients in March 2019. This was on top of his existing 95 in-book clients and 20 out-of-book clients.[6] He earned 14.5% commission on these additional out-of-book clients.

[21] The Claimant acknowledges that he earned additional commissions on these seven out-of-book clients. He did not have these seven out-of-book clients before March 2019.

[22] However, he argues that the General Division mischaracterized this income. He says that the General Division overlooked the fact that, in fall 2018, his employer had reduced his client load to 95 in-book clients. It did this by removing in-book clients.[7] The employer's letter dated May 23, 2019, confirmed that the Claimant had 103 in-book clients in 2017, and that this dropped to 95 in-book clients in 2018.

[23] The Claimant argues that there would have been no change in the terms and conditions of his salary IF his employer gave him in-book clients instead of out-of-book clients. That way, he would have continued to earn 23.5% commissions on the in-book clients. This would have been what he had before his employer reduced his workload in fall 2018 to 95 in-book clients.

[24] But, instead of earning commissions at 23.5%, the Claimant earned commissions at only 14.5%. This was because the employer gave him seven out-of-book clients, instead of in-book clients.

[25] The General Division noted the Claimant's testimony at paragraph 49, that there was a difference in commissions. Yet, it did not address this aspect of the evidence.

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[5] Under section 29(c)(vii), a claimant may have just cause for voluntarily leaving an employment if they had no reasonable alternative to leaving, if there was a significant modification of the terms and conditions respecting wages or salary.
[6] At approximately 30:34 to 34:58 of the audio recording of the General Division hearing.
[7] At approximately 1:06:14 to 1:08:25 of the audio recording of the General Division hearing.

[26] The Claimant undoubtedly earned more from getting additional clients. But, the General Division failed to see a distinction. There was a different commission payout, depending upon whether the client was out-of-book or in-book. The difference in the commission rate was 9%.

[27] The Claimant wanted a reduced workload. But, with staffing changes, the employer had to re-distribute work and increase the Claimant's workload. The Claimant argues that if he had to take on an increased workload, his employer should have given him back in-book clients. Otherwise, this resulted in a decreased commission payout. He claims that the difference in commission payout represented a decrease of about $10,000 in annual salary.

[28] I find that the General Division overlooked the difference in the commissions between in-book and out-of-book clients. The difference in commissions effectively resulted in a significant change in the terms and conditions of the Claimant's salary.

[29] The Claimant earned more after March 2019 than he had been making between fall 2018 and March 2019. This was unsurprising when his workload increased. But, his commission earnings were lower than he had been making before fall 2018. Put another way, although his workload went back up, his earnings dropped because of the lower commission rate.

Did the General Division overlook key facts about whether the Claimant had reasonable alternatives to leaving his job?

[30] The Claimant argues that the General Division overlooked key facts about whether he had reasonable alternatives to leaving his job. The Claimant argues that, if the General Division had not overlooked these key facts, it would have concluded that he did not have any reasonable alternatives but to leave his job when he did.

[31] The General Division found that the Claimant had reasonable alternatives as follows:

- The Claimant could have sought accommodations from his Employer. For instance, it found that the Claimant could have asked his employer to reduce his workload.

- The Claimant could have continued working under the same conditions he had been working from May to August 2019. The employer advised the Respondent, the Canada Employment Insurance Commission (Commission), that it had offered the Claimant a

position under the same conditions that he left.[8] The General Division found that, since the Claimant continued working for another three months after he had already submitted his resignation, the working conditions could not have been that intolerable.

- The Claimant could have given his new manager a chance to explore ways to accommodate him.

- The Claimant could have asked for a leave of absence. During a leave of absence, the Claimant could have sought medical advice about quitting his job. Or, he could have looked for other suitable employment.

- The Claimant could have looked for other work before he gave his resignation letter or left his job. The General Division acknowledged that there was a two-month non-competition clause in the Claimant's employment contract. But, the General Division suggested the Claimant could have asked his employer to waive this two-month period. The General Division also found that, even if there was a non-competition clause, the Claimant could have at least started looking for work.

The Claimant's Arguments

[32] The Claimant argues that the General Division failed to recognize that these options were unrealistic. He says that the General Division overlooked the fact that he tried to find solutions with his employer.

[33] As it was, the Claimant felt that he had an unmanageable workload that caused him stress and pain. He raised his concerns with his employer.

[34] In fall 2018, the Claimant's employer reduced his workload by removing some of his files. But, this did not last long. Within months, his employer reassigned more work to him. So, his workload again became unmanageable.

