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

Citation: *JA v Canada Employment Insurance Commission and X*, 2021 SST 160

Tribunal File Number: AD-20-780

BETWEEN:

J. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: April 22, 2021

Canada

DECISION AND REASONS

DECISION

[1] J. A. is the Claimant in this case. I have found errors in the General Division decision and am allowing his appeal. The Claimant is not disqualified from receiving Employment Insurance (EI) benefits.

OVERVIEW

[2] The Claimant used to work for X (Employer). In February 2018, the Claimant was involved in a heated exchange with the Employer's Chief Executive Officer (CEO). The Claimant says that he was harassed and that his work environment became unsafe. As a result, he refused to work from the office whenever the CEO was there.

[3] In late March, the Employer insisted that the Claimant return to work in the office. When he refused, the Employer dismissed him for abandoning his job.

[4] The Claimant later applied for EI regular benefits. However, the Canada Employment Insurance Commission (Commission) denied his application.

[5] At its core, this case is about whether the Claimant is disqualified from receiving EI benefits.[1] The *Employment Insurance Act* (EI Act) disqualifies a person from receiving EI benefits if they:

a) lose a job because of their own misconduct; or

b) voluntarily leave a job without just cause.[2]

The history of this appeal

[6] In its initial decision, the Commission denied the Claimant's application for EI benefits. Specifically, the Commission disqualified the Claimant from receiving EI benefits because he

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[1] Section 30 of the *Employment Insurance Act* (EI Act) defines who is disqualified from receiving EI benefits.
[2] In this context, "just cause" has a very specific meaning. It is defined in section 29(c) of the EI Act.

had voluntarily left his job without just cause. In other words, the Claimant had reasonable alternatives to leaving his job when he did.

[7] The Commission then reconsidered its initial decision. This time the Commission found that the Employer had fired the Claimant because of his own misconduct. But the result was the same: The Claimant was disqualified from receiving EI benefits.

[8] The Claimant appealed the Commission's decision to this Tribunal. In its first decision, the General Division agreed that the Claimant was disqualified from receiving EI benefits because of his own misconduct.

[9] The Claimant then appealed to the Appeal Division. The Appeal Division decided that the Claimant's appeal had no reasonable chance of success. So, it denied the Claimant's request for leave (or permission) to appeal.

[10] The Claimant then asked the Federal Court to review the Appeal Division decision. According to the Court, the misconduct analysis used by the Tribunal failed to consider the Claimant's allegations of harassment in their full context.[3] For that reason, the Federal Court sent the matter back to the Appeal Division. And, with the agreement of the parties, the Appeal Division returned the case to the General Division.[4]

[11] The General Division held a new hearing. And, on August 31, 2020, it dismissed the Claimant's appeal for the second time. The General Division maintained the Claimant's disqualification. This time it found that the Claimant had voluntarily left his job without just cause.

[12] This is the decision that I am now reviewing.

[13] I have decided that there are errors in the General Division decision and that I can intervene in this case. I have also decided that the Claimant had just cause for refusing to return

[3] The Federal Court decision is cited as *Astolfi v Canada (Attorney General)*, 2020 FC 30.
[4] See the Appeal Division decision dated April 6, 2020.

to the Employer's office. As a result, I am allowing his appeal. The Claimant is not disqualified from receiving EI benefits.

ISSUES

[14] I can intervene in this case only if the General Division made a relevant error. Briefly, relevant errors are about whether the General Division:[5]

a) failed to provide a fair process;

b) failed to decide all the issues that it had to decide, or decided issues that were beyond its powers to decide;

c) misinterpreted the law; or

d) based its decision on an important error about the facts of the case.

[15] During the hearing before me, the Claimant listed many questions that he wanted answered. After the hearing, he provided me with a copy of his questions in writing.[6] It is four pages long. I do not need to specifically answer all of the Claimant's questions.

