



Citation: *HB v Canada Employment Insurance Commission*, 2022 SST 940

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** H. B.  
**Representative:** Craig Floden (counsel)

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Anick Dumoulin

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**Decision under appeal:** General Division decision dated January 27, 2022  
(GE-21-2373)

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**Tribunal member:** Janet Lew

**Type of hearing:** Videoconference

**Hearing date:** June 28, 2022

**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** September 23, 2022

**File number:** AD-22-140

## Decision

[1] The appeal is allowed. The matter will go back to a different member of the General Division for reconsideration.

## Overview

[2] This is an appeal of the General Division decision. The General Division found that the Appellant, H. B. (Claimant), had not shown that he had just cause for leaving his job. The General Division found that the Claimant had reasonable alternatives to leaving his job. The General Division concluded that the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural, legal, and factual errors. In particular, the Claimant argues that the General Division overlooked statements in which he said that "P.," one of his co-workers (who also happened to be his union representative) physically assaulted him.

[4] The Claimant argues that the General Division then compounded its error by failing to consider whether he had just cause for leaving because of harassment, or because of working conditions that represented a danger to his health or safety.

[5] The Claimant further argues that the General Division made a legal error when it found that he had reasonable alternatives to leaving his employment. The Claimant argues that there were no reasonable alternatives, taking into account the risks to which he would have been exposed by returning to an unsafe work environment.

[6] The Claimant asks the Appeal Division to give the decision that he says the General Division should have given. He says the General Division should have found that he had just cause because he did not have any reasonable alternatives to leaving his work. Or, he asks the Appeal Division to return the matter to the General Division for redetermination.

[7] The Respondent, the Canada Employment Insurance Commission (Commission), denies that the General Division made any errors or that if it made any errors, says the outcome would have been the same. The Commission asks the Appeal Division to dismiss the appeal. Alternatively, the Commission says that if the Appeal Division should find that the General Division made a procedural error, that it should then return the matter to the General Division for a redetermination.

## Issues

[8] The issues in this appeal are

- a) Did the General Division breach any rules of procedural fairness?
- b) Did the General Division make a factual error regarding an incident that occurred on August 6, 2020?
- c) Did the General Division make legal errors about whether the Claimant had any reasonable alternatives to leaving his job?

## Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.<sup>1</sup>

### **Did the General Division breach any rules of procedural fairness?**

[10] The Claimant argues that the General Division breached rules of procedural fairness. He says it did this by drawing conclusions about some of the evidence. He says the General Division should have given him an opportunity to respond to that evidence.

[11] The Claimant argues that, if the General Division had questioned him about some of the evidence, he would have been able to explain what the General Division considered were inconsistencies. He claims that the General Division would have then

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<sup>1</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

accepted his evidence upon which he relies to establish that he had good cause for having left his employment.

[12] The evidence included the Claimant's two statements regarding an incident that took place on August 6, 2020, between the Claimant and one of his co-workers.<sup>2</sup>

[13] The Commission denies that the General Division breached any rules of procedural fairness because:

1. The evidence came from the Claimant,
2. The Claimant did not produce this evidence until after the General Division hearing, and
3. The Claimant had the opportunity to attach comments when he filed the evidence.

[14] At the General Division hearing, the Claimant spoke about a statement that he made. The General Division member noted that he had not received a copy of the statement, so asked for a copy.

[15] The General Division member noted that he received two statements on January 13, 2022, about a week after the hearing had already taken place.

[16] The member wrote that he considered one of the Claimant's statement in making his decision, "as it was information [he] had asked for and was also directly related to the Claimant's argument he could not give his employer a copy of his statement as he would not get a fair investigation."<sup>3</sup>

[17] The General Division noted that the Commission also filed additional submissions, on January 17, 2022. The member did not consider the Commission's additional submissions, as they were unsolicited. Further, the member decided that if the Commission had wanted to add to their original submissions or had an issue with

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<sup>2</sup> See Incident Reports, at GD8-6 and GD8-7 to GD8-9.

<sup>3</sup> See General Division decision, at para 17.

anything that arose at the hearing, they “could have been present at the hearing to offer their submissions, but they chose not to attend.”<sup>4</sup> In other words, the General Division found that the Commission lost its opportunity to respond to any post-hearing documents by failing to attend the hearing.

[18] The General Division found that the appeal turned on whether and to what extent the Claimant’s co-worker assaulted him.

[19] The General Division suggested that, if the Claimant’s co-worker had physically assaulted him, then the Claimant could have had good cause (subject to any reasonable alternatives he might have had to leaving his job). But, if the Claimant’s co-worker had not physically assaulted him, then the incident with the co-worker did “not present such a threat to the Claimant’s health and safety that he could not return to work.”<sup>5</sup>

[20] The General Division examined the evidence surrounding the assault. The General Division noted the following:

- The Claimant told the Commission that “there was a scuffle, and that the union rep almost ripped him out of his truck”<sup>6</sup>
- In his testimony at the General Division, the Claimant repeated this claim, “that the union rep was physically trying to drag him out of the truck.”<sup>7</sup>
- In his initial statement that the Claimant wrote and gave to his lawyer, that at no point does he ever say the union rep touched him. The Claimant wrote that his colleague “was yelling at [him] so loud ... [He] was being very aggressive and yelling at [him].”<sup>8</sup>

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<sup>4</sup> See General Division decision, at para 18.

