Citation: *DH v Canada Employment Insurance Commission*, 2023 SST 1066

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. H.
Representative:	R. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 15, 2023 (GE-22-4035)

Tribunal member:	Stephen Bergen
Decision date:	August 10, 2023
File number:	AD-23-611

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] D. H. is the Applicant. She left her employment in July 2022, and made a claim for Employment Insurance (EI) benefits so I will call her the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission), denied the claim because it found that the Claimant had voluntarily left her employment without just cause. When the Claimant asked the Commission to reconsider, it would not change its decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She is now asking the Appeal Division for leave to appeal.

[4] I am refusing leave to appeal. The Claimant has not identified an arguable case that the General Division made any of the errors that I may consider.

Issues

[5] Is there an arguable case that the General Division made an error of jurisdiction by setting “de facto mandatory requirements”?

[6] Is there an arguable case that the General Division acted in a way that was procedurally unfair by failing to provide an opportunity to cross examine the Commission or its witnesses?

[7] Is there an arguable case that the General Division made an error of law by

a) applying the wrong legal definition for “just cause for leaving”?
b) adding requirements to the legal test?
c) misapplying the legal burden or onus, and failing to give the Claimant the benefit of the doubt?
d) misapplying the case law?

e) failing to reconcile contradictory evidence? or
f) requiring a doctor's note to prove working conditions were a danger to the Claimant's health?

[8] Is there an arguable case that the General Division made an important error of fact.

a) in how it assessed the credibility of the employer's evidence?
b) by evaluating the sufficiency of the Claimant's job search?
c) by requiring the Claimant to have asked for a leave of absence as a reasonable alternative to leaving?
d) by finding that the Claimant should have raised her concerns to the employer more emphatically?
e) in considering how the employer might respond to a more emphatic complaint?
f) by considering her period of notice to be relevant to whether her working conditions were intolerable?

Analysis

General Principles

[9] For the Claimant's application for leave to appeal to succeed, her reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[10] I may consider only the following errors:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division based its decision on an important error of fact.

d) The General Division made an error of law when making its decision.[1]

[11] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an "arguable case."[2]

Error of Jurisdiction

[12] The nature of the Claimant's concern with the General Division's jurisdiction is unclear.

[13] The General Division has jurisdiction to consider the issues arising from the Commission's reconsideration decision. It must consider every issue in the reconsideration decision, but it cannot consider any other issues.

[14] There is no arguable case that the General Division either exceeded its jurisdiction or failed to exercise its jurisdiction.

[15] The only issue in the reconsideration decision was the Claimant's disqualification which resulted from the Commission's finding that she had voluntarily left her employment without just cause.

[16] The General Division considered whether the Claimant voluntarily left her employment and found that she did. Then it considered whether she had any reasonable alternatives to leaving, which is the test for "just cause".

[17] The Claimant argues that the General Division imported an additional requirement to the legal test by considering the sufficiency of her job search efforts. The General Division found that the Claimant did not conduct a sincere job search and that

---

[1] This is a plain language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

she could have (as a reasonable alternative to leaving) conducted a “serious” attempt to find alternate employment before leaving her job.

[18] If this is an error, it would be an error of law or possibly of fact; not of jurisdiction. I will consider how the General Division handled the sufficiency of her job search later in this decision.

Procedural Fairness

[19] The Claimant argues that the process was unfair because neither the Commission, nor any witness contacted by the Commission, appeared at the hearing. This deprived the Claimant of the opportunity to cross examine the Commission or its witnesses.

[20] There is no arguable case that the process was procedurally unfair.

[21] Procedural fairness requires an impartial decision maker, and that a party is given a fair opportunity to know the case (what evidence the other party is relying on), and a fair opportunity to be heard.

[22] In the absence of a Commission representative, the Commission’s argument relies on the evidence that is on the record, including the statements it collected in its investigation. This represents the Commission’s entire case. The Tribunal ensured that the Claimant had all of this material, together with the Commission’s written representations, in advance of the hearing. She had the opportunity to respond through her testimony or additional documentary evidence and to make her own written or oral representations.