[16] Instead, I focused on these issues:

a) Was the Claimant denied a fair and impartial hearing?

b) Did the General Division make an error of fact or law when it decided that the Claimant had voluntarily left his job (rather than being dismissed for misconduct)?

c) Did the General Division make an error of law by failing to consider how all the Claimant's circumstances limited his reasonable alternatives?

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[5] The precise errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[6] See document ADN8.

d) Did the General Division make an error of fact or law when it concluded that the CEO could not have harassed or antagonized the Claimant because the CEO's conduct was motivated by performance issues?

e) Did the General Division make relevant errors of fact when considering the Claimant's reasonable alternatives?

f) What is the best way of fixing the General Division's errors?

g) Is the Claimant disqualified from receiving EI benefits?

ANALYSIS

The Claimant received a fair and impartial hearing

[17] The Claimant was entitled to a fair and impartial hearing. This means that the General Division member who decided the Claimant's case must not have been biased against him.

[18] Allegations of bias are serious. They challenge the integrity of the Tribunal and of its members.[7] The Claimant must prove bias based on evidence, not suspicion.[8] If proven, bias would taint the entire General Division proceeding.

[19] The legal test for establishing bias is high: "[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [they] think that it is more likely than not that [the General Division member], whether consciously or unconsciously, would not decide fairly."[9]

[20] According to the Claimant, several situations show that the General Division member was biased against him. For example, he argued as follows:

a) The General Division member was strongly influenced by evidence collected as part of the Commission's investigation. The Commission's notes were unreliable and full of hearsay, its agents were inept, and its processes favoured the Employer. Yet the

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[7] *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).
[8] *SM v Minister of Employment and Social Development*, 2015 SSTAD 1050 at paragraph 17.
[9] The Supreme Court of Canada established this test in *Committee for Justice and Liberty*, note 7 above at page 394.

General Division member preferred this evidence to the sworn testimony that was before her.

b) The General Division member made unreasonable findings that were contradicted by the evidence, based on unfounded assumptions, or beyond her expertise.

c) The General Division made several references to the secret recording of a conversation that happened on March 23, 2018, although it actually happened on March 22, 2018.

[21] I have listened to the audio recording of the General Division hearing, which was almost five hours long. I have also studied the General Division decision, which spans 142 paragraphs.

[22] The Claimant's allegations do not meet the high bar needed to prove bias. An informed person viewing the matter realistically and practically would not conclude that the General Division member decided the case unfairly.

[23] The General Division member was entitled to consider hearsay and weigh the evidence, including evidence that the Commission collected closer in time to the actual events. At the hearing, the General Division member gave the parties the opportunity to clarify or correct the information that the Commission had collected.

[24] The General Division might not have accepted many of the Claimant's arguments. Yet its decision shows that it considered the Claimant's evidence and arguments in detail.

[25] The Claimant put a large amount of information in front of the General Division. The member did not have to mention every piece of it, nor did her decision have to be perfect. These perceived flaws do not lead me to conclude that the General Division member was biased against the Claimant.

[26] I recognize, however, that the Claimant's allegations also raise possible errors of fact and law. I will discuss these possible errors in more detail below.

The General Division did not make an error when it decided that the Claimant had

voluntarily left his job

[27] In its dismissal letter, the Employer told the Claimant that he was "terminated for job abandonment."[10] So, did the Claimant quit his job or was he fired? As highlighted above, the Commission and General Division have both answered this question in different ways.

[28] In the decision before me, the General Division recognized this issue and concluded that the Claimant had voluntarily left his job.[11] Given the history of this file, I asked the parties whether the General Division might have made a relevant error in this part of its decision.[12] But the parties' written arguments did not address this question in much detail, if any.

[29] At the hearing before me, the Employer said that both were true: The Claimant quit his job and was fired. It emphasized how the Claimant chose to work from home, even though he clearly understood the consequences of not returning to work at the office. The Claimant, on the other hand, refused to admit that he had abandoned his job. He simply refused to work from a particular location when the CEO was there.

