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

Citation: *CE v Canada Employment Insurance Commission and X*, 2021 SST 388

Tribunal File Number: AD-20-768

BETWEEN:

C. E.

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: August 4, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal. I am giving the decision that the General Division should have given. The Claimant had just cause for leaving her employment.

OVERVIEW

[2] The Appellant, C. E. (Claimant), is appealing the General Division's decision. The General Division found that the Claimant did not have just cause for leaving her employment at an accounting firm. The General Division found that the Claimant had reasonable alternatives to leaving. The Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made several legal and factual errors. The Claimant requests that her appeal be allowed. She also asks the Appeal Division to rescind the disqualification and find that she had just cause to quit her employment. As an alternative, the Claimant asks the Appeal Division to refer the matter back to the General Division for a new hearing with a different member.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), agrees with the Claimant that the General Division made legal errors. However, the Commission claims that the record is incomplete. For that reason, it asks the Appeal Division to make its own decision.

[5] The Added Party, X (Employer), argues that the General Division did not make any legal or factual errors. Or, if the General Division made any legal errors, the Employer argues that did not have any impact on the outcome. Either way, the Employer argues that the appeal should be dismissed. As an alternative, the Employer argues that the Appeal Division should return the matter to the General Division for a rehearing.

[6] I find that the General Division made some mistakes in its decision. I find that the evidence establishes that the Claimant had just cause for leaving her employment because she did not have any reasonable alternatives to leaving.

PRELIMINARY MATTERS

[7] Is the Claimant restricted to arguing just the grounds upon which I granted leave to appeal?

[8] The Employer argues that the Appeal Division granted leave to appeal on two narrow, succinct issues. The Employer argues that the appeal is therefore limited to these two issues.

[9] However, an application for leave to appeal is either granted or refused. As the Federal Court noted in a case called *Tsagbey*,[1] section 58(58(3) of the *Department of Employment and Social Development Act* (DESDA) does not, on its face, allow the Appeal Division to restrict the scope of the appeal if leave is granted. "The language of the statute provides for only one result without qualification."

[10] The Claimant is not restricted from advancing other arguments, on top of the grounds upon which I granted leave to appeal.

ISSUES

[11] The Claimant has raised several issues, as follows:

i. Did the General Division fail to consider evidence that explained why the Claimant withdrew her resignation?

ii. Did the General Division fail to consider evidence about the use of scents in the workplace?

iii. Did the General Division make a factual error about the Claimant's attempts to see a doctor?

iv. Did the General Division misapprehend the Claimant's evidence about her co-worker?

v. Did the General Division fail to apply the test for discrimination?

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[1] *Canada (Attorney General) v Tsagbey*, 2017 FC 356 at para. 52.

ANALYSIS

[12] Section 58(1) of the DESDA 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 power to conduct any reassessments.

[13] The Appeal Division may intervene if there are jurisdictional, procedural, legal, or factual errors.[2] The Claimant argues that the General Division made several legal and factual errors under section 58(1) of the DESDA.

i. Did the General Division fail to consider evidence that explained why the Claimant withdrew her resignation?

[14] Yes. The General Division failed to consider evidence that explained why the Claimant rescinded her resignation.

The Parties' Positions

[15] The General Division found that the Claimant exaggerated why she left her employment. It drew this conclusion because "she withdrew her resignation and continued to work showing the situation in the workplace could not have been dire to the degrees she needed to leave."[3]

[16] The Claimant argues that the General Division failed to consider evidence that showed why she rescinded her resignation. She rescinded her resignation because she believed that working conditions would improve.

[17] The Claimant argues that, if the General Division had not overlooked this evidence, it would have found that she faced an intolerable level of harassment and discrimination. On top of that, she was still overwhelmed with work. She argues that the General Division would have also concluded that she had just cause for leaving her employment.

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[2] Under section 58(1) of the *Department of Employment and Social Development Act*, the factual error is one upon which it based its decision, and the error was made in a perverse or capricious manner or without regard for the material before it.
[3] General Division decision, at para. 36.

[18] The Claimant explained why she resigned in the first place.[4] She was overwhelmed and found work very stressful. The Claimant did not directly say that the owner discriminated against or harassed her. The closest she came to this was when she wrote that she was "made to feel inadequate."[5] She found her employer unresponsive to her requests for a meeting. She also felt underappreciated and underpaid. She also wrote that the male staff were very disrespectful and unprofessional.[6]

[19] The Claimant later told the Commission that she was "ill treated by the owner."[7]

[20] When the Claimant applied for Employment Insurance benefits, she explained that she had resigned in January because of the owner. She found the owner difficult. She claims the owner had a reputation for mistreating employees.

[21] Despite the Claimant's views about the working conditions, she rescinded her resignation within days. She did this because she understood the owner would be addressing the problems that she raised. The Claimant believed that the work environment and her relationship with the owner would improve.

[22] The Claimant claims that the evidence showed that there was reason for her to be hopeful about staying at the firm:

- To begin with, the owner acknowledged there were workplace issues. She acknowledged that the work was stressful.[8] The owner wrote in an email that, "Yes, sometimes people (including me) do not deliver a message with sufficient sensitivity, whether it is because we are busy/in a rush or under pressure ourselves."[9]

[4] Claimant's resignation letter dated January 27, 2020, at GD3-42 (and at GD6-3 2).
[5] *Ibid.*
[6] *Ibid.*
[7] Supplementary Record of Claim, dated June 18, 2020, at GD3-51.
[8] Employer's email exchange on January 27, 2020, with the Claimant, at GD6-31 to GD6-32.
[9] *Ibid*.

- The Claimant understood that the owner was encouraging her to reconsider her decision. In the same email, the owner also wrote that she "certainly [did] not want [the Claimant] to leave."[10]

- The owner promised changes. The Claimant received assurances that she would get help with her workload.[11] The owner mentioned that the Claimant was free to hire someone to assist. As well, another employee might be starting to work full-time.[12]

- The Claimant claimed that, up until she resigned in January, the owner abused and bullied her on several occasions. During a meeting that she requested, she asked the owner "to stop talking to her in that manner."[13] The owner "promise[d] to change."[14] The Claimant understood this meant the owner would treat her better.

[23] The Claimant argues that the General Division should have considered this evidence because it explained why she rescinded her resignation.

[24] The Commission agrees with the Claimant that the General Division should have addressed all of this evidence. The Commission argues that the General Division misconstrued or mischaracterized the evidence. The Commission argues that overlooking this evidence led to a perverse and capricious finding that the work environment could "not have been dire" because the Claimant continued working.

