Citation: *NK v Canada Employment Insurance Commission*, 2023 SST 1319

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	N. K.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen

Decision under appeal:	General Division decision dated February 15, 2023 (GE-22-4221)

Tribunal member:	Stephen Bergen
Type of hearing:	In Writing
Decision date:	October 3, 2023
File number:	AD-23-192

Decision

[1] I am dismissing the appeal.

[2] I have found that the General Division made an error and made the decision that the General Division should have made.

[3] After correcting the General Division's error, I must still find that the Claimant had a reasonable alternative to leaving his job. Because of this, he is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[4] N. K. is the Appellant. He made a claim for EI benefits so I will refer to him as the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim because he left his employment without just cause. The Claimant disagreed and asked the Commission to reconsider, but it would not change its decision.

[5] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal). His appeal was dismissed so he appealed the General Division decision to the Appeal Division.

[6] I am dismissing the appeal. I agree with the Claimant that the General Division made an important error of fact. However, when I correct that error, I must still come to the same conclusion as the General Division.

Preliminary matters

New evidence

[7] An appeal to the Appeal Division is an appeal on the record. The Appeal Division can review whether the General Division made an error in how it conducted the hearing, understood the evidence, and applied the law. With very limited exceptions, such as

where a party is trying to show how the hearing process was unfair, the Appeal Division does not consider evidence that the General Division did not have.[1]

[8] The Claimant's submissions repeat much of the evidence presented to the General Division, but they also add factual details that the General Division did not have. The Claimant sent the Appeal Division some other documentary evidence as well, such as screenshots of texts and a copy of a job advertisement.

[9] I will not be considering the additional details, texts, advertisement copy, or other new documents. They were not before the General Division so I cannot consider them in this appeal.

Issue

[10] The issues in this appeal are as follows:

> "Did the General Division make an important error of fact by
>
> a) disregarding evidence that his work conditions were more difficult and hazardous than he expected?
> b) ignoring evidence that his job training did not cover his job duties?
> c) ignoring evidence that the employer broke the law?
> d) ignoring evidence of possible repercussions for reporting safety concerns to the employer?

Analysis

General Principles

[11] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.

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[1] *Hideq v. Canada (Attorney General)*, 2017 FC 439, *Parchment v. Canada (Attorney General*), 2017 FC 354, *Mette v. Canada (Attorney General*), 2016 FCA 276).

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 made an error of law when making its decision.
d) The General Division based its decision on an important error of fact.[2]

[12] The Claimant was disqualified from receiving EI benefits because he voluntarily left his job without just cause.[3] "Just cause" is where a claimant has no reasonable alternative to leaving "having regard to all the circumstances."[4]

[13] The *Employment Insurance Act* (EI Act) lists a number of circumstances that must be taken into account in determining whether a claimant has just cause, whenever they are suggested by the evidence. The list of circumstances is not meant to be exhaustive. In other words, there may be other, unlisted, circumstances that could be relevant.

Important error of fact

[14] The Claimant argues that the General Division made an important error of fact.

[15] I will consider whether the General Division made any error in how it evaluated the Claimant's circumstances, and ultimately; whether it made an important error of fact when it determined that he had a reasonable alternative to leaving his employment.[5]

[16] The General Division addressed two circumstances (or sets of circumstances) that the Claimant had identified as being important to his decision to quit. The first of these related to his specific concerns with safety.

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[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] See section 31(1) of the *Employment Insurance Act* (EI Act).
[4] See section 29(c) of the EI Act.
[5] Section 58(1)(c) of the DESDA says that the General Division has made an important error of fact when it "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

– **Dangerous working conditions**

[17] The General Division considered whether the Claimant's working conditions were "working conditions that constitute a danger to health or safety." This is one of the circumstances listed in the EI Act.

[18] The Claimant argued that his working conditions were unsafe. He argued that the employer did not provide the personal protective equipment (PPE), support, or training, which was required to properly mitigate the various workplace hazards.

[19] The General Division agreed that the Claimant raised legitimate safety concerns about not having proper PPE and having to take readings in uncontrolled traffic. It agreed this represented a danger to his health and safety. As a result, the General Division understood that it had to take this concern into account when it analyzed whether reasonable alternatives to leaving existed.

[20] The Claimant has not suggested that the General Division made any error in accepting that his working conditions were dangerous.