[30] The courts have cautioned against focusing too much on whether the employer or employee initiated the end of the employment relationship.[13] The key is that EI benefits are not available to applicants who deliberately create or increase the risk of becoming unemployed.[14]

[31] For the following reasons, I have concluded there was no error in this part of the General Division decision:

a) None of the parties identified a relevant error in this part of the General Division decision.

b) At both the General and Appeal Division levels, the Claimant framed his case according to the various circumstances listed under section 29(c) of the EI Act, which

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[10] The dismissal letter is on page GD3-36.
[11] See paragraphs 15 to 35 of the General Division decision dated August 31, 2020.
[12] See paragraph 22 of my leave to appeal decision dated December 18, 2020.
[13] See paragraph 9 of the Federal Court of Appeal's decision in *Canada (Attorney General) v Côté*, 2006 FCA 219. See also CUB 57021.
[14] See the Federal Court of Appeal's decisions in *Smith v Canada (Attorney General)*, 1997 CanLII 5451 (FCA); and *Tanguay v Unemployment Insurance* Commission (1985), 10 CCEL 239.

he thought better responded to the Federal Court decision. This is part of the legal framework that applies when employees voluntarily leave their jobs.[15]

c) Misconduct and voluntarily leaving a job without just cause are connected. Both are about a person losing their job because of their deliberate actions, and both lead to a disqualification under the EI Act.[16]

[32] In addition, the Federal Court had criticized the Tribunal for failing to consider the Claimant's allegations of harassment in the full context. The General Division has now done this.

The General Division made an error of law by failing to consider how *all* the Claimant's circumstances limited his reasonable alternatives

[33] The General Division concluded that the Claimant was disqualified from receiving EI benefits because he had voluntarily left his job without just cause.[17]

[34] Just cause was the main issue in the case. In other words, having regard to all the circumstances, did the Claimant have any reasonable alternative to leaving his job when he did?[18] In its decision, the General Division recognized that the EI Act sets out a list of circumstances that it had to consider.[19] Beyond those listed in the EI Act, the General Division acknowledged that it needed to consider other relevant circumstances too.[20]

[35] However, I am not convinced that the General Division's analysis is complete. The General Division applied a narrow lens, deciding that the Claimant did not fit within any of the circumstances listed in the EI Act. But it does not seem to have then considered how the Claimant's psychological injury limited the reasonable alternatives available to him.

[36] Briefly, the Claimant told the General Division that his relationship with the CEO started to deteriorate in January 2018. At that time, the CEO sent an email to the Claimant, copied to his

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[15] Audio recording of June 18, 2020, hearing at approximately 13:20.
[16] Relevant cases on this point include *Canada (Attorney General) v Desson*, 2004 FCA 303; *Smith*, note 14 above; and *Canada (Attorney General) v Easson* (1994), 167 NR 232 (FCA).
[17] Sections 29 and 30 of the EI Act set out the relevant provisions in this type of case.
[18] *Canada (Attorney General) v White*, 2011 FCA 190 at paragraph 3.
[19] See paragraph 37 of the General Division decision dated August 31, 2020, and section 29(c) of the EI Act.
[20] For example, see paragraphs 38 and 141 of the General Division decision. The Federal Court of Appeal confirmed this principle in *Canada (Attorney General) v Lessard*, 2002 FCA 469 at paragraph 10.

co-workers, that was critical of the Claimant's performance on an important project.[21] Things boiled over at a meeting held on February 23, 2018. The Claimant planned this meeting, which he attended with the CEO and other co-workers (some of whom were on the telephone).

[37] The CEO explained at the General Division hearing that the meeting took place just after his return from holiday. During the meeting, he was surprised to learn that the project was moving slower than planned and that an important deadline would likely be missed.