<sup>5</sup> See General Division decision, at para 48.

<sup>6</sup> See General Division decision, at para 43, referencing GD3-21 and GD3-29.

<sup>7</sup> See General Division decision, at para 43.

<sup>8</sup> See General Division decision, at para 44, referencing GD8-8.

[21] The General Division found that there were inconsistencies in the Claimant's statements.

[22] The General Division rejected the Claimant's statement to the Commission. It also rejected his oral evidence at the hearing. The General Division rejected this evidence, explaining that it "appear[ed] coloured by the passage of time."<sup>9</sup>

[23] Instead, the General Division preferred the Claimant's initial statement, "as he says he wrote it within two weeks of the actual event taking place."<sup>10</sup> The General Division found the initial statement was reliable. The General Division found that the initial statement more likely reflected what had happened between the Claimant and his co-worker.

[24] As the trier of fact, the General Division is permitted to assess and weigh the evidence before it. However, it still has a duty to provide the Claimant with an opportunity to address any seeming inconsistencies in the evidence, particularly on an issue so pivotal to the outcome.

[25] It is not enough that the Claimant could have attached comments or arguments when he filed his statement. After all, the Claimant may not have appreciated that there were any inconsistencies in the evidence, or that the General Division would have used that evidence against him to conclude that his subsequent statements were unreliable.

[26] The Claimant's legal representative should have been alive to the fact that there were seeming inconsistencies in the Claimant's evidence and addressed them when the Claimant filed the post-hearing evidence. But, even so, this does not negate the General Division's duty to ensure that the Claimant had an opportunity to address what it saw as conflicting evidence. The General Division should have squarely put this evidence to the Claimant.

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<sup>9</sup> See General Division decision, at para 45.

<sup>10</sup> See General Division decision, at para 45.

[27] By failing to provide the Claimant with an opportunity to address or explain the conflicting evidence, the General Division did not follow the rules of procedural fairness.

### **The Claimant's remaining arguments**

[28] The Claimant has raised other arguments. But, it is unnecessary to address them, as I have determined that the General Division failed to follow the rules of procedural fairness. This is enough for me to consider what remedy is appropriate to give.

### **Remedy**

[29] Unless the outcome would have been the same anyway, there are two remedies available to correct any errors: the Appeal Division can send the matter back to the General Division for reconsideration, or it can give the decision that the General Division should have made.<sup>11</sup> If the Appeal Division substitutes its own decision, this means it may make findings of fact.<sup>12</sup>

[30] The Commission maintains that, even if the General Division made any errors, that this does not change the result, so says the appeal should be dismissed. The Commission says the appeal should be dismissed because, even if the General Division had accepted the Claimant's oral evidence that his co-worker physically assaulted him, the Claimant still had reasonable alternatives to leaving his employment. The Commission notes, for instance, that the Claimant could have taken a medical leave of absence from his employment, while looking for other work.

[31] Alternatively, the Commission asks the Appeal Division to return the matter to the General Division.

[32] The Claimant argues that the Appeal Division should give the decision that he says the General Division should have given. He argues that the General Division

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<sup>11</sup> See section 59(1) of the *Department of Employment and Social Development Act* lists the remedies available.

<sup>12</sup> *Weatherly v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

should have determined that he had just cause for having left his employment and that he was therefore entitled to Employment Insurance benefits. Alternatively, he asks the Appeal Division to refer the matter to the General Division for reconsideration.

[33] Usually I would substitute my own decision instead of returning the matter to the General Division. However, I would only do that if I was satisfied that the evidentiary record was complete, that there was an agreement on the general facts, and if the parties had the chance to fairly address the evidence and argue the merits of their case. These factors are missing in this case—for both parties. I note, for instance, that the General Division did not provide the Commission with the opportunity to respond to the evidence that the Claimant filed after the hearing.

[34] Further, although the Commission argues that the Claimant had reasonable alternatives to leaving his employment, this does not take into account the possibility that the Claimant's co-worker may have physically assaulted him. If the Claimant's co-worker assaulted the Claimant, this could have affected the reasonableness of any alternatives to leaving his job that he might have otherwise had.

[35] I agree with the parties' alternative solution. Returning the matter to the General Division will allow the parties to properly address the inconsistencies in the evidence, and to examine whether the Claimant had just cause for having left his employment.

## **Conclusion**

[36] The appeal is allowed. The General Division failed to follow the rules of procedural fairness, as it should have provided the Claimant with a fair opportunity to address the evidence. The matter is to be returned to a different member of the General Division for a redetermination.

Janet Lew  
Member, Appeal Division