[23] Nothing compels the General Division to accept any of the evidence at face value, including evidence provided by the Commission. It is the General Division’s job to weigh the evidence and to make findings of fact. If there is a significant conflict in relevant evidence, it must choose what evidence to accept. In some cases, it will give more weight to statements on the record because they were made closer in time to the

events. In other cases, it may give more weight to a party's oral testimony or the testimony of a witness, where the General Division considers it credible and reliable.

[24] The absence of the Commission does not interfere with the Claimant's right to know the case or to respond to it.

[25] I note that the Claimant's representative volunteered an opinion about the fairness of the process at the close of the General Division oral hearing. He said that the process was fair and that the hearing was conducted in a way that allowed the Claimant to have a full say.[3]

Error of Law

– **Use of the correct legal test**

[26] There is no arguable case that the General Division applied an incorrect legal test.

[27] The Claimant states that it is "patently unreasonable" for the General Division to have required her to exhaust all reasonable alternatives. Reasonable or not, the *Employment Insurance Act* (EI Act) says that just cause for voluntarily leaving exists if the claimant had no reasonable alternative to leaving having regard to all the circumstances.[4] In other words, claimants must exhaust their reasonable alternatives before leaving their employment.

[28] The General Division must apply the EI Act as it is written.

[29] The Claimant understands the General Division to have decided that she did not have "reasonable cause to leave" her job. She suggests that it ought to have applied a "reasonable person" test and considered what would have been reasonable for a person in her circumstances.

---

[3] Listen to the audio recording of the General Division hearing at timestamp 1:30:15 (approx.).
[4] See para 6 and 12 and 14 of the General Division decision; see section 29(c) of the EI Act for definition of just cause.

[30] The Claimant appears to misunderstand what the General Division decided. It did not decide that the Claimant did not have "reasonable cause", or that she acted unreasonably. This is not what the law requires. It decided that she had reasonable alternatives. The issue is the reasonableness of the alternatives; not the reasonableness of the Claimant's decision to leave the employment.[5] The test for just cause is not what a reasonable person would do in the Claimant's circumstances.[6]

[31] A claimant may have reasonable alternatives to leaving even where they acted reasonably in leaving their employment.[7] If even one reasonable alternative to leaving likely existed at the time that a claimant leaves their job, they will have left without just cause and they will be disqualified from receiving benefits.

[32] The question of whether an alternative to leaving is reasonable must consider all the circumstances. A number of relevant circumstances are listed in the legislation. Any of these that are applicable must be considered, but there may be other relevant circumstances.[8] "Working conditions that constitute a danger to health or safety," is the only circumstance that the General Division considered applicable.[9]

[33] The Claimant does not agree with how the General Division evaluated the hazards of her workplace, but she has not otherwise argued that the General Division failed to consider "all the circumstances".

– **Improperly adding requirements to the legal test**

[34] To decide if the Claimant had just cause for leaving, the General Division had to consider whether the Claimant had reasonable alternatives to leaving. One of the alternatives the General Division assessed was that the Claimant could have looked for other work before she quit.

---

[5] See the decision in *Canada (Attorney General) v Laughland,* 2003, FCA 129.
[6] See the decision in *Canada (Attorney General) v Imran,* 2008, FCA 17.
[7] See the decision in *Tanguay v Unemployment insurance Commission*, A-1458-84.
[8] See section 29(c) of the EI Act.
[9] See section 29(c)(iv) of the EI Act.

[35] The General Division acknowledged that the Claimant made efforts to find work before she quit. However, as I noted earlier, the Claimant believes that the General Division made an error by considering the sufficiency of those efforts. She believes this imposes an additional requirement and changes the legal test.

[36] There is no arguable case that the General Division changed the legal test by evaluating the sufficiency of the Claimant's job search.

[37] She had to show that she had no reasonable alternative to leaving. Looking for other employment before leaving is only considered a reasonable alternative to leaving because it might result in alternate employment. If the Claimant had found another job, she could have avoided unemployment and would not have required EI benefits.

[38] "Looking for work" may not always be a reasonable alternative to leaving. It might not be considered reasonable to continue searching following a significant period of sincere but unfruitful efforts. However, looking for work before quitting could not be ruled out as a reasonable alternative to leaving, where a claimant's efforts are token or minimal.