[38] The CEO has long accepted that he acted inappropriately during the meeting on February 23, 2018: He raised his voice and pounded his fist on the boardroom table four or five times.[22] The parties also agree that the CEO criticized the Claimant's level of effort. The Claimant also said that the CEO's "meltdown" lasted about 30 minutes, was witnessed by those in the meeting and overheard by others in the office, and included threats that the CEO would find someone else to do the job.[23]

[39] The Claimant argued that the facts of his case fell within many of the circumstances listed in the EI Act. Mainly, he claimed that the CEO had harassed and antagonized him. He also said that the Employer had failed to provide him with a safe and healthy work environment. The General Division considered each of the alleged circumstances one by one. But in the end, it concluded that none of the circumstances listed in the EI Act applied to the Claimant's case.

[40] However, proceeding in this way reveals the General Division's error. Although the General Division described the law correctly, it failed to apply it properly. By focusing in such a detailed way on the circumstances listed in the EI Act, the General Division's analysis appears like more of a box-ticking exercise.

[41] Instead, the General Division still needed to consider the Claimant's reasonable alternatives given *all* the circumstances of his case. The General Division could not answer this question based solely on whether the Claimant fit neatly within any of the circumstances listed in the EI Act.

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[21] These emails start on page RGD8-2.
[22] See paragraph 60 of the General Division decision dated August 31, 2020.
[23] See paragraph 20 of the General Division decision dated August 31, 2020.

[42] In this case, for example, the Claimant experienced a traumatic incident at work. That incident might not have amounted to harassment or antagonism or created an unsafe work environment. However, it resulted in a psychological injury to the Claimant. One psychologist said that the Claimant's trust in people and systems had been breached and that he had suffered a "moral injury."[24]

[43] Following a comprehensive assessment by Alberta's Workers' Compensation Board (WCB), another psychologist diagnosed the Claimant as having anxiety and an adjustment disorder.[25] As a result, the WCB agreed to treat the Claimant for his workplace injury and to pay him wage replacement benefits over many months.

[44] Whether or not the Claimant was able to fit within one of the specific circumstances listed in the EI Act, the General Division still had to consider the traumatic event that the Claimant experienced at work, the psychological impacts of that event, and how they affected his reasonable alternatives.

[45] The General Division's failure to do this means that it applied the law improperly: It focused on the circumstances listed in the EI Act and overlooked how the Claimant's psychological injury limited the reasonable alternatives available to him.

The General Division made errors of fact and law when it concluded that the CEO could not have harassed or antagonized the Claimant because the CEO's conduct was motivated by performance issues

[46] As mentioned above, the Claimant argued that he had just cause for leaving his job and that many of the circumstances listed in the EI Act applied to his case. Among them, the Claimant said that the CEO had harassed and antagonized him.

[47] In its decision, the General Division found that the Claimant had not been harassed or antagonized at work.[26] When arriving at those conclusions, the General Division relied heavily

[24] See the opinion of Dr. Pat Ferris, which starts on page RGD4-18.
[25] The WCB decision starts on page RGD6-19.
[26] See paragraphs 80 to 114 of the General Division decision.

on the fact that performance issues had motivated the CEO's conduct.[27] For example, the General Division wrote this in paragraph 100 of its decision:

> I find it is more likely than not that the CEO, being the alleged harasser, could not reasonably have known that his behaviour would cause offence, embarrassment, humiliation, or other psychological or physical injury to the Claimant **because his actions were related to the Claimant's performance**. While his comments may have been harsh in tone, they were not personal attacks but expressions of frustration related to the perception that the Claimant was not doing all aspects of his job. [Emphasis added]

[48] Similar comments appear in paragraphs 98 and 112 of the General Division decision.

[49] The General Division based its decision on an important mistake about the facts of the case when it decided that the CEO could not reasonably have known that his behaviour would cause offence, embarrassment, humiliation, or other injury to the Claimant.

