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

Citation: *VD v Canada Employment Insurance Commission and X*, 2021 SST 1

Tribunal File Number: AD-20-747

BETWEEN:

V. D.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

and

X

Added Party / Employer

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 2, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for a redetermination.

OVERVIEW

[2] The Appellant, V. D. (Claimant), is appealing the General Division's decision. The General Division found that the Claimant had reasonable alternatives to leaving his employment with his former employer, the Added Party (Employer). The Claimant worked at a bakery that operates out of the owner's home. The General Division concluded that the Claimant did not have just cause for leaving his employment.

[3] The Claimant argues that the General Division made several errors. He argues that the General Division member was biased in favour of his Employer. He also argues that the General ignored some of the evidence and that it made errors of law. The Respondent, the Canada Employment Insurance Commission, accepts some of the Claimant's arguments. The Employer disputes that the Claimant had just cause.

[4] I find that the General Division made some mistakes in its decision. However, I find that there is a gap in the evidence on a critical point. For that reason, I am returning the matter to the General Division for a redetermination.

ISSUES

[5] The Claimant has raised several issues, set out below.

- Did the General Division fail to consider whether the Claimant had just cause to leave his employment because of family obligations?
- Did the General Division fail to consider whether the Claimant had just cause for leaving his employment because of antagonism with his supervisor?

- Did the General Division fail to consider whether the Claimant had just cause for leaving his employment because the Employer's practices were allegedly contrary to the law?
- Did the General Division fail to consider whether the Claimant had just cause for leaving his employment because of any other reasonable circumstances?
- Did the General Division fail to consider the cumulative effect of all of the Claimant's reasons for leaving his job?
- Did the General Division place too much weight on unsworn evidence?
- Did the General Division overlook the Claimant's evidence regarding his job search efforts?
- Did the General Division base its decision on erroneous findings of fact at paragraph 17 of its decision?
- Is there a reasonable apprehension of bias?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* lets the Appeal Division intervene in decisions of the General Division. But, this happens in only a limited set of circumstances. The section does not give the Appeal Division any jurisdiction to conduct any reassessments.

[7] The Appeal Division may intervene if there are errors in law. The Appeal Division may also intervene if the General Division based its decision on any errors of fact, if it made them without regard for the material before it. The Appeal Division may also intervene if the General Division failed to observe a principle of natural justice.

[8] The Claimant argues that the General Division made several mistakes under section 58(1) of the DESDA.

- **Did the General Division fail to consider whether the Claimant had just cause to leave his employment because of family obligations?**

[9] No. I find that the General Division did not fail to consider whether the Claimant had just cause because of family obligations. This issue simply did not arise before the General Division.

[10] Under section 29(c)(v) of the *Employment Insurance Act* (EIA), just cause for voluntarily leaving an employment may exist if a claimant had an obligation to care for a child or a member of the immediate family.

[11] The Claimant is a single parent of four dependent children. He claims that he fits squarely within the section because he has an obligation to care for his four children.

[12] In my leave to appeal decision, I set out the evidence that suggested why the Claimant left his employment. But, there was nothing to suggest that he left his employment because of family obligations.[1]

[13] The Claimant has not referred me to any evidence to show otherwise. Without any evidence or suggestion that the Claimant left his employment because of obligations to care for a family member, there was no basis for the General Division to consider whether section 29(c)(v) of the EIA applied.

- **Did the General Division fail to consider whether the Claimant had just cause for leaving his employment because of antagonism with his supervisor?**

[14] Yes. I find that the General Division failed to consider whether the Claimant had just cause for leaving his employment because of antagonism with his supervisor.

[15] Under section 29(c)(x) of the EIA, just cause for voluntarily leaving an employment may exist if there was antagonism with a supervisor, if an employee was not responsible for that antagonism, and if there were no reasonable alternatives to leaving that employment.

[16] The Commission agrees with the Claimant's claims that the General Division failed to consider section 29(c)(x) of the EIA.

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[1] Leave to appeal decision, at para. 20.

[17] The Commission submits that the General Division should have analyzed the relationship between the Claimant and his employer. In particular, the Commission says the General Division should have considered whether there was antagonism and who was responsible for having created it.

[18] The Commission also claims that the General Division should have considered whether any alternatives to leaving were reasonable, given the Claimant's relationship with his employer.

[19] The Employer argues that the General Division did not make any errors in its decision. The Employer denies that there was any antagonism with the Claimant. Indeed, the owner stated that she "very rarely"[2] worked with the Claimant.

[20] However, I have to determine whether the General Division even examined whether the Claimant left his job because of antagonism with his supervisor. If the General Division overlooked this issue without considering it, then that would represent an error. It would only be at that point that I would have to decide how to address such an error—and only then would I need to assess whether any antagonism existed.

[21] The General Division noted the Claimant's claim that he had to resign from his job because of working conditions and an antagonistic relationship with his employer.[3]

[22] Working conditions and an antagonistic relationship are two distinct considerations. After all, working conditions could simply refer to, for instance, unsafe working conditions such as lack of ventilation. If there is an antagonistic relationship, generally there is active hostility or opposition between individuals.