– **Unexpectedly difficult working conditions**

[21] When the Claimant requested leave to appeal to the Appeal Division, he argued that he did not know he might have to deal with animals. He also said that he did not know he would have to cross creeks and ponds and get over barbed wire fences. He claims that the working conditions were more hazardous and more physically demanding than he had been led to expect.

[22] "Unexpectedly difficult working conditions" is not listed in the EI Act as a relevant circumstance, but that does not mean it is not relevant, particularly where a claimant quits after only a few days of work.

[23] The EI Act lists "a significant change in work duties" as a relevant circumstance. There was no evidence, in this case, that the Claimant's work duties changed over his short period of employment. However, he claims that his work duties were significantly different than what he had been led to expect. This is somewhat analogous to "a

significant change in work duties," and it could be relevant to whether he had reasonable alternatives to leaving.

[24] In my view, the circumstance where a new employee discovers that his job duties or work conditions are significantly more difficult or hazardous than he expected is a relevant circumstance. If this was the case for the Claimant, the General Division should have considered it when evaluating the reasonableness of the Claimant's alternatives to quitting.

[25] The General Division did not accept that the worker encountered unexpected working conditions. However, the General Division made an error when it described the Claimant's expectations of his job duties.

[26] The General Division did not accept that the Claimant did not or could not have expected the working conditions he described. It found that "walking through fields, and crossing streams, jumping fences and dealing with animals … were not unexpected parts of the job." In other words, the General Division accepted that the Claimant knew or should have known about the physical demands of the job. This played a role in its finding that his working conditions did not support a conclusion that he had just cause.

[27] The General Division relied on the Claimant's admission that he was aware of the physical nature of the work from the job advertisement and his interview.

[28] When the Appeal Division granted leave to appeal, it found an arguable case that the General Division made an important error of fact. It noted that the Claimant told the Commission: "… nobody told him he would have to cross creeks and ponds."6 The General Division did not refer to this evidence in its analysis.

[29] The Claimant testified about the job advertisement and the interview. He said that the advertisement said that the job involved surveying underground pipeline, and that it would require him to walk long distances around ten kilometers a day and in all kinds of weather. Speaking of the interview, he said that he was told "pretty much the

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[6] See GD3-22.

same thing."[7] When he started training, he said there was nothing about animals or how to react to them,[8] and nothing about crossing ponds.[9]

[30] This evidence suggests that the Claimant expected he would have to do a lot of walking. It does not support a finding that he expected any of the other difficulties he encountered.

[31] I find that the General Division ignored or misunderstood what the Claimant said about his expectations of work before he started. This was a factor in the General Division's conclusion that the Claimant expected or should have expected to encounter the work hazards and difficulties. This resulted in the General Division discounting what it called the Claimant's "physical issues."

– **Lack of job training**

[32] The Claimant argued that he was not trained or prepared to deal with the actual duties of the job. He talked about the specialized equipment he had to use and that none of his training prepared him for the field work.

[33] The General Division described this as "subpar" training. It said that this might be annoying but that he was learning on the job and the employer did not have any problems with his performance or how he operated the equipment.

[34] The Claimant disagreed that his training was "subpar." He said that he was not trained at all. He also objected to the General Division's assumption that he was annoyed.

[35] I do not think the General Division made an error in describing the Claimant's training overall as subpar. The Claimant did not feel that his training was useful to his actual duties, but he was trained on other things which could have come in useful at some point. That the General Division described the training as "subpar" does not mean

[7] Listen to the audio recording of the General Division hearing beginning at timestamp 06:15.
[8] Listen to the audio recording of the General Division hearing beginning at timestamp 11:20.
[9] Listen to the audio recording of the General Division hearing beginning at timestamp 11:35.

it did not understand that the Claimant considered his training to be irrelevant to his duties.

[36] The General Division recognized that the Claimant was displeased that the employer expected him to use specialized equipment without training. The Claimant may not have described himself as “annoyed,” but I do not accept that the General Division’s use of “annoyed” is of any significance to the decision.

[37] However, the Claimant did not just object to how little training he received on the equipment. He also said he was not properly trained in how to deal with wildlife or dogs, and how to get over barbed wire fences or around water hazards.