[25] The Commission asserts that the evidence could have explained what led the Claimant to reconsider her resignation. The Commission argues that the General Division failed to properly assess this evidence or explain why it dismissed the email exchanges between the Claimant and her employer.

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[10] *Ibid.*
[11] Letter dated June 2, 2020, addressed "To whom it may concern," at GD3-32.
[12] Employer's email exchange on January 27, 2020, with the Claimant, at GD6-31 to GD6-32
[13] Supplementary Record of Claim, dated June 18, 2020, at GD3-51.
[14] Supplementary Record of Claim, dated June 25, 2020, at GD3-59.

[26] The Employer argues that the General Division sufficiently considered all of the evidence and the circumstances that led to the Claimant's departure. The Employer denies that there was any evidence that showed that the owner ever acknowledged that she participated in workplace harassment or bullying, or that she ever gave any assurances to the Claimant that she would correct her behaviour.

[27] The Employer argues that, notably, the Claimant never testified that the owner made any assurances that convinced her to stay. The Claimant also did not testify that any acknowledgment of stressful conditions by the owner or any encouragement from the owner influenced her to rescind her resignation.

[28] The Employer argues that, at most, the Claimant testified that the owner's communications with her made her "uncomfortable" and that, "it's not good for the staff."[15] The Employer argues that, if the owner's assurances had been a major reason for the Claimant's decision to stay with the firm, surely the Claimant would have at least mentioned them when she testified.

[29] The Employer contends that the Claimant's testimony undercuts her claim that she decided to stay at the firm because of the owner's assurances that she would change.

My Findings

[30] I find that the bulk of the Claimant's testimony leading up to and following her statement about the owner's communications largely centred on her feelings about being overworked. She started working in the fall, but already felt burnt out by December. She spoke about being on the verge of a breakdown and needing extra vacation. She felt that she deserved more pay for all of the responsibilities that she held.

[31] The Claimant testified that the owner finally agreed to meet her. The owner agreed to a meeting. The Claimant stressed that this was only after she had already submitted her resignation.

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[15] At approx. 47:35 of the audio recording of the General Division hearing.

[32] During the meeting, the owner agreed to give the Claimant extra vacation. This made the Claimant happy because she felt overworked. The Claimant and the owner also discussed getting support for the Claimant. They agreed a part-time co-colleague would start working full-time.[16] The owner said she could hire someone too.

[33] The bulk of the Claimant's testimony related to being overworked. But, there was evidence that the Claimant was also concerned about how the owner treated her. She was uncomfortable with how the owner communicated. The Claimant also asked, "Can we improve?"[17]

[34] After this meeting, the Claimant agreed to stay at the firm. The Claimant stated that she enjoyed the job and that there would have been no reason to leave in the first place, "if she had been treated properly."[18] She now believed that the owner was making concessions. She also perceived that the owner would be making an effort to change.

[35] Standing alone, the remarks, "can we improve" and "if she had been treated properly" do not prove anything. They do not necessarily show that the owner held out assurances that she would change how she communicated with the Claimant. One could interpret these remarks to mean that the Claimant felt the firm mistreated her by overburdening her with work.

[36] But, the context is important. The Claimant had just complained about how the owner communicated with her. The Claimant's request to improve surely had to have related in part to the owner's communications with her. In this context, "if she had been treated properly" typically would not refer to having an unreasonable workload, particularly as the owner had already offered concessions to address the workload.

[37] Further, the Claimant's evidence included the documents in the hearing file, not just her oral testimony. Evidence in the hearing file supported the Claimant's claims that she understood she could expect changes in the working conditions. The documents in the hearing file also gave more context to the Claimant's oral testimony.

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[16] At approximately 46:00 to 51:40 of the audio recording of the General Division hearing.
[17] At approximately 47:47 of the audio recording of the General Division hearing.
[18] At approximately 50:15 of the audio recording of the General Division hearing.

[38] The General Division had to consider both the oral testimony and the documents in the hearing file. This included the documentary evidence that supported the Claimant's claims that the owner said she would change. The Commission's phone log notes[19] show that the Claimant claimed that she withdrew her resignation because of assurances from the owner. She claimed the owner had "promised to change."[20]

[39] This evidence was important, given the General Division's findings that the working conditions could not have been that dire if the Claimant withdrew her resignation and returned to work. But, if the Claimant believed the owner's attitude towards her was going to improve, that could credibly explain why the Clamant decided to continue working at the firm.

[40] The fact that the Claimant understood that working conditions would improve was certainly relevant towards understanding why she would have withdrawn her resignation.

[41] Generally, one can presume that a decision-maker has considered all of the evidence before it. But, a decision-maker must give reasons for its decision and explain why it dismisses or assigns little or no weight to evidence.

[42] The General Division should have considered the evidence that explained why the Claimant withdrew her resignation. It is unclear whether the General Division member considered the Claimant's evidence that the owner assured her she would change. The member did not refer to any of it, although it was relevant and could have affected the outcome. If the General Division member did in fact consider the Claimant's evidence, he should have explained why he rejected it or gave it little weight.

[43] Given the nature of the error, it is unnecessary to address the balance of the Claimant's argument. However, I will address them as they may have some impact on the outcome.

ii. Did the General Division fail to consider evidence about the use of scents in the workplace?

[19] Supplementary Records of Claim, dated June 18 and June 25, 2020, at GD3-51 and GD3-59, respectively.
[20] Supplementary Record of Claim, dated June 25, 2020, at GD3-59.

[44] Yes. The General Division failed to consider evidence about the use of scents in the workplace. However, there was insufficient evidence to show that it was a contributing factor towards the Claimant's departure.

The Parties' Positions

[45] The Claimant argues that the General Division failed to consider the evidence about the use of scents in the workplace.

[46] The Claimant notes that she had testified that she is allergic to perfumes and that due to workplace exposure, she sometimes experienced trouble breathing, headaches and trouble focusing. She claims that she mentioned her sensitivities to her Employer and to the principal's spouse, but the Employer did not do anything to accommodate her.[21]

[47] As a result, the Claimant wrote an email to a tenant whose perfume she found "very strong."[22] In her email, she stated that the office was "fragrance free due to the fact that some of us in the office are allergic to perfumes/or fragrances…"[23]

[48] The Employer learned of the Claimant's email to the tenant. The Employer noted that the Claimant had not previously objected to the Employer's use of scents.

[49] The Employer did not implement any scent-free policies while the Claimant remained employed.

[50] The Claimant argues that employers have an obligation under human rights legislation to accommodate employees with disabilities, including environmental sensitivities and allergies. The Claimant argues that the General Division made a legal error by failing to address this evidence when it assessed whether just cause existed because of discrimination based on the Claimant's physical disability.