[23] Yet it is not obvious that the General Division considered the Claimant's second issue, that he might have left his employment because of antagonism with his employer.

[24] At paragraph 17, the General Division wrote that the Claimant indicated that he left his employment because of his working conditions. There was no mention of antagonism.

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[2] Appeal Division hearing on October 14, 2020.
[3] General Division decision, AD1A-2, at para. 1.

[25] The General Division listed the Claimant’s working conditions:

i. No lunch breaks
ii. Reprimanded for entering building early
iii. Messy worker
iv. Washroom
v. Exhaust fan
vi. Bakery door left open
vii. Name calling
viii. Belittlement by management
ix. Management power struggle
x. Deliveries
xi. Bullying
xii. Not enough hours and
xiii. Weight loss and stress

[26] Some of these conditions could have been the foundation for an antagonistic environment. However, it is unclear whether the General Division considered any of these conditions in that context.

[27] Apart from the single reference to antagonism in paragraph 1, the General Division did not refer to or discuss antagonism, or anything similar to it, again in its decision.

[28] It may be that the General Division dismissed the idea that the Claimant had an antagonistic relationship with his employer. After all, the General Division found, for instance, that management did not belittle the Claimant. The General Division also found that there was no bullying.

[29] However, without specifically mentioning antagonism or anything similar to it, it is unclear whether the General Division considered if any antagonism existed between the Claimant and his supervisor, or whether antagonism could have explained why the Claimant left his job.

[30] For this reason, I find that the General Division erred by failing to consider whether just cause existed under section 29(c)(x) of the EIA. In other words, the General Division failed to consider whether the Claimant might have had just cause for having left his employment because of antagonism with his supervisor.

- **Did the General Division fail to consider whether the Claimant had just cause because the Employer's practices were allegedly contrary to the law?**

[31] No. The General Division did not consider whether the Employer's practices were contrary to the law. But, there was insufficient evidence to support these allegations anyway.

[32] Under section 29(c)(xi) of the EIA, just cause for voluntarily leaving an employment may exist if the practices of an employer are contrary to law.

[33] The Claimant claims that section 20 of the Ontario *Employment Standards Act* entitles him to an "eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period." The Claimant claims that he worked more than five hours per day most, if not all, of the time. He claims that his employer deprived him of this entitlement.

[34] The Claimant argues that the General Division focused on whether there was a lunch break at all and on the employer's offer for him to use the family dining room for his shortened break. The General Division wrote:

> 1. No lunch breaks. While the [Claimant] asserts he was not given lunch breaks he further states he sat on the steps and ate his lunch. When he referred to Provincial Standards regarding same, he used the criteria regarding an 8 hour work day which was not the case here. The employer, at the hearing, rebutted the [Claimant's] claim and stated he was repeatedly told he could use the family dining room to have his lunch and associated break. He did not refute this statement.[4]

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[4] General Division decision, AD1A-4, at para. 17, point one.

[35] The Commission argues that the General Division did consider the issue of lunch breaks. The General Division rejected the Claimant's allegations that his employer deprived him of lunch breaks. It also noted that there was the possibility of using the Employer's family dining room.

[36] The General Division noted that the Claimant did not refute the Employer's evidence on the issue of lunch breaks. The General Division accepted the employer's evidence. The General Division determined that the Claimant did in fact have lunch breaks.

[37] The Claimant initially argued in his notice of appeal at the General Division that his employer did not provide him with lunch breaks. In his notice of appeal, the Claimant alleged that there were "no lunch breaks".[5] There, the Claimant wrote, "when asked why we were not given lunch breaks, I was told 'I pay you for your lunch break, so eat your lunch quickly and get back to work.' There was no lunchroom, table or chairs so I would sit on a step to quickly eat a sandwich."[6] The Claimant also testified that there were no lunch breaks.[7]

[38] However, after the Employer testified that the Claimant did in fact have lunch, the Claimant acknowledged that he had a lunch break. The parties agreed that the Claimant took approximately 10 to 15 minutes for lunch.

[39] At that point, the Claimant's arguments evolved. He argued that he did not get a full 30-minute lunch break, as opposed to not having a lunch break at all.

[40] The owner of the business agreed that, in hindsight, she "should have probably given [the Claimant] an unpaid half an hour lunch break."[8] At the same time, the owner also testified that she paid the Claimant when he took his lunch break.

[41] The General Division did not make any findings as to whether the lunch breaks met the requirements of section 20 of the *Employment Standards Act*. Instead, the General Division

[5] Notice of Appeal – Employment Insurance – General Division, at GD2-9.
[6] *Ibid*.
[7] At approximately 42:00 of the audio recording of the General Division hearing.
[8] At approximately 44:02 of the audio recording of the General Division hearing.

focused on whether the Claimant had any lunch breaks at all because the Claimant had alleged, “no lunch breaks” in his notice of appeal.[9]

[42] In my view, paying an employee for a 15-minute lunch break does not negate an employer’s obligations under section 20 of the Ontario *Employment Standards Act*.