[39] The General Division applied the legal requirement that a claimant have "no reasonable alternative to leaving" to consider the circumstances of her job search. It found that her effort was not sincere. It found that she could have taken longer with her job search as a reasonable alternative to leaving. This finding concerns a question of mixed fact and law.

[40] Questions of mixed fact and law involve how settled law is applied to particular circumstances. The Courts have held that the Appeal Division has no authority to consider questions of mixed fact and law.[10]

[41] However, the General Division could have made an error of fact if it ignored or misunderstood evidence that was relevant to its finding that looking for work was a reasonable alternative to leaving. I will return to this question when I look at whether the General Division may have made an error of fact.

---

[10] See the decision in *Quadir v. Canada (Attorney General)*, 2018 FCA 21.

– The standard of proof

[42] There is no arguable case that the General Division applied the wrong legal standard of proof.

[43] The Claimant acknowledges that the correct standard is a "balance of probabilities". She argues that the General Division did not apply this standard.

[44] Deciding on a balance of probabilities means only that the General Division weighs all the evidence that is before it - regardless of its source - and decides on the outcome that is more likely than not.

[45] The Commission supplied some evidence through the file documents and its notes of discussions. The Claimant supplied additional evidence through documents filed to the General Division and through her testimony at the hearing. The General Division had to weigh that evidence to decide if it was more likely than not that the Claimant had no reasonable alternative to leaving her employment.

[46] The General Division stated that the Claimant had to prove just cause on a balance of probabilities.[11] Nothing in the decision suggests that the General Division did not apply that standard when it evaluated the evidence. The Claimant has not said why she believes it did not do so.

– Burden of proof

[47] The Claimant agrees that she has the burden of proof in the appeal. However, she argues that the burden of proof shifts to the Commission after she has presented her evidence.

[48] There is no arguable case that the General Division misapplied the burden of proof.

---

[11] See General Division decision at para 13.

[49] It is up to the Commission to prove that the Claimant left her employment. Once it has done so, the burden of proof shifts to the Claimant to prove that she had just cause for doing so. The burden of proof does not shift back to the Commission again.

[50] The Claimant may be confusing the burden of proof with the "evidentiary burden". An evidentiary burden may shift from one party to another. In some cases, a party has a burden to respond to evidence the other party provides to support its view of a particular fact or facts. If they fail to respond, they risk that the decision maker will accept the other party's view of the fact.

[51] While one party or the other may provide unanswered evidence in relation to some particular fact, this does not mean that the General Division will find that the party has met the applicable legal test. It does not even mean that it will accept that fact as proven. The General Division must make its decision after weighing the available evidence in all cases.

– **Benefit of the doubt**

[52] The Claimant also suggests that the General Division made a mistake by not giving her the "benefit of the doubt". There is no arguable case that the General Division made an error of law by not giving the Claimant the benefit of the doubt.

[53] The Claimant refers to the Digest of Benefit Entitlement principles, a policy manual governing decisions of the Commission.[12] The Digest speaks of the Commission's obligation to give the benefit of the doubt to the Claimant. This is also required by section 49(2) of the EI Act.

[54] However, the "benefit of the doubt" can only be applied in the rare circumstance where the evidence is equally supportive of one result or the other. The General Division decision does not suggest that the member considered the evidence to be evenly weighted.

[12] This Digest can be accessed at Digest of Benefit Entitlement Principles - Canada.ca

[55] Furthermore, the law does not impose the same requirement on the General Division as on the Commission. The Federal Court of Appeal has made it clear that the "benefit of the doubt" in section 49(2) applies only to the Commission.[13] There is no requirement that the General Division give the benefit of the doubt to a claimant.

– **Application of case law**

Application of Hernandez

[56] There is no arguable case that the General Division made an error of law by relating the *Hernandez* case to the Claimant's circumstances.

[57] The General Division did not mis-state the basis for the *Hernandez* decision.[14] According to *Hernandez,* a claimant cannot simply claim that workplace conditions are dangerous without discussing the working conditions with the employer, or exploring whether those conditions could be changed.