[50] I recognize that employers sometimes have to criticize their employees, but there are acceptable and unacceptable ways of doing this. And, depending on the circumstances of the case, the subject of the employer's criticism may lose its relevance.

[51] Here, the CEO's criticisms of the Claimant's performance were harsh and emphatic. He slammed his fist on the table several times and criticized the Claimant's ability to do his own job. Plus, the CEO's outburst was sustained, lasting for about 30 minutes. It also happened during a meeting with the Claimant's co-workers, and it was loud enough that other people in the office could hear the CEO's shouting.

[52] It was perverse for the General Division to find that, because the CEO's criticisms were performance-related, he could not have known that his behaviour would injure, offend, embarrass, or humiliate the Claimant in some way.

[53] Seen from a different angle, the General Division seemed to conclude that the legal tests for harassment and antagonism never include situations where employers are criticizing their

[27] See, for example, paragraphs 98 to 100 and 111 to 112.

employees because of their performance. The General Division made an error of law by adding this condition to these legal tests.

The General Division made relevant errors of fact when considering the Claimant's reasonable alternatives

[54] The General Division had no evidence to support some of the reasonable alternatives it said the Claimant should have pursued instead of leaving his job when he did.

[55] An important part of the General Division's job was to consider whether the Claimant had reasonable alternatives to leaving his job when he did. The General Division described those reasonable alternatives in paragraph 140 of its decision, which reads like this:

> Considering all of the circumstances above, I find the Claimant had reasonable alternatives to leaving his job. The Claimant could have accepted the CEO's apology for his conduct at the February 23, 2018, meeting, and his agreement to have weekly meetings and returned to work. He could have looked for a new job prior to leaving his employment. He could also have seen a doctor after the February 23, 2018, meeting and requested medical leave if he felt his treatment at work was overwhelming him. He could also have requested a leave of absence from the Employer instead of unilaterally demanding to work from home. All of these are reasonable alternatives to leaving one's employment. The Claimant did none of these things.

[56] The Claimant complained that these alternatives were never specifically discussed at the hearing and that some are factually incorrect.

[57] The General Division needed written or oral evidence to support the specific alternatives that it found were available to the Claimant.

[58] In fairness to the Claimant, the General Division should also have discussed these alternatives with him during the hearing. That way, the General Division could have explored whether these alternatives were reasonable, or even possible.

[59] In this case, the General Division did not discuss all the possible reasonable alternatives with the Claimant during the hearing. As a result, it made findings that are unsupported by the evidence. For example, I was unable to find any evidence showing that the Claimant had access

to medical leave, let alone a leave of absence. Plus, the General Division never established whether these types of leave were reasonable in light of the Claimant's family obligations and financial commitments.

I will fix the General Division's errors by giving the decision that it should have given

[60] At the hearing before me, nobody argued that I should return the file to the General Division for a third time.

[61] The parties have had a full opportunity to present their evidence and arguments to the General Division. In fact, the written record is very thick, and the hearing held on June 18, 2020, lasted almost five hours.

[62] In the circumstances, I will give the decision that the General Division should have given and determine whether the Claimant is disqualified from receiving EI benefits.[28]

The Claimant is not disqualified from receiving EI benefits

[63] The critical question is essentially this: In all the circumstances of this case, did the Claimant have any reasonable alternative to refusing to work from the office when he did?

[64] I would summarize some of the relevant circumstances in this way:

a) The Claimant's relationship with the CEO started to deteriorate in January 2018, but there was no history of harassment or bullying in the previous five plus years that he had worked for the Employer.[29]

b) After the incident of February 23, 2018, the Claimant alleged that the CEO had breached the Employer's Employee Handbook, but there was nobody to investigate his complaints other than the CEO himself.[30]

c) In February and March 2018, the Claimant and CEO exchanged letters, emails, and phone calls. Important calls happened on March 21 and 22, 2018. The CEO told the

[28] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way.
[29] See paragraphs 88, 90, 99, and 102 of the General Division decision.
[30] See paragraph 99 of the General Division decision.