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[21] At approx. 54:00 of the audio recording of the General Division hearing, and in the Claimant's letter to the Tribunal, dated August 18, 2020, at GD9-3.
[22] Claimant's letter to the Tribunal, dated August 18, 2020, at GD9-3.
[23] Claimant's email dated December 17, 2019, at GD8-15 and GD8-16.

[51] The Employer argues that it was unaware of the Claimant's allergies and therefore it did not discriminate. And, because it was unaware of the Claimant's sensitivities, it denies that it had a duty to accommodate.

[52] The principal of the firm notes that the Claimant never objected when she wore perfumes and deodorants. On top of that, when the principal learned of the Claimant's email to the tenant, she immediately asked who had allergies.[24] It is unlikely that the Employer would have had to make these enquiries if the Claimant had previously brought her concerns to the principal. Either that, or the principal had not been attentive or it did not register with her that the Claimant has environmental sensitivities when the Claimant initially brought up her concerns.

[53] Despite the Employer's email asking who had allergies, the Claimant did not speak up. So, the Employer claims that it was unaware that anyone required accommodation. The Employer doubts that the Claimant has any environmental sensitivities.[25]

[54] Given these considerations, the Employer argues that there was no reason for the General Division to assess whether there was discrimination based on the Claimant's physical disability.

[55] The Claimant further claims that her Employer's response to the scents issue was part of the harassment she endured. And, partly because of the scents issue, she claims that she did not have any reasonable alternatives but to leave her employment.

[56] The Commission agrees with the Claimant. The Commission says that there was evidence that scents in the workplace affected the Claimant's health and well-being. The Commission argues that if the evidence supports the existence of a circumstance, the General Division was at least required to consider the circumstance applied.

[57] The Commission argues that because the Claimant alleges that she had raised the scents issue with her employer, and given that an employer has a duty to accommodate an employee, the General Division should have also examined whether the employer's practices were contrary to law under section 29(c)(xi) of the *Employment Insurance Act.*

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[24] Employer's email to the Claimant, dated December 18, 2019, at GD8-16.
[25] Employer's Notice of Appeal-Employment Insurance-General Division, filed August 7, 2020, at GD6-25.

[58] The Employer argues that the General Division did not fail to consider the scents issue because there simply was insufficient evidence. In particular, the Employer argues that there was no evidence that workplace scents was a paramount consideration for the Claimant when she resigned. Indeed, the Employer—not the Claimant—first brought up the scents issue.

My Findings

[59] The General Division acknowledged that the Claimant had, "issued an unauthorized directive regarding wearing scents in the workplace."[26] Otherwise, the General Division did not consider the issue of whether the Claimant's environmental sensitivities caused her to leave her employment. In particular, the General Division did not consider the Claimant's environmental sensitivities in the context of either section 29(c)(iii) or 29(c)(iv) of the *Employment Insurance Act*.

[60] Just cause for leaving an employment may exist under section 29(c) of the *Employment Insurance Act*. Just cause may exist if there is, among other things:

> (i) Sexual or other harassment, …
> (iii) Discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,
> (iv) Working conditions represent a danger to health or safety, …
> (x) Practices of an employer that are contrary to law …

[61] The Claimant did not the vigorously pursue any arguments about her environmental sensitivities. She did not raise it as a ground of appeal. Even so, it should have been clear to the General Division that it was an issue. The General Division should have addressed whether the Claimant had just cause under section 29(c) of the *Employment Insurance Act*.

[62] However, any of these circumstances would have had to been a basis that led to or contributed to the Claimant's departure from her employment. The evidence is not compelling on this point.

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[26] General Division decision, at para. 28.

[63] For one thing, the Claimant did not respond to her Employer's email about who was allergic. She also continued working for more than two months, without any further attempts to bring her concerns to the Employer. When the Claimant submitted her resignation on March 2, 2020, she explained that she was leaving her employment because she felt overwhelmed, emotionally abused, and bullied. She did not mention anything about the Employer's failure to accommodate her disability.

[64] Further, when the Claimant applied for Employment Insurance benefits, she explained that she left her employment primarily because she found the job demanding and stressful.[27] The Claimant did not raise any concerns relating to her environmental sensitivities.

[65] The Claimant wrote to the Commission. But, there was no mention of any workplace exposure to scents or to the Employer's failure to accommodate her environmental sensitivities.[28]

[66] Indeed, the first time that the Claimant raised the issue of her environmental sensitivities to the Commission or to the Social Security Tribunal was in response to the Employer's description of the Claimant's interactions with others, including with the tenant.

[67] These considerations indicate that the Claimant's departure from her employment was unrelated to her environmental sensitivities. I find that the Claimant did not have just cause for leaving her employment on the scents issue under section 29(c)(i), (iii), (iv). or (xi) of the *Employment Insurance Act*.

[68] Had the scents been a contributing factor in causing the Claimant to leave her employment, she would have had reasonable alternatives to leaving on this point. For instance, having caught the Employer's attention, she could have attempted to resolve the issue.

[69] Even if the Employer had been unresponsive before, there was another re-opening for the Claimant to pursue this issue. She could have responded to the Employer's email. She could have let the Employer know that she has environmental sensitivities, if it did not already know.

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[27] Application for Employment Insurance benefits, at GD3-12 and GD3-15.
[28] Claimant's letter to the Commission, dated June 2, 2020, at GD3-31 to GD3-33.

iii. Did the General Division make a factual error about the Claimant's attempts to see a doctor?

[70] Yes. The General Division made a factual error about the Claimant's attempts to see a doctor.

The Parties' Positions

[71] The Claimant argues that the General Division made a factual error about her attempts to see a doctor.

[72] At paragraph 35, the General Division rejected the Claimant's claim that she had been unable to see a doctor because of COVID-19. The General Division found that the Claimant could have seen a doctor before she left her job on March 2, 2020. The province had not imposed any restrictions until at least March 16, 2020. In other words, the General Division found that doctors' offices remained open.

[73] The Claimant denies that she tried to see a doctor before resigning from her job on March 2, 2020. She expected to see her physician after she left her job.[29] But, by then, there were pandemic-related restrictions and she could only see her doctor virtually.[30]

[74] The Employer argues that the General Division's underlying point was that, if the Claimant claimed that stress and anxiety drove her to quit her job, then she should have sought medical assistance before quitting. Indeed, the General Division member found that there was no evidence to show that the Claimant received any advice to leave her employment when she did.[31]

My Findings

[75] The General Division concluded that, if the Claimant did not seek medical assistance before she left her employment, then her work-related stress and anxiety could not have been that bad. And, if it was not that bad, then she did not have just cause for leaving her job.[32]

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[29] Claimant's Application for Employment Insurance benefits, at GD3-9 and Claimant's request for reconsideration, filed June 9, 2020, at GD3-31.
[30] GD3-31.
[31] General Division decision, at para. 35.
[32] General Division decision, at paras. 35 and 46.

