



Citation: *RW v Canada Employment Insurance Commission*, 2023 SST 1759

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: R. W.
Representative: L. W.

Respondent: Canada Employment Insurance Commission
Representative: Angèle Fricker

Decision under appeal: General Division decision dated June 5, 2023
(GE-23-137)

Tribunal member: Stephen Bergen

Type of hearing: In person
Hearing date: December 1, 2023
Hearing participants: Appellant
Decision date: December 6, 2023
File number: AD-23-677

Decision

[1] I am allowing the appeal in part. The General Division made errors in how it reached its decision. I have corrected those errors and made the decision that the General Division should have made, but only in part.

[2] I am returning the matter to the General Division to reconsider some of the issues.

Overview

[3] R. W. is the Appellant. I will call her the Claimant since she made a claim for Employment Insurance (EI) benefits. Her last day of work at her former employer was in March 2020, but she did not apply for benefits until November 19, 2020. She collected EI benefits beginning November 15, 2020.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), later decided that the Claimant had voluntarily left her employment without just cause on March 20, 2020. It informed her that she would have to repay the benefits she had received. The Claimant asked the Commission to reconsider but it would not change its decision. When she appealed to the General Division of the Social Security Tribunal, the General Division dismissed her appeal. She has now appealed to the Appeal Division.

[5] I am allowing the appeal in part. I have found that the Claimant voluntarily took leave, but I am returning it the matter to the General Division to reconsider other issues including whether she had just cause for taking leave.

Issues

[6] The issues in this appeal are:

- a) Did the General Division make an error of law by failing to analyze contradictory evidence about the Claimant's communications with the employer after she left in March 2020?

- b) Did the General Division make an error of law by failing to make necessary findings of fact about the nature and timing of the Claimant's separation from her employment.
- c) Did the General Division make an error of law by finding that the Claimant had no reasonable alternative to leaving without regard to all the circumstances?

Analysis

General Appeal principles

[7] 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.
- 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.¹

Meaning of “voluntary leaving”

[8] The Claimant was disqualified from receiving EI benefits because the Commission determined that she had voluntarily left her employment in March 2020.

[9] The definition of “voluntarily leaving” includes the situation where a claimant fails to resume their employment when they are expected to return.²

[10] A claimant may be disqualified if they voluntarily leave their employment, or if they voluntarily take a leave of absence, without just cause.³

¹ 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).

² See section 29(c)(b.1)(ii) of the *Employment Insurance Act* (EI Act).

³ Note that there is an exception where a claimant may be disentitled rather than disqualified for taking a voluntary leave without just cause. I will discuss this more later.

[11] A claimant will avoid disqualification if they can show that they did not *voluntarily* leave or take a leave of absence. They will also avoid disqualification - even though they voluntarily left or took a leave of absence - by proving that they had just cause for leaving or taking leave.

[12] To establish “just cause,” a claimant must show that they had no reasonable alternative to leaving their employment or taking leave.⁴

Error of law

– Failing to find necessary facts / Inadequate reasons

Failure to analyze contradictory evidence

[13] The General Division made an error of law because it failed to make required findings of fact or to explain itself adequately. It did this in two areas. First, its decision failed to analyze the contradictions in the evidence.

[14] The General Division found that the Claimant voluntarily left her employment. To some degree, this appears to follow from the Commission’s decision letter, which said the same thing. However, the General Division decision relies on a finding that the Claimant did not make sufficient efforts to reconnect with her job in June 2020. This does not seem to agree with the Commission decision which says that she had already left her employment in March 2020.

[15] The Appeal Division granted leave to appeal partly because the General Division had not grappled with contradictions in the evidence. These included an internal contradiction in the employer’s account and a contradiction between the employer’s evidence and that of the Claimant. All these contradictions concerned the Claimant’s communications with the employer after she left in March 2020.

[16] I agree that the General Division should have explained which if any of the evidence it accepted. If the General Division is going to base its decision on a finding

⁴ See section 29(c) of the EI Act.

that the Claimant did not make sufficient efforts to reconnect, it must also explain what evidence led it to that conclusion.

Nature and timing of separation from employment

[17] The second area in which the General Division's reasons are inadequate concerns the nature and timing of the Claimant's separation from her employment.

[18] I cannot determine from the General Division at what point the Claimant was actually separated from her employment. The General Division's justification for its finding that the Claimant voluntarily left her employment suggests that it understood the Claimant to have "voluntarily left" when she refused to resume her employment – not when she stopped working. If this is correct, the law says that she should be disqualified from the date she was supposed to have resumed her employment.⁵

[19] However, the Commission was of the view that the Claimant voluntarily left her employment in March 2020. Presumably, the Commission relied on statements from the employer which assert that the Claimant requested a leave of absence in March 2020 due to her fears of Covid. In its arguments to the Appeal Division, the Commission specifically noted that it considered the Claimant's leave of absence as the reason for separation, as well as the reason for disqualification - since there was no evidence of an agreed return date.