[58] What a claimant should do to explore the possibility of changes to working conditions will depend on the facts of the case. The evidence before the General Division was that the Claimant did not talk to the employer's Health and Safety representative about her concerns. She said that she mentioned that the air was "heavy" to her manager on a number of occasions, and one day said that she was dizzy. However, she did not say what she meant by heavy air, or specifically relate her dizziness or any other health concern to ventilation problems in the office. She did not say that she asked the employer to do anything about it.

[59] On these facts, the General Division did not accept that the Claimant, "truly attempted to inform the Employer of her health concerns and try to resolve the issue."[15] Presumably, the General Division did not accept that the Claimant "discussed the working conditions" with the employer in the sense intended by the Court in *Hernandez*.

---

[13] See the decision in *Chaoui v Canada (Attorney General)*, 2005 FCA 66.
[14] See the decision in *Canada (Attorney General) v. Hernandez*, 2007 FCA 320.
[15] See the General Division decision at par 65.

Application of non-binding decisions

[60] The Claimant had provided the General Division with an SST decision and three CUB decisions.[16] She recognizes that the General Division is not bound by these decisions, but she asserts that the General Division dismissed them "out of hand."

[61] The law says that a Tribunal "should not depart from decisions of earlier panels unless there is a good reason."[17] However, there is no arguable case that the General Division made an error of law by departing from these decisions.

[62] The decisions provided by the Claimant do not collectively form a pattern, nor are they part of a broader pattern, in support of some particular proposition of law. They do not stand for the principle that a claimant's perception of risk is sufficient to establish that their workplace is a danger to their health or safety.

[63] Nonetheless, the General Division did not simply dismiss the cases. It distinguished the SST decision by saying that the appellant in that case had consulted a doctor on more than one occasion and the doctor had provided a medical note. The General Division distinguished the CUB decisions on the basis that the Umpire could take judicial notice of the hazards of the workplace.

– **Failure to reconcile contradictory evidence**

[64] If the General Division relied on evidence without reconciling it with contradictory evidence, this could be characterized as either an error of fact or of law.

[65] The Claimant asserts that there were internal contradictions in the evidence. She specifically notes a contradiction between one statement to the effect that she did not raise her concerns with management, and another statement in which she said she told the employer she was feeling dizzy. The General Division found that she never told the employer that the air quality was making her sick.

---

[16] CUB 60013, 59269, and 51905; *WA v. Canada Employment Insurance Commission*, 2019 SST 937
[17] *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257

[66] However, there is no arguable case that the General Division made an error by failing to reconcile this evidence.

[67] The statements do not need to be reconciled because they are not contradictory. The General Division noted that the Claimant had complained about the air quality to her manager during casual conversations, and once told her manager that she was feeling dizzy.

[68] The General Division found that the Claimant had not told her employer that the air quality was affecting her health based on own her testimony.

[69] Its finding was not inconsistent with the Claimant having raised air quality concerns with her manager, and it was not inconsistent with the Claimant's evidence that she once complained that she felt dizzy.

– **Requiring a doctor's note**

[70] There is no arguable case that the General Division made an error of law by requiring a doctor's note.

[71] At the General Division, the Commission argued that the Claimant could have consulted a doctor before leaving her employment to confirm that her work circumstances represented a danger to her health. The General Division agreed, finding that the Claimant had not sought medical evidence by which she could have concluded she needed to leave her job when she did.

[72] The Claimant said that she left her job when she did because she was afraid of the health consequences of staying. Therefore, the General Division had to evaluate whether her health concerns required her to leave urgently so that it could assess whether the proposed alternatives to leaving were reasonable.

[73] The General Division did not find that the Claimant could have sought medical evidence as a reasonable alternative to leaving. It considered the Claimant's failure to seek medical evidence because this was relevant to whether her health problems were

related to her work environment and to whether she needed to get out of that environment urgently.

[74] The General Division did not state or imply that it could not - as a rule - find working conditions be dangerous in the absence of a doctor's note. Instead, it suggested that it would require some sort of evidence that the workplace conditions were hazardous to health beyond the Claimant's assertion. It gave air qualify testing as another example of evidence that would have been helpful.