[38] I find that the General Division made an error of fact by not considering evidence that the Claimant may have had inadequate training in other aspects of the job, unrelated to his use of equipment.

[39] I accept that the poor safety training was part of the reason that the Claimant left his job. In my view, the General Division should have acknowledged this shortcoming as another one of the working conditions constituting a danger to health or safety.

[40] When the General Division considers the various circumstances surrounding a claimant’s decision to leave their job, it is not sufficient for it to consider “working conditions that constitute a danger to health or safety” in the abstract. It must consider all the particular conditions that are dangerous. Whether there are alternatives to leaving that are reasonable in the circumstances will depend on the particular facts.

[41] The General Division did not refer to the Claimant’s concerns about poor training in areas related to his personal safety. It accepted that the Claimant’s working conditions involved a danger to his health or safety in general, but this was more about his PPE and working in uncontrolled traffic. It did not consider that he may not have had appropriate **safety** training.

[42] Such an error means that the General Division assessed the Claimant’s reasonable alternatives without regard to all the relevant evidence.

– **The employer's illegal activity**

[43] The Claimant also argued that the General Division did not consider that the employer was breaking the law. He argues that this establishes that he had just cause. This argument must fail for three reasons.

[44] First, the circumstances listed in the EI Act are simply circumstances that – where they exist – must be considered when deciding if there are reasonable alternatives. The presence of any of the listed circumstances, or any other circumstance, does not establish that there is no reasonable alternative to leaving. It only means that the reasonableness of alternatives to leaving must be assessed with those circumstances in mind.

[45] In this case, the General Division said it was reasonable for the Claimant to have discussed his concerns with the employer before quitting. If the employer were breaking the law, this could affect the availability of reasonable alternatives. However, this would depend on the manner in which it was breaking the law. For example, it may not be reasonable to expect an employee to confront an employer about illegal activity that included assaulting its employees for speaking up. However, it might be reasonable for an employee to point out to their employer a lesser or unintentional infraction.

[46] Second, this is the first time the Claimant has argued that the employer broke the law at the General Division. He did not raise this at the General Division, and he did not tell the General Division anything about how the employer's activities were illegal.

[47] The Claimant told the General Division that the employer had not provided all of the safety equipment identified by the job hazard analysis form (JHA), but there was no evidence that the equipment identified on the JHA was required by law. The Claimant said the form may have been the employer's own requirements or that the employer may have obtained it from the client, "TC."

[48] He mentioned to the General Division that he made a complaint to "OHS Alberta" (Occupational Health and Safety, Alberta). However, he did not say that OHS Alberta suggested that the employer had broken the law.

[49] Third, there was no evidence that the unlawfulness of the employer's actions or behaviours influenced the Claimant's decision to leave. He testified that he only thought to contact OHS Alberta after he learned the Commission had refused to reconsider his claim.[10] This was well after he had already quit. It does not help him prove that it was a factor in his decision to leave.

[50] The General Division had no reason to consider the lawfulness of the employer's actions in relation to whether the Claimant had reasonable alternatives to leaving.

– **Repercussions**

[51] Finally, the Claimant argued that the General Division failed to consider that he "did not want to start a war with a major oil and gas employer."[11] The Claimant seems to be arguing that he was concerned he would experience repercussions if he complained to his employer.

[52] The prospect of repercussions could make it unreasonable to raise certain kinds of concerns with certain employers. For example, an employer could "brand" an employee as a troublemaker and blacklist them so that the employee could not find work in the industry in which they were trained.

[53] The problem is that the Claimant did not make this argument to the General Division. He did not describe any repercussions, or explain why he thought he would be in trouble if he told his employer about his safety issues or the other difficulties he was having with work. He told the General Division only that he "didn't want to start a war; that it was "not his personality."[12] This suggests only that the Claimant disliked or preferred to avoid conflict.

[54] The General Division did not make an error by not considering how repercussions affected the reasonableness of requiring the Claimant to speak to his employer about his concerns before quitting. There was no evidence on which the

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[10] Listen to the audio recording of the General Division hearing beginning at timestamp 45:15.
[11] See AD5-1.
[12] Listen to the audio recording of the General Division hearing beginning at timestamp 44:40.

General Division could have found that the Claimant reasonably expected repercussions. There was no evidence that would allow it to assess the nature of those supposed repercussions.