[8] See Supplementary Record of Claim, dated January 8, 2020, at GD3-60.

[35] On top of that, the firm was continuing to lose staff. So, he did not have much office support.

[36] The Claimant understood that the situation would not be improving. Even if the firm hired additional staff, he felt it would take two years before any new staff would be able to relieve him of his workload. (He notes that when he left three months later, the firm had yet to hire anyone, even though it knew he was leaving.)

[37] The Claimant argues that the General Division was mistaken when it suggested that the employer could have reduced the Claimant's workload again. The General Division believed that the employer could reduce the workload to what it had been before March 2019. The Claimant says that this ignores the fact that the employer was "already documented as having refused to do this."[9] Also, the ongoing loss of employees only meant their work would be redistributed to any remaining employees. This included the Claimant.

[38] The Claimant believed that he did not have any options other than to resign from his job. When the Claimant submitted his resignation, his branch manager suggested that the Claimant was "burning out." He also suggested that maybe the Claimant needed a break from his duties. The manager directed the Claimant to his superior.

[39] However, the employer dismissed the branch manager.[10] It is not clear from the evidence whether the employer's dismissal of the branch manager had anything to do with the Claimant. Either way, it is clear that the Claimant believed that there were no viable options anyway.

[40] The Claimant shared his concerns with the Operations Manager for Eastern Canada. The Operations Manager told him that there were no short-term solutions.[11] The Operations Manager offered to transfer the Claimant to a start-up branch in Eastern Canada. But, the Claimant did not see this as a workable option. He felt that the workload and staffing issues were even greater at the start-up branch.

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[9] See Claimant's application to the Appeal Division, filed on April 8, 2020, at AD1-73.
[10] See Claimant's application for Employment Insurance benefits, at GD3-15.
[11] *Ibid*, at GD3-16.

[41] The Claimant states that he agreed to continue working after he resigned to "close up certain clients".[12] But he says that the General Division neglected to appreciate that the terms he was working on were "tied to a finite body of work that had come to an end."[13]

[42] The Claimant's employment contract had a non-competition clause. The General Division suggested that the Claimant could have asked the employer to waive the 60-day non-competition clause. But, the Claimant says that it was clear his employer intended to enforce this clause. After all, the employer's letter of May 23, 2019, reminded him of his contractual obligations. His employment contract forbid him from competing against the firm for 60 days.[14]

[43] As well, because of the non-competition clause, the Claimant felt that he could not look for other work while he was still employed.

Review of the General Division's Decision

[44] The General Division acknowledged the Claimant's evidence. It noted the Claimant's evidence under the heading, "What were the circumstances that existed when the Claimant quit?" It noted the Claimant's concerns that the overall workload was unmanageable and caused the Claimant undue stress. The General Division also noted that the Claimant had reported that any solutions were unavailable over the short term.

[45] The General Division was mindful of the Claimant's evidence about any options he had to leaving. It did not overlook key facts about whether the Claimant had reasonable alternatives to leaving his job.

[46] The General Division simply did not accept the Claimant's evidence about the feasibility of any options he had. But, the General Division thereby failed to recognize the working environment in which the Claimant found himself.

[47] To begin with, it is clear that the Claimant's employer was unable to provide any further accommodations. There had already been a loss in staff. With the staff turnover, the employer

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[12] General Division decision, at para. 22.
[13] See Claimant's application to the Appeal Division, filed on April 8, 2020, at AD1-71.
[14] See employer's letter dated May 23, 2019, at GD3-57.

redistributed work to any remaining personnel. By the time the Claimant left the firm, his employer had yet to hire any staff. Support staff had also left the firm.

[48] The General Division also suggested that the Claimant could have stayed on working under the same conditions he had been working in the final months of his employment. However, this overlooked the fact that the Claimant had agreed to stay on to "close up certain clients."

[49] The employer did not give the Claimant any additional work while he closed these files. That certainly would not have been the case if the Claimant were to have continued working at the firm. The Claimant's workload in the last three months were only available because he was leaving the firm and had to finalize his files.

[50] If the Claimant had remained with the firm, the Claimant anticipated that he would have seen his workload increase. The employer was unable to offer the kind of accommodations that the Claimant sought.

[51] The General Division was unduly optimistic that the Claimant's new branch manager could have found other options. Yet, the Claimant found that the new branch was unfamiliar with the situation. Even the Operations Manager had been unable to provide any viable, long-term options for the Claimant. According to the Claimant, the employer had also advised him that there were no short-term solutions.

[52] The General Division suggested the Claimant could have asked his employer to waive the non-competition clause in his employment contract. But, the evidence showed that the employer intended to enforce these provisions.