General Division that he had secretly recorded the call on March 22, 2018, and that he had chosen his words carefully because the Claimant was threatening to sue him for harassment.[31]

d) During the phone call of March 22, 2018, the CEO said that he was prepared to meet some of the Claimant's conditions for resolving his harassment complaint.[32] He apologized for his behaviour, acknowledged that it was unacceptable, and promised not to treat the Claimant that way again. He also agreed to weekly progress meetings with the Claimant. However, he refused to admit that he had harassed the Claimant, to confirm that he would never raise his voice again, to hire more staff, or to put his apology in writing.[33]

e) At the end of the call on March 22, 2018, the Claimant said that the CEO lacked sincerity and that he did not feel safe returning to the office when the CEO was there. The CEO, on the other hand, said that the Claimant would be abandoning his job if he did not return to work from the office.

f) On March 27, 2018, the Claimant wrote to the CEO and restated the conditions for resolving his harassment complaint, including a written apology and written commitments to follow the Employee Handbook and to provide a safe workplace free from harassment, intimidation, and bullying.[34] The CEO responded later the same day saying that he would not meet the Claimant's changing demands and warning the Claimant that he would be fired if he did not return to the office.[35]

g) The Claimant worked from home on April 2, 2018, and the Employer terminated his employment the next day.[36]

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[31] This part of the General Division hearing starts at around 3:51:00. There are different transcripts and an audio recording of this call (RGD7). In several places throughout its decision, the General Division mistakenly referred to this phone call as being on March 23, 2018, when it was, in fact, on March 22, 2018. Nothing turns on this mistake.
[32] See paragraph 84 of the General Division decision.
[33] See paragraphs 26, 91 to 94, and 102 of the General Division decision.
[34] See paragraphs 28 and 29 of the General Division decision, along with the Claimant's letter starting on page GD3-34.
[35] The CEO's email is on page RGD8-7.
[36] The Employer's termination letter is on page GD3-36.

[65] The Claimant and Employer continue to disagree on whether the CEO's actions meet the legal definition of harassment or antagonism. I recognize that the February incident was an isolated one and that repeated incidents are often required before a tribunal finds that there has been harassment.[37] However, the law recognizes that, in serious cases, a tribunal can find that a person was harassed based on just one incident.[38]

[66] The precise characterization of the CEO's behaviour is less important in this case. The CEO recognizes that he acted inappropriately during the meeting of February 23, 2018. And psychologists confirmed that the event was traumatic for the Claimant. One psychologist said that the Claimant had suffered a moral injury, and another confirmed that he was unable to work for many months because of his anxiety and adjustment disorder.

[67] The Claimant's injury is a relevant circumstance that I must keep in mind when considering the reasonable alternatives that he had to staying away from the office.

[68] In addition, the Claimant was in a senior executive position that required significant trust between him and the CEO. Yet, the events from January to March 2018 severely damaged the trust that had previously existed between the two. This is another factor that contributed to the Claimant's decision to stay away from the office and that I must keep in mind.

[69] In particular, the Claimant felt that he had shown himself to be a loyal and committed employee who always put work first. For example, he took just a half-day's leave when his first child was born. He also braved terrible weather conditions to attend a meeting on the Employer's behalf and ended up having a serious car accident. This background contributed to the Claimant's feeling that the CEO's conduct on February 23, 2018, was a significant betrayal.