[43] Even so, I find that there is insufficient evidence that the Claimant’s 15-minute lunch breaks necessarily reflected the Employer’s practices. There was no evidence that the Employer prohibited the Claimant from taking a 30-minute or longer lunch break or a combination of two 15-minute breaks over a five-hour period.

[44] Indeed, the owner testified that she encouraged the Claimant to go upstairs and take his lunch at the dining-room table. She says that she could have taken a half hour lunch off his pay every day. She claims that she told him, “Go, but he never did, so [she] paid him.”[10] The evidence suggests that, if anything, there was some flexibility and that the Claimant chose not to take an unpaid 30-minute lunch break.

[45] The Claimant also alleges that the employer may have engaged in some “under the table” business.[11] However, these are largely unspecified allegations, as the Commission notes. Without specifying the nature of these practices, and without any evidence to support these allegations, I find that the General Division was in no position to address whether these other practices were contrary to law.

[46] I recognize that the Claimant argued at the General Division that the Employer should have kept the exhaust fan running when the ovens were in use. The General Division found that this represented the Claimant’s opinion. The Claimant claims that there was a legal requirement for the fans to operate. However, the Claimant did not refer to any specific regulatory requirement of this. The evidence fell short in establishing that this was a practice contrary to law.

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[9] Notice of Appeal – Employment Insurance – General Division, at GD2-9.
[10] At approximately 44:30 of the audio recording of the General Division hearing.
[11] At approximately 42:00 of the audio recording of the General Division hearing.

[47] I find that the General Division did not commit any errors under section 29(c)(xi) of the EIA.

- **Did the General Division fail to consider whether the Claimant had just cause for leaving his employment because of any other reasonable circumstances?**

[48] No. The General Division did not fail to consider whether the Claimant had just cause because of any other reasonable circumstances.

[49] The Claimant argues that his economic circumstances justified leaving his employment. He claims that he needed to leave his employment so he could put all of his efforts into finding more gainful and steady employment.

[50] There is no legal basis for this argument.

[51] Under section 29(c)(xiv) of the EIA, just cause for voluntarily leaving an employment may exist if there are any other reasonable circumstances that are prescribed.

[52] For the purposes of section 29(c)(xiv) of the EIA, the prescribed circumstances are set out in section 51.1 of the Employment Insurance Regulations (Regulations). They include circumstances in which the Claimant has to accompany a person with whom he has been cohabiting in a conjugal relationship for a period of less than one year and where

(i) either of them had a child or adopted a child during that period

(ii) the Claimant or that person is expecting the birth of a child, or

(iii) the child has been placed with the Claimant or that person during that period for the purpose of adoption.

[53] As I noted above, in my leave to appeal decision, I set out the evidence that suggested why the Claimant left his employment.

[54] There was no mention or evidence of any of the prescribed circumstances set out in section 55.1 of the Regulations.

[55] The Claimant has not referred me to any evidence to show otherwise. Without any evidence or suggestion that the Claimant left his employment because of any of these prescribed circumstances, there was no basis for the General Division to consider whether section 29(c)(xiv) of the EIA applied.

[56] The Claimant argues that just cause does exist because of economic considerations.[12] He is not relying on section 29(c)(xiv) of the EIA. He relies on a 2003 decision of the Canadian Umpire Benefit (CUB) 57874.

[57] In that case, that claimant quit her job to relocate from New Brunswick to the Toronto area because her wages were poor and she found it difficult to make a living. There were better job opportunities in the Toronto area. The Board of Referees found that claimant did not have just cause. However, the Umpire found that, in determining whether a claimant had just cause to leave a job, one had to consider all of a claimant's circumstances, including their economic circumstances.

[58] With respect, CUB 57874 is inconsistent with section 29 of the EIA and with established case law. The Federal Court of Appeal has held that circumstances similar to those of the Claimant do not justify voluntarily leaving one's employment.

[59] For instance, the claimant in *Tremblay*[13] left his employment because of insufficient pay. The Federal Court of Appeal held:

> We are all of the view that the umpire erred in law in finding that the alleged insufficiency of the salary earned could constitute just cause within the meaning of s. 28 [now section 29]. The fact that in the claimant's view an employment is not sufficiently well paid certainly cannot as such justify him in abandoning it and compelling otherrs [*sic*] to support him through unemployment insurance benefits.

[60] Decisions of the Federal Court of Appeal are binding on me, unlike those of the Umpire. I am required to follow and apply decisions of the Federal Court of Appeal. With that, it is clear that the Claimant's economic circumstances did not give him just cause to voluntarily leave his

[12] Claimant's submissions filed on October 9, 2020, at AD3-4. The Claimant argues that economic circumstances can represent just cause: CUB 57874.
[13] *Tremblay*, A-50-94.

employment under section 29 of the EIA. I find that the General Division did not err in law by not considering the Claimant's economic circumstances.