[76] As well, the member found that the Claimant had reasonable alternatives to leaving. The member found that one of the alternatives would have been to seek medical advice regarding her stress, before quitting.[33] From this perspective, it does not bolster the Claimant's case when she denies that she tried to see a doctor before resigning.

[77] Even so, the General Division made a factual error when it found that the Claimant claimed that she had been unable to see a doctor because of COVID-19. The error arose when the General Division assumed that the Claimant claimed that she tried to see a doctor before left her job, or soon after she left, when in fact the evidence showed that she intended to see her doctor shortly after leaving her job. There was no evidence to support either assumption. The Claimant may have intended to see a doctor soon after leaving her job. But, this does not necessarily mean she actually went to see one right after she left her job.

[78] The General Division member's error was important because he relied on it as a basis to find that the Claimant was not credible.[34]

iv. Did the General Division misapprehend the Claimant's evidence about her co-worker?

[79] Yes. The General Division failed to properly assess the Claimant's evidence about her co-worker.

The Parties' Positions

[80] The Claimant argues that the General Division failed to understand her evidence when it found that her assertions about her co-worker had proven "to be patently false"[35] and that she used the co-worker's personal issues to "falsely bolster her case."[36]

[81] The Claimant argues that the General Division's error was significant. The error led to an adverse finding of credibility against her. Indeed, the error was the main reason the General Division found the Claimant was not credible.

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[33] General Division decision, at para. 46.
[34] Claimant's submissions filed March 5, 2021, at AD8-17.
[35] General Division decision, at para. 40.
[36] General Division decision, at para. 47.

[82] The Claimant submits that, if the General Division had appreciated her evidence, it might have found her to be credible. And, it might have accepted that she had just cause for leaving her employment.

[83] The General Division wrote:

> [40] Now I must address the Claimant's assertions that a co-worker, […], had left his employment with [the Employer] for the same reason she did. This assertion has been proven to be patently false. This gentleman was facing some personal issues which required him to be off work for a period of time. The employer, when she became aware of his situation, granted him the time off and when he was ready to return to work his position would be there for him. The circumstances around his departure were personal and were not shared with anyone. This shows [the owner and founder of the firm] to be a compassionate employer.
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> [41] The Claimant attempted to use, what her version of these events seemed to be, another's personal problems to further her own case thus bringing into question as to what lengths she would go to make this employer out to be such an ogre in the workplace. The only result being her own credibility is questionable. If, in her position as Administration Services Manager, she garnered any information regarding this gentleman's leave, disclosing it for any purpose is highly unprofessional.

[84] The Claimant claims that the evidence regarding her co-worker was as follows:

- The Claimant sat near the co-worker, so she had a first-hand chance to observe how the owner treated him. She observed the owner mistreat the co-worker, similar to how she had been mistreated.[37]
- The owner told her the co-worker had a nervous breakdown.[38]
- The co-worker left his employment. The Claimant notes that the Employer used the terms "resigned" and "took a leave" when describing his departure.[39] The employer wrote, "She is completely wrong about the reason for <u>his resignation</u>; in fact, she has no idea why he <u>resigned</u> …"[40] (emphasis added)

[37] Claimant's letter dated August 18, 2020, at GD9-2.
[38] At approx.1:00:00 to 1:00:35 of the audio recording of the General Division hearing on August 25, 2020.
[39] Claimant's submissions to the General Division, filed March 5, 2021, at AD8-8, referring to GD9-2 and GD10-1.
[40] Employer's email to Tribunal, dated August 19, 2020, at GD10-1

[85] The Claimant argues that this evidence shows that her assertions about her co-worker were not "patently false."

[86] The Claimant also argues that the General Division erred in making a negative credibility finding against the Claimant for introducing this evidence. The Claimant asserts that this evidence was relevant. It showed that the owner had a pattern of mistreating employees.

[87] The Claimant denies that she acted in bad faith in disclosing any information about her co-worker. She argues that her co-worker will not suffer any consequences from this disclosure because the Tribunal anonymizes its decisions.

[88] The Employer argues that the General Division did not make any factual errors regarding the co-worker. The owner denies the Claimant's allegations about her co-worker. In particular, the owner denies that the co-worker left the company. She says that he was on a temporary leave of absence for personal reasons. The Employer argues that, either way, the Claimant breached the co-worker's privacy rights.

My Findings

[89] The General Division suggested that the Claimant was improperly using her co-worker's personal problems to further her own interests. But, as unfortunate as the co-worker's issues may have been, there is no reason why the Claimant could not have relied on that evidence, as long as it was relevant to the case, even if, as the Employer alleges, any information relating to the co-worker was intended to be confidential.

[90] There was nothing inappropriate with the Claimant giving evidence about what she had observed or about what the owner might have communicated to her. At the General Division hearing, the Claimant testified that the owner told her the co-worker was having a nervous breakdown and needed time off. She also said, "I witnessed her treating him badly as well."[41]

[41] At approx.1:00:00 to 1:00:35 of the audio recording of the General Division hearing on August 25, 2020. (With VLC media player, at approx. 1:00:20 to 1:00:56.)

[91] Significantly, the General Division did not go so far as to say that that the Claimant could not rely on that evidence or that that evidence was inadmissible.

[92] It was up to the General Division to determine the truthfulness or the reliability of the Claimant's evidence and to assess whether her observations or understanding of any communications with her was accurate. But, the General Division seemed to have determined that the Claimant's assertions had to have been necessarily false because she used "another's personal problems to further her own case."[42] This was not a basis for assessing evidence. For this reason, the General Division failed to properly assess the Claimant's evidence about her co-worker.

[93] Ultimately, the Claimant was factually wrong when she suggested her co-worker resigned. The co-worker apparently returned to the company after a leave of absence. However, the owner reinforced the Claimant's error when she wrote that the co-worker had resigned.[43]

[94] That said, while the Claimant wrote that her co-worker suddenly resigned in January, she also wrote in the same email that he took a sick leave.[44] It is unclear whether the Claimant understood that a sick leave was different from or the same thing as a resignation.

v. Did the General Division fail to apply the test for discrimination?

[95] Yes. It is not readily apparent if the General Division considered whether the Claimant experienced adverse treatment in the catering incident.