[53] Most of the alternatives that the General Division identified were not practicable, based on the Claimant's own evidence. This left two remaining options that the General Division identified:

- The Claimant could have asked for a leave of absence. During a leave of absence, the Claimant could have sought medical advice about leaving his job. He could have also sought alternative employment.

- The Claimant could have looked for other work before he gave his resignation letter or left his job, even if he had a non-compete clause in his employment contract. The General Division also found that, even if there was a non-competition clause, the Claimant could have at least started looking for work.

[54] The Claimant agrees that that he did not ask any of his medical practitioners to provide a report to address the issue of whether he could continue working. But, he claims that his chiropractor's report proves that he had medical limitations.[15] On top of that, he had high stress levels.

[55] None of this explains why asking for a leave of absence was not a reasonable alternative for the Claimant to leaving his employment. It is speculative whether the employer would have granted the Claimant a leave of absence. But, under the circumstances, the Claimant still had an obligation to at least make a request.

[56] The Federal Court of Appeal has considered what represents a reasonable alternative. It has held that looking for other work before quitting is generally a reasonable alternative.[16] The General Division and Appeal Division are both bound to follow decisions of the Federal Court of Appeal. So, the General Division had to assess whether looking for other work was a reasonable alternative for the Claimant, given the circumstances.

[57] The Claimant explained that his priority was leaving his employment, rather than looking for other work. In his application, he wrote that the "nature of the problems themselves precluded [him] from attending to other pursuits while simultaneously continuing [his] employment."[17]

[58] The Claimant was under great stress. He intended to look for work after he left the firm. Besides, he believed that his employment contract prevented him from even looking for other work while still employed.

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[15] See chiropractic report dated October 22, 2019, at GD2-8 and GD3-49.
[16] *Lakic v Canada (Attorney General)* 2013 FCA 4.
[17] Application for Employment Insurance benefits, at GD3-18.

[59] The Claimant's employment contract restricted him from working with his employer's competitor for 60 days after leaving his employment, or after he last provided services to the employer. But, the Claimant's contract did not restrict the Claimant from looking for other work before he left his employment. In other words, the Claimant could have looked for other work, provided they did not complete with the Claimant's employer.

[60] The General Division found that the Claimant could have looked for work before leaving his employment. However, the General Division seemed to have considered this in the context of a leave of absence. That is, if he had been on a leave of absence, he could have looked for work then. It is unclear whether the General Division also considered whether looking for work while still employed was feasible.

[61] Even so, the evidence showed that the Claimant did not face any barriers—medical, physical, contractual, or other—that prevented him from looking for other work while he remained employed.

[62] The General Division may not have appreciated some of the Claimant's circumstances when it assessed whether he had reasonable alternatives to leaving his employment. Despite this, the General Division's overall analysis and conclusions are sound. This is because the General Division identified at least two viable reasonable alternatives that the Claimant could have attempted to pursue. It found that the Claimant could asked for a leave of absence or he could have looked for other work before he left his employment.

OUTCOME

[63] The General Division made a factual error about the changes to the Claimant's salary. There was indeed a significant modification of the terms and conditions regarding the Claimant's salary.

[64] But, this does not automatically mean that the Claimant had just cause for having voluntarily left his employment. After all, section 29(c) of the *Employment Insurance Act* also required the Claimant to show that he had no reasonable alternatives to leaving his employment.

[65] As the Commission argued, the question of reasonable alternatives is "a necessary and non-severable element of "just cause" determinations.[18]

[66] In this case, the General Division found that the Claimant had reasonable alternatives. The General Division may have failed to recognize the Claimant's circumstances when it assessed the reasonableness of some of those alternatives. But, it identified some reasonable alternatives that were viable. For one, the Claimant could have asked for a leave of absence. And two, the Claimant could have looked for work before leaving his employment. The Claimant did neither. There was a 60-day non-competition clause after the Claimant left his employment. But, this did not serve as a barrier to any efforts the Claimant might have undertaken to look for and secure assurances of employment. There was nothing either that prevented the Claimant from asking for a leave of absence.

[67] For these reasons, the Claimant did not have just cause for having left his employment.

CONCLUSION

[68] I find that the General Division overlooked some of the facts and, consequently, made factual errors. However, the General Division identified two reasonable alternatives that the Claimant had to leaving. These alternatives were reasonable, under the circumstances. For this reason, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	August 18, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. H., Appellant M. Allen, Representative for the Respondent

[18] See Commission's submissions filed on July 27, 2020, at AD2-4.