– **Reasonableness of alternatives**

[55] In evaluating whether the Claimant had reasonable alternatives to leaving, the General Division is required by law to consider, "all the circumstances."

[56] When the General Division assessed the Claimant's reasonable alternatives to leaving, it considered only that his working conditions constituted a danger to his health and safety. It did not accept that there were any other relevant circumstances.

[57] However, the Claimant has satisfied me that the General Division ignored some evidence of unsafe working conditions, even though it accepted unsafe working conditions as a relevant circumstance. I am also satisfied that the General Division should also have considered, "the unexpectedly difficult working conditions."

[58] For these reasons, I find that the General Division did not consider "all the circumstances." This could be considered an error of law. However, if it was an error of law, it resulted from an error of fact. That means the decision was based on an error of fact.

[59] I find that the General Division made an important error of fact within the meaning of the EI Act.

Remedy

[60] I have found an error in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[13]

[13] See section 59(1) of the DESDA.

[61] The Claimant has asked me to make the decision.[14]

[62] The Commission suggested that I might consider sending the matter back to the General Division because the General Division asked about the Claimant's job advertisement but did not give him a chance to produce it.

[63] The advertisement might support the Claimant's contention that the jobs working conditions were unexpected. However, the Claimant testified that the advertisement told him little beyond the fact that he would be surveying buried pipes and would have to walk long distances in all kinds of weather.

[64] However, I have no reason to doubt the Claimant on this point. As a result, there is no need to return the matter to the General division so that he can submit the advertisement.

[65] I find that the record is complete. There is already evidence on every issue that I must decide. I will make the decision that the General Division should have made.

Relevant Circumstances

[66] I have already found that there are two relevant circumstances supported by the evidence:

- The Claimant's working conditions represented a danger to his health and safety (which include inadequate safety training).
- His working conditions were unexpectedly difficult and hazardous.

[67] When I consider whether the Claimant had reasonable alternatives to leaving, I must take into account both circumstances.

– Dangerous working conditions

[68] The Claimant's safety concerns included a concern that the employer had not provided all the required PPE. The employer did not provide radios, even though the

[14] See AD5-3.

Claimant's job duties required him to work in remote areas. In addition, the employer did not provide gas detectors. The Claimant's job included some risk of gas exposure. He would have to work around pump jacks or pumping stations. The employer also did not provide coveralls or rubber boots to keep the Claimant's feet dry, but the Claimant himself did not view these as significant concerns.

[69] There were also other expected hazards from wildlife or aggressive dogs and from crossing barbed wire fence lines. The Claimant said the employer did not properly train him to deal with these problems. His job also required him to take brief readings on a highway. The employer did not provide a flag person to warn or stop traffic during these readings.

[70] The Claimant told the Commission that he did not raise any of these issues with his employer. He did not give the employer an opportunity to remedy or mitigate the Claimant's safety concerns.

[71] In another case called *Hernandez*, the Federal Court of Appeal considered a claimant who left his work because of his fear of unsafe working conditions.[15] The claimant left without discussing his working conditions or whether the employer could make any changes in response to his concerns. The Court said there was no evidence, "on which it could be concluded that in departing the claimant has no reasonable alternative." I think that the *Hernandez* decision applies to the present case.

[72] The General Division found that it would have been reasonable for the Claimant to have raised his safety concerns with his employer before quitting. I agree with the General Division.

[73] The Claimant admitted that he did not raise his safety concerns with his employer. The Claimant said he did not think the employer would do anything about his

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[15] *Canada (Attorney General) v. Hernandez*, 2007 FCA 320.

concerns because he was so new,[16] and because of his previous experiences with employers.[17] However, he did not know that, and he did not even ask.

[74] The Claimant said that communications were difficult and that it was hard to contact his employer. However, he was able to talk to his supervisor to say he was quitting, and his supervisor asked him to talk to J., the site lead. He spoke to J., and J. asked him if he needed time off. He responded that this would not address his concerns, but he admitted that he did not explain his concerns when he talked to J..[18] He could have asked either one of those employer representatives to address his safety concerns or to bring them to someone who would.

[75] There is no evidence in the present case to suggest that it would have been unreasonable for the Claimant to at least talk to the employer about his safety concerns, including missing PPE, hazards working in traffic, and inadequate safety-related training.