[42] General Division decision, at para. 41.
[43] Employer's email to Tribunal, dated August 19, 2020, at GD10-1
[44] Claimant's email dated August 18, 2000, at GD9-2.

The Parties' Position

[96] The Claimant argues that the General Division failed to properly assess whether she had experienced workplace discrimination. In particular, she claims the member failed to apply the three-part test for discrimination set out by the Supreme Court of Canada.[45] On top of that, she claims that the General Division considered irrelevant evidence while ignoring relevant evidence.

[97] The Claimant argues that, if the General Division had applied the three-part test, it would have found discrimination on a prohibited ground within the meaning of the *Canadian Human Rights Act*. And, it would have accepted that she had just cause for leaving her employment because of the discrimination.

[98] The Claimant submits that *prima facie* discrimination exists where:

i. An employee has a characteristic protected by the *Canadian Human Rights Act*

ii. She experiences adverse treatment with respect to her employment; and

iii. Her protected characteristic was a factor in the adverse treatment.[46]

[99] The General Division found that there was no evidence of any discrimination, based on race or any other factor, other than the Claimant's own accusations. The Claimant argues that she did not simply allege discrimination without any evidence. She cited examples of what she had observed or experienced.

[100] In assessing whether there was discrimination, the Claimant argues the General Division should have applied the three-part test for discrimination to the evidence.

[101] The Claimant also argues that the General Division should have disregarded any evidence regarding the fact that the Employer had given a presentation on diversity training at a

[45] The Claimant cites *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII) at para. 24 and *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33.
[46] *Ibid.*

conference. The Claimant says that the Employer's participation in this type of training was irrelevant to whether the owner had discriminated against her.

[102] The Claimant identifies as Hispanic. She argues that the employer discriminated against her because of her race, ethnic origin, and colour. She claims that other racialized employees faced similar treatment. She listed examples of the discrimination::

- the owner corrected the Claimant's English, which was not her first language. The owner would "correct [her] over and over again."[47] The owner asked her to keep repeating a sentence. The owner kept saying "PARDON," until she was satisfied with the Claimant's response.[48]

- The owner openly spoke down to the Claimant. The owner also pointed out the Claimant's mistakes in front of others or in email threads. The Claimant observed the owner treat Caucasian co-workers with respect.[49]

- A co-worker, who was an immigrant from Spain, was hospitalized. The Claimant alleges that the co-worker told her the owner put a lot of stress on him. The co-worker quit shortly after the Claimant started working.

- The Claimant observed the owner mistreat another racialized employee. The owner also corrected this co-worker's mistakes in front of other co-workers. She alleges that he had an emotional breakdown and went on sick leave.[50]

- A Caucasian co-worker did not face any discipline when she arrived 60 to 90 minutes after office hours began.[51] This same co-worker did not work overtime, unlike the Claimant.[52]

[103] The Employer acknowledges that the Claimant might not have welcomed some of the owner's comments. But, the Employer argues that the test for harassment or discrimination is

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[47] Claimant's letter dated June 2, 2020, at GD3-31.
[48] Supplementary Record of Claim, dated June 18, 2020, at GD3-51.
[49] Claimant's letter dated June 2, 2020, at GD3-31.
[50] Claimant's letter dated August 18, 2020, at GD9-2.
[51] At approx.1:03:40 of the audio recording of the General Division hearing.
[52] At approx.1:03:22 of the audio recording of the General Division hearing.

whether the employer reasonably knew that their behaviour would cause embarrassment, humiliation, or other psychological or physical injury.[53] The Employer argues that the Claimant has not proven that she met the test for discrimination in the factual circumstances of this case.

[104] The owner denies that the Employer harassed or discriminated against the Claimant, or any other employee, for that matter. The Employer notes that it gave a presentation on diversity in the workplace at a conference.

[105] The Employer denies that it ever criticized the quality of the Claimant's work. The Employer argues that, if anything, the owner's comments were factual and intended to be constructive. Rather, the owner was merely giving feedback and correcting errors. The owner pointed out errors on gender pronouns and incorrect telephone numbers, so the Claimant would not repeat these errors in future.

[106] In any event, the Employer denies the Claimant's allegations, including her allegation that the owner told her—five times—not to order from a particular caterer again. The owner believes that it told the Claimant only once. The Employer notes that it had instructed the Claimant to order from another caterer in the first instance.

My Findings

[107] The Claimant alleges that she had just cause under section 29(c)(iii) of the *Employment Insurance Act* because she faced discrimination in her employment on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.

[108] As noted above, section 29(c)(iii) of the *Employment Insurance Act* says that just cause may exist if the Claimant had no reasonable alternatives to leaving, if there was discrimination on a prohibited ground within the meaning of the *Canadian Human Rights Act*.

[53] At approx. 1:06:01 to 1:06:11 of the audio recording of the General Division hearing.

[109] The Claimant argues that the General Division failed consider whether there was discrimination because it did not conduct the three-part test she identified.

[110] It is settled law that there is a two-part test to establish discrimination in the workplace:[54] The Claimant identified the first part of this test. It consists of the three steps that the Claimant listed: whether a complainant has a characteristic that is protected from discrimination, that they experienced adverse treatment with respect to their employment or term of that employment, and whether the characteristic was a factor in the adverse treatment. But the test goes beyond this first part.

[111] Once an employee establishes a *prima facie* case of discrimination, the burden shifts to the employer to justify the conduct or practice. This involves looking at any exemptions under the applicable human rights law. This is the second part of the test. If the employer is unable to justify the conduct or practice, discrimination will be found to have occurred.

[112] The General Division considered whether there was just cause under section 29(c)(iii) of the *Employment Insurance Act.* The General Division acknowledged the Claimant's allegations that she faced discrimination. But, it rejected her claims that she received any adverse treatment with regard to her employment. The General Division wrote, "I find these accusations by the Claimant to be baseless"[55] because there was no supporting evidence to back up her claims. Further, the General Division found that the Employer was justified in its conduct.

[113] The General Division focused on the "catering incident." The Claimant alleges that the owner told her—five times—not to order from a certain caterer again. The General Division wrote:

> Regarding the catering incident, it is totally within the employer's right to dictate suppliers to her business. If the Claimant wilfully disregards a directive from her employer regarding same she can expect to be "spoken to" and reprimanded. The Claimant refers to non-professional behaviour on the part of the employer; this is a blatant example of such behaviour on her part.[56]

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[54] See *Moore v British Columbia (Education)*, 2012 SCC 61.
[55] General Division decision, at para. 38.
[56] *Ibid*.