- **Did the General Division fail to consider the cumulative effect of all of the Claimant's reasons for leaving his job ?**

[61] Yes. I find that the General Division failed to consider the cumulative effect of the Claimant's reasons for leaving his job.

[62] The Claimant claims that he had several reasons for leaving his employment. He argues that the concept of just cause is not limited to a single circumstance. He says that a collection of circumstances, when considered on a cumulative basis, may provide just cause for leaving one's job.

[63] The Claimant notes that the General Division found each circumstance on its own was not "serious enough that it would cause [the Claimant] to impulsively leave when [he] did."[14] In doing so, he argues that the General Division considered his reasons on an individual basis, rather than on a cumulative basis as it should have.

[64] The Claimant insists that the General Division's approach was wrong. He argues that the General Division should have recognized that multiple circumstances explained his departure. He says that the General Division should have viewed those circumstances together when it assessed whether he had just cause to leave his employment.

[65] The Claimant argues that failing to consider the cumulative effect of several circumstances represents a legal error. He cites *S.W. v Canada Employment Insurance Commission*.[15] In that case, the Appeal Division member determined that it is an error of law to consider all circumstances separately, if more than one exists. The member found that the cumulative effect of several circumstances might be greater than any one of them separately.

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[14] General Division decision, AD1A-4, at para. 17, at point four. The passage actually referred to only the washroom access issue. The Claimant had to face the owner's three dogs when he went to the bathroom. The General Division found that the Claimant encountered this situation throughout his employment. The General Division found that the washroom issue was not that serious that it would cause the Claimant to "impulsively leave his job when he did."
[15] *S.W. v Canada Employment Insurance Commission*, 2017 SSTADEI 437.

[66] The Commission believes that the General Division ignored the Claimant's attempts to resolve some of the issues. The Commission also believes that, by focusing on each example provided by the Claimant, the General Division failed to consider the progressive and cumulative effects of multiple circumstances on the Claimant's decision to leave his employment.

[67] The Employer did not offer any submissions on this issue.

[68] In my view, the General Division looked at each circumstance individually. It did not consider the cumulative effect of the Claimant's circumstances.

[69] The Claimant claims that there were several incidents that, when considered together, establish that there was antagonism. In this regard, the General Division should have considered the cumulative effects that multiple circumstances could have had on the Claimant's decision to leave his employment.

- **Did the General Division place too much weight on unsworn evidence?**

[70] No. The General Division was acting within its authority when it decided how much weight to assign to unsworn statements.

[71] The Claimant argues that the General Division should not have given any deference to unsworn statements. The Employer had obtained supporting statements from her employees. These employees spoke favourably about the Employer and the working conditions.

[72] From this, I understand that the Claimant is arguing that the General Division placed too much weight on this evidence. The Claimant argues that there are two primary reasons the General Division should have given little, if any, weight to these statements: (1) there was the "potential for bias or disincentive for the employees to portray their employer in a negative light so as not to harm their employment relationship"[16] and (2) the statements were unsworn.

[73] Ideally, the Employer would have produced the witnesses, or the Claimant would have asked the employer to produce them for the purposes of cross-examination. However,

[16] Claimant's submissions filed on October 9, 2020, at AD3-5.

proceedings before the General Division are largely informal and the General Division can accept unsworn testimony in the form of witnesses' statements.

[74] General Division members should vigorously test such evidence to the extent possible, to ensure its reliability, accuracy and consistency with the balance of the evidence. In this case, it appears that the General Division member did that.

[75] Even if it had not, assessing and measuring the weight to assign to that evidence is an exercise that lies exclusively with the General Division in its role as the trier of fact.[17] Unless the General Division ignored evidence, or made perverse findings, I would not interfere with its authority to make factual findings. The General Division member was entitled to assign whatever weight it deemed was appropriate.

- **Did the General Division overlook the Claimant's evidence regarding his job search efforts?**

[76] Yes. I find that the General Division overlooked the Claimant's evidence regarding his efforts to find other employment before he left his job.

[77] At paragraph 22 of its decision, the General Division wrote that, "The [Claimant] neither sought out any type of employment prior to his quit [*sic*]."

[78] However, as the Commission notes, there was some evidence that the Claimant did look for work. He looked for work during a temporary layoff. In his notice of appeal, for instance, the Claimant wrote:

> 12. Not Given Enough Hours
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> We were all laid off in late December 2019 because business was slow at which time I decided to look for a new job.[18]

[79] The Claimant's job search took place during a layoff. Even so, the General Division seemed to have overlooked this fact. As the Commission notes, there was other evidence too:

[17] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[18] Notice of Appeal, at GD2-10.