[75] Having said that, it would not have been an error for the General Division to have required the Claimant to seek medical advice as a reasonable alternative to leaving when she did. In *Green*, the Court accepted this as a legitimate alternative to leaving. It confirmed an Appeal Division decision that found that a claimant had reasonable alternatives which included, "requesting medical leave, seeking consultation with a doctor, or obtaining a doctor's note regarding his medical issues."[18]

Important error of fact

[76] If the General Division decision is based on a finding of fact that ignores or misunderstands relevant evidence, or does not follow logically from the evidence, this would be considered an error of fact.

[77] When I consider whether the General Division made such an error, I cannot consider any new evidence to help me to decide.[19] To the extent that the Claimant's submissions include assertions of facts that were not in evidence before the General Division, I will not be considering them.

[78] I also have no power to interfere with how the General Division weighed or evaluated the evidence that was before it.[20]

---

[18] See the decision in *Green v Canada (Attorney General)* 2020 FCA 102.
[19] *El Haddadi v. Canada (Attorney General*), 2016 FC 482; *Mette v. Canada (Attorney General*), 2016 FCA 276.
[20]See for example: *Hideq v Canada (Attorney General)*, 2017 FC 439, *Parchment v Canada (Attorney General)*, 2017 FC 354, *Johnson v Canada (Attorney General)*, 2016 FC 1254, *Marcia v Canada (Attorney General)*, 2016 FC 1367.

[79] The Claimant identified several areas in which it disagreed with the General Division's findings of fact.

– **Credibility assessment**

[80] The Claimant argued that the General Division should have rejected all of the evidence from the employer, because the General Division rejected the employer's statement that the worker left because the workload was too heavy.

[81] In other words, the Claimant suggests that it was an error for the General Division to accept that any evidence from the employer was credible.

[82] When considering the Claimant's reasons for leaving, the General Division weighed the Claimant's evidence - including her testimony and the stated reason for her resignation - against the Commission's notes of the employer's statement. Where that evidence conflicted, it chose to prefer the Claimant's evidence. It found as fact that she left because of her health concerns.

[83] When the General Division considered the reports of air quality concerns, it noted the employer's evidence that the Claimant raised some concerns with air quality but that she had not made a specific complaint about air quality. It also noted the Claimant's evidence about what she told the employer. She confirmed that she had never made a formal complaint and that she had not told the employer that the air quality was making her feel unwell.

[84] The General Division found that the Claimant told the employer that there were issues with the air quality. It also found that she did not make a formal complaint.

[85] There is no arguable case that the General Division made an error in accepting some of the evidence from the employer.

[86] It is up to the General Division to decide what weight it will give to each piece of evidence. I cannot interfere with findings of fact unless they are unsupported by evidence, or they ignore or misunderstand the evidence.

[87] In addition, the General Division did not prefer the employer's evidence to that of the Claimant. Excepting its finding on why the Claimant left, the General Division's findings of fact are consistent with the evidence of the Claimant.

[88] The Claimant does not think the General Division should have accepted the employer's assertion that she was the only employee who complained about air quality. She says there is no evidence of that.

[89] She probably means that there is no corroborative evidence. The employer's statements say that no one else in the office complained.[21] These statements are evidence even though they are not corroborated.

[90] It was open to the General Division to accept at face value the employer's statement that no one else complained since there was no evidence to the contrary. The Claimant did not refute the employer's evidence that no one else complained. She did not testify that she was aware of other complaints, and she did not provide documentary evidence of other complaints.

– **Job search**

[91] The Claimant disagreed with the General Division's understanding of her job search efforts. The General Division said that the Claimant admitted that she only started her job search a week before leaving her employment. This is relevant since the General Division said that she should have "started to search for other employment sooner, or stayed longer, in order to make a serious attempt to find alternate employment before she decided to leave."[22]

[92] However, there is no arguable case that the General Division made an error by misunderstanding the timing or extent of her job search.

---

[21] See GD3-30 and GD3-43.
[22] See General Division decision at para 91.