[114] It is unclear whether the General Division accepted or rejected the Claimant's allegations that the owner told her on five separate occasions not to order from a particular caterer. Either way, as the member put it, it was "within the employer's right to dictate suppliers."

[115] But, the General Division's conclusions that it was within the employer's right to dictate suppliers does not adequately address part of the test for discrimination. While the Employer is clearly entitled to decide suppliers, the General Division still had to decide whether the Claimant experienced adverse treatment, and whether her protected characteristic--which she describes as "race, ethnic origin, and colour"—was a factor in the adverse impact.

[116] The Claimant also cited other cases when she experienced discrimination. The General Division member did not have to address every piece of evidence and explain how he dealt with it. But, when the member suggested that an employer may manage employees in any manner it deems appropriate, it raises the question of whether the General Division appropriately applied the test for discrimination in any of the examples the Claimant described.

[117] This is not to suggest that the Claimant has necessarily established that she faced discrimination in the workplace. For instance, she alleges that the employer pointed out the Claimant's mistakes in email threads, and that she copied others in the company. That does not appear to be borne out in the select emails that the Employer provided.[57]

[118] The Claimant also refers to the fact that a colleague did not face any discipline for arriving 60 to 90 minutes after office hours started. It is unclear from the evidence whether the Employer expected this colleague, who was employed part-time, to start work when others did.

[119] I am by no means saying the Claimant had to provide other evidence to support her claims of discrimination. Indeed, the General Division may have made a legal error when it suggested that the Claimant had to produce supporting evidence of discrimination. Such evidence is not required, and is not always available.

[57] See email exchanges between the Claimant and the owner, at GD8. In one of the emails, the owner asked the Claimant to provide the correct telephone number and contact name, but did not copy others. In another exchange of emails, the owner advised the Claimant that she had the incorrect last name for a client. The owner copied another individual, but the email had originated with the Claimant, who had copied that individual (page GD8-5).

[120] There were other reasons why the General Division did not find the Claimant very credible. She had not mentioned racism in her initial statements to the Commission as the reason she left her job. When the Claimant brought up racism later on, the member found that this was "provided with the intent of overturning a previous unfavourable decision."[58]

[121] Yet, the Claimant's subsequent allegations about how the owner treated her were consistent with her initial statements. The Claimant's initial statement[59] was limited in detail, but the Claimant had alleged the owner was demeaning and belittling towards her, and would embarrass her in front of others.

[122] In short, the General Division assumed that the Claimant could not have been credible because (1) she did not provide evidence to support her allegations of discrimination, and (2) she did not mention racism in her application for Employment Insurance benefits. Yet, these findings were misplaced.

[123] The General Division relied on its assumption that the Claimant was not credible when it determined that the Claimant had not experienced or faced any adverse treatment. With such a finding, the General Division would not have had to consider the remaining step of the first part of the test for discrimination, or the second part of the test.

[124] However, the General Division based its assumption about the Claimant's credibility on a combination of legal and factual errors.

[125] And, in the catering instance, the General Division did not make a finding, one way or the other, about whether the Claimant faced adverse treatment. In that case, the General Division failed to apply the two-step test for discrimination.

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[58] General Division decision, at para. 39.
[59] Application for Employment Insurance benefits, at GD3- 12 and GD3-15.

REMEDY

[126] How can I fix the General Division's errors? I have several choices.[60] I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.[61]

[127] Just cause for leaving an employment exists if a claimant had no reasonable alternative to leaving, having regard to all the circumstances, including the following: if there is harassment, discrimination on a prohibited ground, working conditions that are a danger to health or safety, or excessive overtime work or refusal to pay for overtime work.

The Parties' Positions

[128] The Claimant argues that there is a substantial record, enough for me to give the decision that the General Division should have given. She argues that the evidence overwhelmingly shows that she experienced workplace harassment and discrimination, dangerous working conditions and excessive overtime. She argues that, given the working conditions, she had no reasonable alternative to leaving. She argues that the evidence shows that she was unable to seek medical attention before quitting. She argues that proactively protecting one's health in this case outweighed the risk of unemployment.

[129] The Employer denies the Claimant's allegations, particularly the claims that the owner harassed or discriminated against her. Either way, the Employer argues that the Claimant had reasonable alternatives to leaving. The Employer suggests that the Claimant could have gotten medical attention or a medical note before she resigned. Or, she could have looked for other work, or asked the Employer to reduce her hours or her workload. The Employer asks me to dismiss the appeal, or alternatively, to send the matter to the General Division for a reconsideration because of conflicting information.

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[60] Section 59 of the DESDA.
[61] *Weatherley v Canada (Attorney General)*, 2021 FCA 158, at paras. 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para. 17.

[130] The Commission argues that, while there is conflicting evidence that may never be resolved, there are gaps in the evidence on important issues. The Commission argues that because there are gaps, it would be appropriate to send the matter back to the General Division.

The Scents Issue

[131] I have already determined that the scents issue was not a factor in the Claimant's departure from her employment. So, I do not find that the Claimant had just cause under section 29(c)(iv) of the *Employment Insurance Act.*

Credibility

[132] As for the remaining issues, the parties have presented two strikingly different perspectives on the work atmosphere.

[133] The General Division made adverse credibility findings against the Claimant, but they were largely based on factual errors without regard for the material before it. Without these errors, the Claimant's evidence could have been just as credible and compelling as the Employer's evidence.

[134] If anything, it appears that the General Division readily accepted the Employer's claims without subjecting it to the rigours of scrutiny to ensure that the evidence was generally consistent and plausible.

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.[62]

[62] *Faryna v Chorny*, 1951 CanLII 252 (BCCA).

[135] The General Division found the owner to be very forthcoming and credible in her testimony and submissions.[63] Yet, the General Division did not question the Employer's conflicting portrayals it gave of the Claimant.

[136] The owner indicated that she did not want the Claimant to leave the firm because she thought she was doing "a very good job and [was starting] to get a handle on everything."[64] Yet, in the Notice of Appeal to the General Division, the owner wrote that the Claimant "simply was unable to fulfil the job requirements."[65] The owner also described the Claimant as "rude, dismissive, and condescending."[66] The owner did not paint the Claimant in a very favourable light.

[137] The Employer's description of the Claimant may have been accurate, but then it does not seem logical that, despite whatever strengths it saw in the Claimant, that the Employer would want to continue to employ someone it saw as wholly unfit for the position.

[138] I raise this as an example because the credibility of the witnesses is critical to the outcome of this matter. It is unclear whether the General Division considered this seeming discrepancy in the Employer's evidence, let alone give the owner a chance to explain it.