- In a telephone conference with the Commission on April 6, 2020, the Claimant stated he looked for other jobs and had several interview [*sic*] however, he did not secure employment elsewhere before quitting his job.[19]

- In an email dated May 5, 2020, the Claimant wrote, "in January 2020 I was also trying to find a new job so I phoned a friend of mine … at the time he was slow so he told me maybe later … I told [the Employer] I wanted to find a job with more hours.[20]

[80] The evidence before the General Division showed that the Claimant looked for work. Given this, the General Division made a factual error when it concluded that the Claimant had not looked for any work before leaving his employment and that he therefore had reasonable alternatives to quitting.

[81] To be clear, I am not suggesting that the Claimant lacked reasonable alternatives to leaving. Rather, I find that the General Division failed to consider the impact his job search had on that question.

- **Did the General Division base its decision on erroneous findings of fact at paragraph 17 of its decision?**

[82] The Claimant argues that the General Division made several erroneous findings of fact upon which it based its decision, that:

i. The Claimant's lunch breaks complied with the requirements under the Ontario *Employment Standards Act* – the Claimant claims that he did not get a full 30-minute lunch break. He argues that because he did not get 30 minutes for lunch, his employer engaged in practices that are contrary to the law. He argues that the General Division failed to acknowledge the employer's practices.

   As I noted above, the Claimant did not refer me to any evidence to show that his employer forbid him from taking 30 minutes or that he took less than 30 minutes for a lunch break or for two eating periods that total at least 30 minutes.

[19] Supplementary Record of Claim, dated April 6, 2020, at GD3-20
[20] Claimant's email dated May 5, 2020, at GD3-32.

ii. The Claimant's employer reprimanded him for entering her home – the Claimant explains why he entered her home and says that the incident contributed to the antagonism that he felt with his employer.

The Claimant suggests that his employer did not have any justification to reprimand him. The fact that the Claimant had a legitimate explanation for entering the Employer's home does not mean the General Division made an erroneous finding. Indeed, the parties agree that the Employer got upset with the Claimant when he entered her home. There was no error about this particular fact.

The General Division did make one technical factual error on this point. It found that the Claimant entered the Employer's home at 7 a.m. The Claimant states that he entered his employer's home before his shift began at 7 a.m.[21] In his notice of appeal, the Claimant indicated that he entered the building five minutes early.[22] However, I find that nothing turns on it, as the General Division did not base its ultimate decision that the Claimant did not have just cause on whether he arrived before or exactly at 7 a.m.

iii. It found that the Claimant failed to mitigate the issue over access to the washroom. The Claimant says that when he tried to access the workplace washroom, the Employer's three dogs jumped on him. The Claimant advised his employer that he should not have to encounter the dogs each time he attempted to access the washroom.

The General Division found that the Claimant had the onus to attempt to mitigate the situation with the employer. The General Division relied on this finding when it decided that the Claimant had reasonable alternatives to leaving his employment.

The Claimant argues that the General Division made a factual mistake because he did in fact attempt to mitigate the situation by speaking with his Employer.

[21] Claimant's submissions filed on October 9, 2020, at AD3-6.
[22] Notice of Appeal, at GD2-9.

Apart from speaking with his Employer, it is unclear what other mitigation efforts the Claimant could have pursued. Thus, I find that the General Division made an erroneous finding that the Claimant should have taken steps to mitigate the situation when there was evidence that he tried.

iv. It found that the Claimant failed to provide advice to his employer. The General Division wrote, "Again, if the open door had a negative effect on the quality of the employer's product, responsible workers and management should be able to point and address the issue, it is not grounds to quit the employment."[23]

The Claimant denies that he was irresponsible and maintains that he raised this issue with his employer. He says that he cautioned against leaving the door open because it would diminish the quality of baked goods. He claims that his employer ignored his advice. He also claims that when baked goods failed to meet the owner's standards, she blamed him.[24]

The Claimant "lamented that [he] was cold,"[25] but it is unclear from the Notice of Appeal whether the Claimant actually also told his employer that the dough would become dry and would not turn out.

I am not suggesting that this could not have occurred. However, there was no evidence that the Claimant told his employer that opening the door affected the quality of the baked goods. This allegation first surfaced in the Claimant's appeal before the Appeal Division.

v. It found that the Employer blamed the Claimant for a baking mistake. The Claimant argues that the Employer was not entitled to "alone … berat[e] [him] for the mistake [of preparing date squares] as it is [the supervisor's job] to ensure that what is being done is correct."[26]

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[23] General Division decision, AD1A-5, at para. 17, point six.
[24] Application to the Appeal Division, filed on August 14, 2020, at AD1-13 and Claimant's submissions filed on October 9, 2020, at AD3-6
[25] Notice of Appeal – Employment Insurance – General Division, at GD2-9, point 6.
[26] Claimant's submissions filed on October 9, 2020, at AD3-7.