[70] There was a lot of evidence pointing to how much the relationship between the Claimant and CEO had deteriorated. Here are just a few examples:

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[37] The Canadian Human Rights Tribunal discussed this requirement in *Siddoo v International Longshoremen's and Warehousemen's Union, Local 502*, 2015 CHRT 21 at paragraphs 44 to 47.
[38] See, for example, *Canada (Human Rights Commission) v Canada (Armed Forces)*, 1999 CanLII 7907 (FC); and *ND v Canada Employment Insurance Commission*, 2019 SST 1262 at paragraph 34.

a) The Claimant was threatening to bring harassment claims against the CEO, all while demanding that he make important admissions in writing. As a result, the CEO feared that he was being "set up" and secretly recorded one of their conversations.

b) Although the CEO apologized for his behaviour during the phone call of March 22, 2018, the Claimant doubted the CEO's sincerity. The Claimant said that the CEO's apology needed to take a certain form and be put in writing. In fact, the Claimant even demanded that the CEO say, in writing, that he would follow the Employee Handbook and respect the laws that apply to all employers.

[71] The chances of the Claimant and CEO reconciling were also complicated by problems with the Employer's Code of Ethics and Conduct and Whistleblower Policy.[39] For example, the Code of Ethics and Conduct did not anticipate a complaint being made against the CEO, and the Employer had discontinued the reporting service mentioned in the Whistleblower Policy.

[72] So, there was no independent third party who could help the Claimant and CEO to resolve their differences. Instead, the CEO was acting as an investigator and negotiator, something that contributed to the Claimant's sense of distrust. And while the CEO did not have to accept all of the Claimant's demands, an independent third party might have helped to identify other ways of reducing the Claimant's fears about returning to the office.

[73] When all these circumstances are considered together, the Claimant has shown, on a balance of probabilities, that he had no reasonable alternative to refusing to work from the office when he did.

[74] The Claimant could not have reasonably been expected to simply accept the CEO's apology and return to the office given:

a) the seriousness of the February incident;

b) the psychological harm that the Claimant experienced because of it;

[39] See pages GD3-28 to 31.

c) the significant breakdown of trust between the CEO and Claimant; and

d) the lack of an effective dispute resolution mechanism.

[75] The Claimant did try to resolve his differences with the CEO, but the gulf dividing them was just too wide. And there was no sign of the two reconciling quickly. In fact, the WCB concluded that he was unable to work in April 2018 and for many months later.

[76] Medical leave and leave without pay, if available, were not reasonable alternatives for the Claimant in this case. Neither option would have helped to rebuild the critical relationship of trust that was required between the Claimant and CEO. On the contrary, given the speed at which the CEO wanted the relevant project to advance, his relationship with the Claimant would have likely worsened if the Claimant had taken any additional leave.

[77] In addition, I find it unreasonable to expect that the Claimant would take any type of leave that would significantly reduce his income.

CONCLUSION

[78] I have concluded that the General Division made the following errors in this case:

a) It made an error of law by limiting its analysis to the circumstances listed in the EI Act and by failing to consider how the Claimant's reasonable alternatives were limited by all the circumstances in his case.

b) It made errors of fact and law when it found that the CEO could not have harassed or antagonized the Claimant because the CEO's behaviour was motivated by performance issues.

c) It made errors of fact when considering the Claimant's reasonable alternatives.

[79] These errors allow me to intervene in this case.

[80] After considering all the relevant circumstances, I have concluded that the Claimant had no reasonable alternative to refusing to work from the office when he did. As a result, I am allowing his Claimant's appeal. The Claimant is not disqualified from receiving EI benefits.

[81] In closing, it is worth mentioning that this decision does not guarantee that the Claimant will, in fact, receive EI regular benefits or in what amount. There are other relevant decisions that the Commission must make now that I have lifted the disqualification.

[82] During the General Division hearing, for example, it was discussed how the Commission would have to allocate (or account for) the benefits that the Claimant had received from the WCB. In addition, a person can receive EI regular benefits only if they are willing and able to work.[40]

Jude Samson
Member, Appeal Division

HEARD ON:	March 2, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A., Appellant Julie Villeneuve, Representative for the Respondent Grant N. Stapon, Q.C., Representative for the Added Party

[40] Section 18 of the EI Act describes this restriction.