Excessive Overtime

[139] The Claimant's workload is another area of the evidence where the parties disagree. The Claimant says that she was overworked, to the point that she skipped her lunch breaks and worked overtime, without pay.[67]

[140] There is some conflicting evidence from the Claimant about the amount of overtime she might have worked. When she wrote to the owner in December 2019, she reported that she

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[63] General Division decision, at para. 47.
[64] Owner's email dated January 27, 2020, to Claimant, at GD6-31.
[65] Notice of Appeal – Employment Insurance – General Division, filed July 28 2020, at GD2-5.
[66] *Ibid.*
[67] Claimant's letter dated June 2, 2020, at GD3-31 to GD3-32 and Claimant's email dated December 18, 2020, at GD3-38.

worked an average of 3 to 3.5 hours overtime each week.[68] But when she asked the Commission to reconsider its decision, she stated that she worked about 11 extra hours a week.[69]

[141] The owner denies the Claimant's allegations that there was a large workload or that the Claimant was doing the work of three people.[70] The owner says the Claimant was slow at catching up.[71]

[142] Despite the conflicting evidence, I am prepared to find that there was excessive overtime, and that the Claimant left her job in part because of the excessive overtime. There is a discrepancy in the overtime hours that the Claimant reported, but she has been consistent in complaining that she worked overtime. And, even if the overtime hours were on the lower end of what she reported, the overtime happened on a weekly basis. The regularity of overtime could also be considered excessive.

[143] The workload itself may not have been large. But, the Claimant was frequently interrupted throughout the day with demands from others, including the owner. As a result, the Claimant found herself unable to complete work during the day. She testified that she worked overtime to meet the work demands. The owner does not challenge the Claimant's assertions that there were frequent interruptions and that the Claimant ended up having to work overtime.

[144] Indeed, there is no dispute that some overtime was necessary from time to time to meet client deadlines. The Employment Agreement clearly spelled out that there could be overtime.[72] The Agreement also said, "There will be no overtime pay."

[145] The Agreement also signaled that there could be excessive overtime. The Agreement required the employee to "advise us of this" and the parties would then discuss how to address the excessive overtime.

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[68] Claimant's email dated December 18, 2020, at GD3-38.
[69] Claimant's letter dated June 2, 2020, at GD3-31.
[70] Supplementary Record of Claim (phone log notes between the Commission and the owner on June 25, 2020), at GD3-59.
[71] *Ibid*.
[72] Employment Agreement dated October 1, 2019, at GD6-27.

[146] The Claimant did just that. She notified the Employer that she was regularly working overtime each week.[73] The Employer did not immediately address the Claimant's concerns about overtime immediately until after she resigned in January.

[147] The Employer's efforts to accommodate the Claimant support the Claimant's allegations that there was so much work that she had to work overtime. The owner gave the Claimant "free rein" to hire someone to assist. The owner acknowledged the Claimant should download work to others, likely to the new person the Claimant was to hire. On top of that, the owner suggested that another employee, who might be starting to work full-time, could also help.[74]

[148] The fact that the Employer offered to hire an extra person, with the possibility of help from an existing employee, strongly indicates that, up until that point, the Claimant had to have been working excessive overtime.

[149] Generally, a claimant who takes reasonable steps to find solutions to intolerable conditions will have just cause if those steps are unsuccessful. The Claimant took steps to try to address the excessive overtime, and the Employer in turn responded to the Claimant's concerns.

[150] However, the Claimant left her employment before she or the company hired anyone, or before the co-worker started working full-time. The Employer says that the Claimant did not leave a reasonable period for these accommodations to take effect. The Employer argues that the Claimant therefore does not have just cause because she had reasonable alternatives that she failed to meaningfully pursue.

Harassment

[151] The Claimant says that she did not have any option but to leave because the owner harassed and discriminated against her. She says that she received unequal treatment compared to other workers. She argues that she should not have had to stay while she looked for other employment. Otherwise, she would have continued to face discrimination and harassment.

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[73] Claimant's email dated December 18, 2020, at GD3-38.
[74] Owner's email dated January 27, 2020, at GD6-31.

[152] The Claimant says that there was a toxic work environment. She claims that the owner harassed and discriminated against her and other racialized employees. The owner denies the Claimant's allegations, especially any claims that she might have been abusive towards any employees.

[153] It seems that the Claimant tied some of the harassment to what she perceived was a never-ending onslaught of work demands. For example, the Claimant wrote, "She would harass me at work and send me emails and would no [*sic*] allow me to work … I could not focus as I was being bullied and overwhelmed with her demands. She was demeaning and I felt as though she was harassing me over emails and by telephone and in person."[75]

[154] At the same time, the Claimant wrote that the owner often embarrassed and belittled her in front of others. She alleged that the owner often made her feel inadequate, frequently insulted and told her that she was disappointing. Much of this was tied to the workload. The Claimant states this would happen in front of others and in email threads. Curiously, the Claimant did not retain copies of these email threads in which she alleges the owner harassed her, though she produced copies of other emails.

[155] The few emails prepared by the owner are relatively short. They are lacking in social niceties. But, these emails alone fall short of establishing harassment. Some of the emails include the following:

- December 18, 2019 email – the owner wrote, "It is news to me about anyone in our office being allergic to fragrances. Who is allergic? In the future, can you please check things like this before sending them to tenants?[76]

- January 6, 2020 email – owner wrote, "His last name is NOT P."[77]

- January 22, 2020 email – owner wrote, "J. who? Which file? Keep in mind I have dozens of files going at any one time so I need more specifics than a first name[78]

[75] Application for Employment Insurance benefits, at GD3-12.
[76] Owner's email dated December 18, 2019, at GD8-16.
[77] Owner's email dated January 6, 2020, at GD8-5.
[78] Owner's email dated January 22, 2020, at GD8-7.

- January 26, 2020 email – owner wrote, “This is the wrong cell number. Please ensure you write the correct telephone number and name of the contact – repeat back to the person to ensure accuracy”[79]

- January 27, 2020 emails – owner wrote, “It’s the wrong number”[80] and “Exactly – I figured it out over the weekend”[81]

- February 28, 2020 email – owner wrote, “Sorry – don’t have time for that”[82]

[156] On its face, these emails are not aggressive, harmful, or offensive. Some of the emails may have been abrupt, but they are not demeaning, belittling, nor do they cause personal embarrassment or humiliation. In my view, these series of emails do not constitute harassment. They fall within the Employer’s legitimate and proper exercise of authority. The Employer also denies that it knew or should have reasonably known that its emails would cause offence or harm.

[157] Even so, the owner hints that some of the Claimant’s claims may well have taken place.