In his notice of appeal, the Claimant alleges that the owner told him that he was "…dumb and [doesn't] know anything"[27] and that the she should dock his pay. He found these comments belittling. In his notice of appeal, the Claimant also wrote that the owner frequently reminded him that she had a "filing cabinet full of your mistakes, there's no room for anymore errors."[28]

At the General Division hearing, the Claimant testified that his employer belittled him "all the time and put him down,"[29] to the point that he could no longer tolerate it.[30]

The Employer denied that it ever belittled the Claimant. The owner testified that "it never happened"[31] and that she "would never belittle him."[32] The Employer also testified that, as the owner, she tended to be upstairs and frequently away from the business [33] For that reason, she relied on statements from her employees, as they worked side-by-side and more closely with the Claimant than she did.

The General Division member noted that the other employees found the Employer respectful towards everyone. As a result, it seems that the General Division rejected the Claimant's allegations that the Employer made any belittling comments. The General Division did not make any specific findings about whether the Employer made the alleged belittling comments towards the Claimant, such as calling him dumb.

However, the employees' statements were little more than character statements. The employees spoke about their own relationship with the Employer and their interactions with the Claimant. The employees did not provide their observations, if any, of any interactions between the Claimant and the Employer. The witnesses' statements were of limited utility in this regard.

[27] Notice of Appeal – Employment Insurance – General Division, at GD2-9, point 8.
[28] Notice of Appeal – Employment Insurance – General Division, at GD2-10, point 11.
[29] At approximately 14:16 of the audio recording of the General Division hearing.
[30] *Ibid.*
[31] At approximately 19:40 of the audio recording of the General Division hearing.
[32] At approximately 20:25 of the audio recording of the General Division hearing.
[33] At approximately 28:00 to 28:52 of the audio recording of the General Division hearing.

Turning back to the Employer's evidence, despite denying ever belittling the Claimant, the Employer suggested that she might have nitpicked. She testified that:

> [The Claimant] worked for me for probably six to seven to eight months or something like that. She figured that if she was "belittling" or nitpicking and it was her way or the highway and if I'm still nitpicking at you after six to seven to eight months of work, you're not doing your job right. And you haven't been doing it right if I have to keep correcting you and saying you're not doing it right. You're not after eight months.

The General Division member did not clarify the Employer's evidence nor determine whether the Employer nitpicked and what that meant. While the Employer denied ever making any belittling remarks towards the Claimant, the General Division should have examined the frequency and the context in which any nitpicking may have occurred. This would have involved examining the Employer's demeanour, tone and language. After all, depending upon the context, any nitpicking may have amounted to belittlement, or even bullying.

The Claimant argues that the Employer was highly demanding, and suggests that, because of her exacting standards, she crossed the line into abusive behaviour.

The Claimant notes that the General Division accepted that the Employer had high standards. The General Division wrote that the Employer's high standards were necessary "and to be commended." [34] However, the Claimant argues that because the General Division was impressed with the Employer's standards, it became blind to the Employer's bullying and belittlement.

It is unclear whether the General Division determined that the Employer was justified in making any belittling-type remarks because of her exacting standards.

Ultimately, the General Division did not address the Claimant's specific allegations that the Employer made certain remarks and, if so, whether those remarks represented belittlement.

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[34] General Division decision, AD1A-5, at para. 17, point six.

The Claimant also suggests that the General Division failed to hold his manager responsible for the baking mistake too. There is no evidence that the Claimant brought up this issue at the General Division. So, I cannot fault the General Division for not addressing an issue that did not arise.

- **Is there a reasonable apprehension of bias?**

[83] The Claimant argues that the General Division was biased in favor of the Employer. He claims bias can be found in the General Division's decision, as follows:

> Bullying
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> … The employer, in an effort to assure consistent quality, demands a certain degree of competency in the preparation of her product following her techniques and guidelines. The old adage is relevant here: Rule number 1; **the Captain is always right**, Rule number 2; if in doubt refer to rule number 1.[35]
>
> (My emphasis)

[84] The Claimant argues that, in writing this, the member showed that he found the Employer's actions justifiable, just by virtue of the Employer's relationship with the Claimant. The Claimant argues that being an employer did not justify bullying or antagonistic behaviour towards him. Yet, he claims that the member was prepared to overlook or forgive any behaviour because the Employer had high expectations and was "always right".

[85] As an aside, the Employer offered that she found it humorous that the General Division referred to the "old adage." She found it humorous because she has a sign at the workplace with a similar theme. Her sign reads, "I'm not bossy. I'm just always right." She considers her sign a joke.

[86] A reasonable apprehension of bias arises where there is a reasonable probability that the decision-maker may not have acted impartially. The test for a reasonable apprehension of bias is, "what would an informed person, viewing the matter realistically and practically—and having

[35] General Division decision, AD1A-6, at para. 17, point 11.

thought the matter through—conclude. Would he think it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[36]

[87] In this case, I conclude that the General Division's decision at paragraph 17, demonstrated a reasonable apprehension of bias. An informed person would perceive bias when reading the General Division member's passage on bullying. In writing that the Employer is "always right" under the subheading "Bullying," the member seemed to suggest that anything the Employer did—even bullying—was virtually acceptable, if it ensured consistent qualify of the Employer's baking products. Significantly, the Employer acknowledged that the member "shouldn't have probably said that."[37]

REMEDIES

[88] The General Division made some errors under section 58(1) of the DESDA. Therefore, I am now turning to the issue of the appropriate remedy. I have various options.[38] I can give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, with directions, or rescind or vary the decision in whole or in part.