– **Unexpectedly difficult working conditions**

[76] I have found that the General Division should have considered that the Claimant did not expect some of the difficult and hazardous working conditions he encountered. I will now consider how this circumstance affected his reasonable alternatives.

[77] The Claimant is 50 years old. He said that the employer had not required a fitness test, but that he thought he could manage walking around ten kilometres a day as described in the advertisement. He did not know he would also have to negotiate obstacles such as barbed wire fences, streams, and ponds.

[78] The Claimant described how his working conditions were more challenging because of his age and physical condition. He talked about how he had blisters and was exhausted after work, and how everyone else was so much younger.

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[16] See GD3-38.
[17] See GD3-31.
[18] See GD3-38.

[79] I accept that the physical requirements of the job would have been more difficult for the Claimant than for a person who was young and work-hardened. He may have overestimated his stamina. He may have underestimated the difficulty of the job demands he should have anticipated. Or he may just have been unaware of some of the particularly difficult job demands he would encounter. I suspect it was some combination of all of these things.

[80] It is understandable that the Claimant would quickly regret having accepted the job. It is also understandable that he quit a job that he found to be too physically demanding. However, I find that the Claimant could have discussed his concerns with his employer as a reasonable alternative to quitting.

[81] The Federal Court of Appeal considered similar circumstances in a case called *Green*.[19] In that case, the appellant quit a very physically demanding job after working for only six days. When he quit, he told his employer that he was too old for the job, and he told the Commission that the job was too difficult. He later argued that the job aggravated his knee problems.

[82] Even so, the Commission had said that the appellant had the reasonable alternative of continuing to work until he found another job. This was upheld by the Board of Referees. Its findings were adopted by the Umpire,[20] and finally confirmed by the Federal Court of Appeal. The Court confirmed that the appellant's knee problems did not mean that he had no reasonable alternative to quitting - even though he had been found to work in a very physically demanding job.

[83] The Claimant was also new to his job, and he also immediately discovered that his working conditions were too difficult. He did not claim to have a knee problem or any other medical condition, but his age and inadequate physical conditioning made the job more difficult.

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[19] *Green v. Canada (Attorney General)*, 2012 FCA 313.

[20] The Board of Referees was formerly the first level of administrative appeal in EI appeals, similar to the General Division. The Umpire was a second level of appeal, as is the Appeal Division.

[84] Just as in *Green*, there is no evidence to suggest that it would have been unreasonable for the Claimant to talk to the employer before leaving. The Claimant may believe that such a discussion would not have been productive and that the employer would have no interest in accommodating him in any way. Nonetheless, he had an obligation to at least try.

[85] Furthermore, there is at least some evidence to suggest that the employer might have been willing to make some changes. When the Claimant talked to J. about quitting, J.'s response was to offer him some days off. The Claimant said this would not address his concerns, but he did not identify what those concerns were, or explore what the employer could do to accommodate him. It is possible that the employer might have offered to transition him through other job duties or a different work schedule while he built up his stamina.

[86] I appreciate that the Claimant may have felt he could not continue at the job even one more day. But his employer offered him some time off. That means he did not need to quit urgently. If he had accepted the offer of time off, he would have had time to talk to the employer about his concerns and seek a solution to his difficulties. He demonstrated that he could contact his supervisor and his lead hand. While he may not have had an easy time contacting the person who hired him, he knew how to do it. He likely could have found out how to contact the employer's Occupational Health and Safety representative as well, if he did not know.

[87] I accept that the Claimant had good reasons for leaving. However, whether he had good reasons is not the issue. To qualify for EI benefits, he must show that he had just cause for leaving, which is a legal test: He must show that he had no reasonable alternative to leaving.

[88] I have considered all the circumstances arising out of the facts of this case. I have considered that the Claimant's working conditions involved health and safety risks including poor or missing safety training, and that he had other concerns arising from unexpected duties that were hazardous and too difficult for the Claimant.

[89] Having taken these circumstances into consideration, I find that the Claimant had reasonable alternatives to leaving. He could have discussed his various concerns with his employer before leaving his job.

[90] The Claimant did not have just cause for leaving and is disqualified from receiving EI benefits.

Conclusion

[91] The appeal is dismissed.

[92] The General Division made an important error of fact. However, when I correct for that error, I reach the same result.

Stephen Bergen
Member, Appeal Division