[93] The Claimant argued that her first job application was June 25 and that she had begun looking for work before that. However, this is new evidence that was not before the General Division so I can not consider it.[23]

[94] The only evidence before the General Division about when the Claimant started to look for work is from her own statements to the Commission. She said she started applying for jobs in July.[24] She said she applied to a few jobs before leaving and had one interview.[25] The Claimant did not testify at the General Division about the extent of her job search or clarify the date that she began to look for work.

[95] The Claimant did not state, in so many words, that she only started her job search "a week before leaving her employment." However, she did say that she only started applying in July and she gave formal notice to her employer by an email dated July 8, 2022. From this, the General Division could infer that she had only been looking for work for about a week before resigning.

– **Asking to take leave as an alternative to leaving**

[96] The Claimant argues that it makes no sense that the General Division would suggest that she could have requested a leave of absence as a reasonable alternative to leaving. She argues that this makes no sense because she would have had no pay. A finding of fact that is "perverse or capricious" is an error. I presume the Claimant is arguing that this is a perverse or capricious finding.

[97] The Claimant has no arguable case that the General Division made an error of fact when it found that she could have asked to take a leave.

[98] However, the General Division decision is supported by case law. The Federal Court of Appeal considered the case of a claimant who was unable to establish that the employer would have refused the claimant a leave of absence, if they had sought one.[26]

---

[23] See the decision in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, See also *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[24] See GD3-28.
[25] See GD36-8, and GD3-36.
[26] *Canada (Attorney General) v Patel*, 2010 FCA 95.

The Court held that it was reasonable for the Umpire to conclude that the claimant had not demonstrated that they had no reasonable alternative to leaving.[27]

[99] Even if taking a leave was not a reasonable alternative for the Claimant, the General Division decision accepted that other reasonable alternatives existed. To have a reasonable chance of success, the Claimant would have to make out an arguable case that the General Division made an error or errors that could have affected all of the reasonable alternatives on which it relied.

– **Danger to health apparent / More emphatic complaint**

[100] The Claimant argues that the workplace air quality was a clear hazard and that it was obvious that the employer needed to do something about it. She argues that the General Division made an error in finding that she had not shown the working conditions were a danger to her health or safety. She also argues that the General Division made an error in finding that she had not raised her concerns emphatically enough.

[101] There is no arguable case that the General Division made an error of fact in these findings.

[102] The Claimant points to evidence that there was particulate matter on office surfaces, and that the staff in the plant (where the particulates were presumably escaping from) wore face masks. She also notes that she is especially sensitive because of her cancer history and that she honestly believed the dust/air quality represented a danger.

[103] The General Division referred to the particulate matter,[28] to the use of respirators[29] and to her cancer history,[30] as well as to other evidence such as the claimant's evidence of fumes, the effect the air or fumes had on her, and to the Safety Data Sheet.

---

[27] The Umpire was the second level of appeal in Unemployment Insurance matters under the former administrative appeal scheme.
[28] See General Division para 20.
[29] See General Division para 23.
[30] See General Division paras 22 and 32.

[104] However, the General Division also noted that the Claimant did not seek a medical opinion that her work conditions were causing her symptoms. It noted that she did not talk to her employer about her conviction that her symptoms were related to the workplace air quality. It observed that there were no tests to confirm the air quality of the workplace.

[105] The General Division weighed the evidence and found that the Claimant had not shown that the working conditions actually posed a danger to her health and safety. I am not authorized to reweigh the evidence and come to a different conclusion.

[106] The Claimant also believes that it told the employer enough that it ought to have known it needed to do something about the air. The General Division disagreed. It considered evidence that the Claimant had not approached the Health and Safety representative, that she had not made a formal complaint but only spoken of the air quality in the office in casual conversations, and that she had never told the employer that she had health concerns related to the air quality.[31]

[107] The Claimant did not identify any relevant evidence that the General Division ignored or misunderstood when it considered the dangers of the workplace or described how she raised her concerns. She may disagree with how the General Division weighed the evidence to find these facts, but the General Division's finding was rationally connected to the evidence, and I cannot interfere with it.

[108] The Claimant also took issue with the General Division's requirement that she provide the employer with more information about her health concerns. She says that her medical history is confidential and that she doesn't trust the employer to treat that information appropriately.