[89] The Claimant states that if the General Division were to rehear the appeal, he does not have any evidence to add, apart from a letter that he filed with this appeal.[39] The letter confirms that the Claimant attended a job fair in March 2020. However, this took place after the Claimant had already left his employment, so the letter is irrelevant. The letter does not address the issue of whether the Claimant looked for work before he left his employment with the bakery.

[90] Initially, the Commission argued that I should return the matter to the General Division for a rehearing. However, as the Claimant states that he does not have any new evidence to offer, the Commission is now urging me to dismiss the appeal altogether. The Commission agrees that the General Division made mistakes under section 58(1) of the DESDA. However, the Commission argues that the General Division's errors do not change the outcome. The

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[36] *Baker v Canada (Minister of Citizenship and Immigration)*, 1990, CanLII 699 (SCC), [1999] 2 SCR 817, at para. 46, citing Grandpré, writing in dissent, in *Committee for Justice and Liberty v National Energy Board,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369, at p. 394.
[37] Appeal Division hearing on October 14, 2020.
[38] Section 59 of the DESDA.
[39] Letter dated August 14, 2020, filed on October 9, 2020, at AD3-8.

Commission argues that the Claimant simply has not established that he had just cause for having left his employment.

[91] The Claimant's supervisor states that she did not have all of the file materials for the hearing. Even so, she states that she was able to put her case forward. She denies the Claimant's allegations. She says that the General Division came to the right conclusion. She argues for dismissal of the Claimant's appeal.

[92] It would be preferable to decide whether the Claimant has just cause, rather than to return the matter to the General Division. That way, there would be a final resolution.

[93] However, I am returning this matter to the General Division for a new hearing. I do not share the parties' views that there is a complete evidentiary record. I find that there is a gap in the evidence on a critical point. The gap concerns the Claimant's claim that there was antagonism with his employer and that it caused him to leave his employment.

[94] The Claimant maintains that he had just cause for having left his employment because of antagonism with his employer, for which he was not responsible. He claims that his employer antagonized him and that he faced constant belittlement. The General Division set out some of these allegations at paragraph 17.

[95] The General Division determined that each incident did not constitute just cause. To some degree, the Claimant acknowledges that each incident on its own did not cause him to leave his employment. However, the Claimant claims that the cumulative effect from the incidents justified leaving his job. The Claimant claims that the combination of and the progressive impact of each of these incidents built up. They reached a boiling point where he could no longer tolerate his work environment.

[96] The Claimant argues that it was unreasonable to expect him to continue working in an environment where he was belittled and faced antagonism. Because of the cumulative effect of the incidences, the Claimant claims that he did not have any reasonable alternatives but to leave his employment when he did.

[97] The Claimant rejects any suggestions that he could stayed at the bakery until he found another job. He says that he could not tolerate working at the bakery anymore.

[98] The Claimant also rejects any suggestion that he could have raised any concerns with his employer. He denies that his employer would have addressed or allayed any concerns that he had.

[99] The Claimant says that while the owner might have always assured him that "we'll take care of it,"[40] ultimately his employer did nothing to address his concerns. For instance, he notes that the owner did nothing when he complained about having to face her dogs when he went to use the bathroom. Instead, she responded that the dogs had free rein because it was their home.

[100] At the General Division hearing, the Employer generally denied the Claimant's allegations of antagonism, bullying, or belittlement. However, the owner did not give any evidence regarding, for instance, the Claimant's claims that he had to face the owner's three dogs whenever he went to use the washroom, or that the owner frequently commented that he was a messy worker. The Claimant found these comments belittling.

[101] While the owner denied ever belittling the Claimant, at the same time, she indicated that she nitpicked and that it was "her way or the highway."[41] The General Division should have clarified the owner's evidence on this point. After all, as I indicated above, depending on the context, any nitpicking may have amounted to belittlement, or even bullying.

[102] The owner relied on the witness statements. But, they were of limited assistance. None of the witnesses offered any evidence about any interactions they observed between the owner and the Claimant. Furthermore, each of the witness's individual experiences may not have reflected the Claimant's own experience with the owner. After all, the witnesses are considerably younger and have less related work experience than the Claimant had. It is clear that the dynamic was different between the Claimant and the owner.