[158] When the Claimant resigned the first time, she wrote, “It seems that I am made to feel inadequate when I can’t keep up.”[83] The Claimant did not provide specifics, but the Employer did not deny that its conduct or behaviour could have had that effect on the Claimant, even if it was unintentional.

[159] When the owner responded to the Claimant’s first resignation email, she wrote, “And yes, sometimes people (including me) do not deliver a message with sufficient sensitivity, whether it is because we are busy /in a rush or under pressure ourselves. It is not meant personally.”[84]

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[79] Owner’s email dated January 26, 2020, at GD8-6.
[80] Owner’s email dated January 27, 2020, at GD8-9.
[81] Owner’s email dated January 27, 2020, at GD8-10.
[82] Owner’s email dated February 28, 2020, at GD3-40.
[83] Claimant’s initial resignation email dated January 27, 2020, at GD6-47.
[84] Owner’s email dated January 27, 2020, at GD6-32.

[160] The Claimant's email should have been a wake-up call to the Employer, even if it did not already perceive that the Claimant felt demeaned and belittled by the Employer's conduct or behaviour.

[161] The Claimant resigned a second time. She wrote:

> [the owner was] very difficult to work with. I honestly feel emotionally abused by the way [the owner has] been interacting with me. It seems when [the owner is] in a bad mood [she] find[s] "ONE" person to bully in the company and it just happens to be me… [The owner has] belittled me, emotionally abused me and disrespected me.[85]

[162] The Claimant also wrote to a co-worker, saying that the owner was very difficult to deal with.[86]

[163] The Claimant claims that the Employer's harassment extended beyond emails. In addition to the catering incident, the Claimant also described how the owner required her to repeat responses to the owner's satisfaction. She also claimed that the owner corrected her English and asked her to repeat sentences.

[164] The owner's response about lacking sufficient sensitivity seems to support the Claimant's allegations, even if the Employer perceived any criticisms as constructive.

[165] The harassment also took a subtler form when the owner circulated email to all staff, seeking feedback about seating arrangements.[87] Ultimately, the Employer determined that the Claimant was unable to deal with staff and that staff had no desire to be involved with her. The Employer seated the Claimant "away from close contact with [company] staff,"[88] although the Employer moved the Claimant under the guise that it would be quieter for her, though the Claimant resisted the move. (The Claimant had previously suggested moving the printer and moving a work colleague to address noise issues.)

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[85] Claimant's resignation email of March 2, 2020, at GD3-43 [illegible] and GD3-52.
[86] Claimant's email dated March 2, 2020, to co-worker, at GD6-46.
[87] Employer's submissions at GD6-23, and emails at GD6-37 to GD6-41.
[88] Employer's submissions at GD6-25 and at GD8-3.

[166] This move and resulting isolation effectively diminished the Claimant, even if the owner had intended to soften workplace interactions involving the Claimant.

Reasonable Alternatives to Leaving

[167] There is also the issue of whether the Claimant had reasonable alternatives to leaving her employment. The Claimant claims that she tried to find a solution but failed. She argues that there was no improvement in the working conditions, so she had no reasonable alternative to leaving. The Employer argues that the Claimant had reasonable alternatives to leaving.

[168] Because the Claimant found that working conditions were intolerable, it was unrealistic to expect her to continue to work under such conditions, while looking for other employment. While there might have been the prospect of seeking a temporary leave of absence (which likely would have been available, based on the fact that a co-worker was on a leave of absence), it was unreasonable to expect the Claimant to have the specter of harassment hanging over her head. As it was, the Claimant was already experiencing stress and anxiety. She described it as immeasurable.[89] She described anxiety over the thought of returning to work after a weekend.[90] She claims that the stress and anxiety drove her to seek medical treatment. She claims that she continues to experience anxiety as a result of this experience.

[169] The Employer argues that the Claimant should have sought medical treatment for her stress and anxiety, but that would not have addressed the harassment and belittlement that the Claimant felt.

[170] Further, the Claimant was still working overtime without pay. She could not expect the Employer to pay her for overtime because non-payment was enshrined in her Employment Agreement. It was not a reasonable alternative for the Claimant to continue working while she waited for some relief from her workload, or while she looked for other work, if she continued to work overtime without pay.

Discrimination

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[89] Claimant's resignation email of March 2, 2020, at GD3-43 [illegible] and GD3-52.
[90] *Ibid*.

[171] I have not addressed or made any findings about whether the Claimant faced discrimination. It is unnecessary, in light of my overall findings. But, on its face, the evidence seems to fall short of establishing that there was *prima facie* discrimination. While the Claimant received adverse treatment, it does not appear that her protected characteristic was necessarily a factor in the adverse treatment. I look at the catering incident, for instance. The Claimant cited this incident as a particularly harsh example of harassment. She alleged the owner told her about five times not to order from a particular caterer. I do not detect any notion that the owner was influenced by the Claimant's protected characteristic.

Summary

[172] I find that the Claimant had just cause for leaving her employment, especially under section 29(c)(viii) of the *Employment Insurance Act*. There was excessive overtime or refusal to pay for overtime. The Employment Agreement shows that the Employer refused to pay for any overtime. There is no evidence that the Employer ever offered to compensate the Claimant for any ongoing overtime she worked.

[173] The Employer attempted to address the workload and excessive overtime issues. Despite the Employer's accommodations, the Claimant continued to work overtime without pay. The company had yet to hire a new employee to help the Claimant. It is clear from the co-worker's text message also[91] that the Claimant could not rely on this co-worker's support either. (If anything, the co-worker's belittlement in her text contributed to the Claimant's humiliation, which the Employer seemed to have tolerated.)

[174] On top of this, the Claimant received unwelcome messaging from the Employer that lacked "sufficient sensitivity." This messaging had the effect of belittling and humiliating the Claimant. She was frequently interrupted and unable to keep up with the unrelenting workload. She received frequent comments about her work productivity. She found these comments demeaning. It was unrealistic to expect the Claimant to complete the work, given the interruptions and the volume. She described being bullied and singled out by the owner, and being made to feel inadequate.

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[91] Co-worker's text message dated February 27, 2021, at GD8-17.

[175] The Claimant had no reasonable alternatives to leaving her employment, as it was unrealistic to expect her to continue to work overtime without pay, or to continue to be bullied and humiliated.

CONCLUSION

[176] I am allowing the Claimant's appeal.

Janet Lew
Member, Appeal Division

HEARD ON:	March 16, 2021 and May 10, 2021
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	Francesca Allodi-Ross (counsel), Representative for the Appellant Josée Lachance, Representative for the Respondent M. R., Representative for the Added Party J. Jamil (counsel), Representative for the Added party