[109] I am not sure what error the Claimant is asserting but the General Division never suggested that the Claimant should have disclosed her medical history to the employer. The General Division said only that she should have disclosed the symptoms she was

[31] See General Division decision, paras 22-26.

experiencing that she related to the poor air quality. The General Division suggested that this could have led to a more comprehensive response including air quality testing.

– **Reprisals**

[110] The Claimant argues that the General Division made an error when it stated that employers are aware of their liability for ignoring health and safety concerns and that it was speculative to think it would retaliate against a worker who raised such a concern.

[111] There is no arguable case that the General Division made an error of fact through these statements.

[112] The General Division was responding to the Claimant's argument that the employer would have retaliated if she had gone to the health and safety representative. The Claimant was asking the General Division to find that she should not have been expected to ask the employer to remedy the working conditions because the employer would take some kind of action against her.

[113] In a sense, the General Division was taking "judicial notice" that employers are generally aware that there could be consequences for taking retaliatory action against an employee in such matters. In other words, it considered this fact so notorious that it could accept it as true without evidence. Whether it is right about that does not affect its decision.

[114] No matter the General Division member's opinion on what the employer might be expected to know, there is no arguable case that it made an error by considering the Claimant's assertions to be speculative. The Claimant calls the General Division "naïve', but the General Division made no error by refusing to accept, without evidence, the Claimant's contention that the employer would retaliate against her.

– **Intolerable working conditions**

[115] The General Division was not persuaded that the Claimant's working conditions were intolerable. The Claimant disagrees. She argues that she was particularly sensitive to the hazards of the workplace because she was a cancer survivor.

[116] She also argues that the General Division should not have held it against her that she gave two-weeks notice that she was leaving, and offered to train her replacement. She does not accept that this is evidence that her working conditions must have been tolerable.

[117] There is no arguable case that the General Division made an error by failing to consider her cancer history or by considering the Claimant's decision to give notice to be relevant.

[118] The General Division considered her cancer history when it considered whether her working conditions were a danger to her health or safety. It accepted that she had "heightened concerns because of her previous battle with cancer", and it acknowledged that it was "fears of negative health consequences posed by the air quality that ultimately led to her resignation."[32]

[119] The General Division did not reference her cancer history when it determined that her working conditions were not intolerable. Its conclusion relied on other evidence that suggested that the Claimant herself did not consider her working conditions to be intolerable.

[120] It considered that the Claimant had been concerned about the air quality for the entire 22-month period of her employment. In that time, she did not impress upon the employer how seriously affected she was. She did not leave immediately when she experienced worsening symptoms, or take a sick leave. She gave notice so that she could train a replacement.

[121] Given this evidence, the Claimant's fear that her cancer might recur is not so significant that it would be an error for the General Division to omit to mention it in this particular context. The General Division is not required to refer to each and every piece of evidence but may ordinarily be presumed to consider the evidence before it.[33]

---

[32] See General Division decision at paras 32, 40.
[33] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[122] The Claimant also argued that her prospects of finding other employment would be affected if she left without giving notice. I take it that she believes that the General Division should not have held the fact she gave notice against her; that this was somehow an improper or irrelevant consideration.

[123] I appreciate that the Claimant believed her work environment was making her sick and that she may have preferred to leave as soon as possible. I also appreciate that she did not want to leave her job without giving notice because it might affect her prospects of re-employment. She was faced with a disagreeable choice.

[124] But there is no arguable case that the General Division made an error by considering it relevant that she gave two-weeks notice before leaving.

[125] The Claimant's working conditions were either intolerable or they were not. If her working conditions were truly intolerable, she would have had to leave irrespective of the prospect of a poor reference from the employer. She left her job on July 21, 2022, at the end of her notice period. If her working conditions were not so intolerable that she could stay for the period of her notice, then they would have permitted her to stay for other reasons as well. She could have stayed to insist the employer remedy the workplace ventilation, and she could have stayed while she looked for other work.

Summary

The Claimant has not made out an arguable case that the General Division made an error under any of he grounds of appeal. She has no reasonable chance of success on appeal.

Conclusion

[126] I am refusing leave to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division