[103] The owner testified that she was upset because the Claimant used her bathroom at 7 a.m., shortly after arriving for his shift. There was no bathroom in the basement where the bakery was

[40] At approximately 14:36 of the audio recording of the General Division hearing.
[41] At approximately 19:46 of the audio recording of the General Division hearing.

located, so employees used the bathroom in the residential portion of the building. The owner testified that it was problematic for her that the Claimant utilized her bathroom so soon after arriving at work, because he lived nearby and could have used his own facilities. She testified as follows:

> The problem I had with [the Claimant] is that he would come into my house at 7 o'clock in the morning while I'm still in bed, and [he'd] use my washroom and defecate in my washroom. He only lives 15 minutes away from me but he couldn't do that at home. He had to come into my house and do that at 7 o'clock in the morning and yes, I did get a little upset about that because it just continued. He did that several times.[42]

[104] The Claimant denied that he lived nearby or within 15 minutes of work. The Claimant testified that he lived at least 35 minutes away. Depending upon weather conditions, it could be longer. Indeed, the owner testified that the bakery was located in the country and 25 minutes away from a grocery store. So, if the bakery required any supplies, the Claimant would purchase them on his way home.

[105] This suggested that the Claimant indeed lived further away from the bakery than the owner indicated. In other words, using the washroom at work from time to time was probably unavoidable for the Claimant, even if it meant it would result in the owner getting upset with him.

[106] Access to the washroom was an ongoing issue. The owner clearly was unhappy that the Claimant used her washroom after arriving at work. The Claimant clearly was unhappy that the owner was upset that he used the washroom, and that she discouraged him from using it, even if it was the only washroom available for employees.

[107] I note that the owner frequently asked the Claimant whether he was happy working at the bakery. I do not know whether this shows that the owner was aware of the Claimant's unhappiness and if she was trying to address any concerns the Claimant had.

[108] The Claimant testified that initially when the owner asked him whether he was happy, he raised concerns. But, he stated that if he expressed any unhappiness, the owner made comments.

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[42] At approximately 18:49 of the audio recording of the General Division hearing.

It is not clear from the evidence what comments the employer might have made, but the Claimant suggested that he found them upsetting or unsettling.

[109] The owner offered that she has a sign at work that reads, "I'm not bossy. I'm just always right."[43] Curiously, the Claimant did not mention this sign. If the Claimant was aware of the sign, arguably he did not feel belittled or antagonized by it, as he did not mention it at any time during the General Division proceedings. On the other hand, although the owner may have intended posting the sign as a joke, the sign might be seen as representing her attitude towards employees. It may be worth exploring what impact, if any, the sign has at the workplace.

[110] I am prepared to find that at least three of these incidents weighed on the Claimant, to the point that he felt belittled and felt that there was antagonism with the owner. These incidents include:

- Having to face three dogs while accessing the washroom. Even the General Division acknowledged that facing the owner's three dogs on the way to or from the washroom "would be intimidating."

- The owner frequently commenting that the Claimant was a messy worker.

- The owner berating the Claimant for using the washroom when he arrived for work.

[111] Despite these incidents that the Claimant claims led him to feeling antagonized by his employer, I cannot overlook the Employer's arguments that she made at the General Division.

[112] The Employer argued that the working conditions could not have been as unpleasant or as wretched as the Claimant portrays. If the circumstances accumulated and became so bad, it makes very little sense that, sometime in early February 2020, shortly before he left his employment, the Claimant sought out summer jobs for his twin daughters. The Employer raises a legitimate question: if the Claimant found the owner antagonistic, why would he risk subjecting his daughters to a poor working environment?

[43] Appeal Division hearing.

[113] The General Division based its decision, in large part, on this consideration. The General Division member found that the issue relating to the daughters' summer job prospects diminished the Claimant's credibility.

[114] While the General Division provided the Claimant with the opportunity to reply to the Employer's submissions, either the Claimant failed to appreciate the point that the owner had made, or he avoided addressing it. Either way, the General Division member should have directed the Claimant to the specific issue that the Employer made.

[115] The member should have asked the Claimant to explain why he would have sought summer employment at the bakery for his twin daughters if he thought the working conditions were so antagonistic that it would cause him to leave that employment. Ultimately, the Claimant might not have explained why he sought summer employment for his daughters, but that would have been a response at least.

[116] This is a key issue that the Claimant needs to address before any definitive findings can be made about antagonism in the workplace, and whether the antagonism was at such a level that it caused the Claimant to leave his employment when he did.

[117] This likely will require examining whether anything significant arose or changed between the time the Claimant sought summer employment for his daughters, and the time that he left his employment. I recognize that the Employer closed the bakery due to weather conditions, but it is unclear from the evidence how closing the business because of weather conditions fit any pattern of antagonism or contributed to it, such that it caused the Claimant to immediately leave his employment.

[118] There is also the issue of whether the Claimant had reasonable alternatives to leaving his employment. I accept that, if working conditions were truly antagonistic and intolerable, that it would be unrealistic to expect an employee to continue working in such conditions. However, as I have pointed out, there is insufficient evidence on a critical point to be able to decide, one way or the other, whether there was such a level of antagonism that it caused the Claimant to leave his job.

CONCLUSION

[119] I am allowing the appeal and returning the matter to the General Division for a redetermination by a different member of the General Division.

Janet Lew
Member, Appeal Division

HEARD ON:	October 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. D., Appellant Josée Lachance, Representative for the Respondent A.W., Representative for the Added party