[20] If the Claimant's separation from employment occurred in March 2020, then the General Division ought to have analyzed whether she took a voluntary leave in March 2020, or whether she was laid off at that time. There was evidence that the Claimant requested to take a leave of absence in March, but there was also evidence suggesting that the employer laid her off because of a slowdown in business from March to June 2020.⁶

⁵ See s.29(b.1)(2) of the EI Act.

⁶ See GD3-24; Also, listen to the audio recording of the General Division hearing at timestamp 12:20.

[21] If the General Division found that she took a leave of absence in March 2020, it should also have considered whether she and the employer had agreed on when she would return. I say this because such an agreement would mean that she could only be disqualified if, and when, she failed to return as agreed.

[22] If the General Division meant to find that the Claimant voluntarily left in June 2020, because she failed to resume her employment, it would need to determine which of the following cases were true:

- a) The Claimant was laid off in March 2020, but refused or ignored the employer's recall in June 2020 (or later).
- b) The Claimant took a definite leave of absence, but failed to return to work at the time that was agreed with her employer.

[23] The General Division simply found that she voluntarily left (not that she was laid off or voluntarily took a leave of absence). This was based largely on the apparent opportunities for more shifts that arose sometime after she had already stopped working.

[24] The General Division made an error of law because its reasons are not "transparent, intelligible and justified."⁷

– **Failing to consider all the circumstances**

[25] The EI Act says that a claimant will have "just cause" for leaving, if they have no reasonable alternative to leaving, having regard to "all the circumstances."⁸ It also includes a list of relevant circumstances that should be considered where they are present. One of those listed circumstances is "a significant modification of terms and conditions respecting wages or salary."⁹

⁷ According to the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, this is the starting point for determining whether a decision is reasonable. See also *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

⁸ See section 29(c) of the EI Act.

⁹ See section 29(c)(vii) of the EI Act.

[26] The General Division made an error of law because it did not have regard to all the circumstances. There was evidence before the General Division to suggest that the Claimant had experienced a significant reduction or loss of hours of work. The General division did not consider whether this amounted to “a significant modification,” or how this affected her reasonable alternatives.

[27] The Claimant testified that she had regularly been getting 24-25 hours per week. She said that her employer did not have enough hours for all its employees and had to prioritize its full-time employees. This meant that her hours had been significantly reduced. Partly because of this, she told her employer that she was looking for alternative work but that she would still take hours if they had them. She said she took reduced hours for a while but that the employer stopped giving her any hours at all.¹⁰ The employer confirmed that business had been slow from March to June 2020, and that it recalled workers in June.¹¹

[28] In addition, the General Division failed to consider whether the Claimant’s work environment involved “working conditions that constituted a danger to health and safety.” This is another of the circumstances listed in the EI Act.¹²

[29] The Claimant said that she had also been concerned about continuing to work because of Covid. She said the government was telling everyone to stay home and be safe.¹³ The employer was of the view that the Claimant left her job “due to Covid concerns.”¹⁴

[30] The General Division acknowledged the employer’s evidence, but it did not consider the significance of this circumstance when it analyzed her reasonable alternatives. This was also an error of law.

¹⁰ Listen to the audio recording of the General Division decision at timestamp 10:35.

¹¹ See GD3-21.

¹² See section 29(c)(iv) of the EI Act.

¹³ Listen to the audio recording of the General Division decision at timestamp 9:35.

¹⁴ See GD-20.

Summary

[31] I have found that the General Division's reasons were so inadequate as to be an error of law. I have also found that it made errors of law by failing to consider all the circumstances, as required by the EI Act.

[32] That means that I must decide how to remedy the General Division decision.

Remedy

[33] I must decide how to correct the General Division errors. 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.¹⁵

[34] The Claimant believes that I have evidence on all the issues I need to decide and that I should make the decision the General division should have made. The Commission has not taken a position.

[35] I have all the information that I require to decide the question of whether the Claimant voluntarily left her employment, so I can make that part of the decision. However, I will have to refer the matter to the General Division to reconsider some of the other issues arising from the General Division decision.

Decision on Voluntary leaving

[36] The Claimant gave several reasons for why she stopped working in March 2020. She noted that she had moved to Winnipeg several months earlier with the expectation that she would be able to find work there while she went to school. Her job required her to commute an hour and a half each way, and this was not cost-effective for the wages she made. Her employer knew that she had moved to Winnipeg and that she was looking for other work.

¹⁵ See section 59(1) of the DESDA.

[37] She also said that her hours had been cut until she was not getting any hours, and she said that she was concerned about the risks of Covid.

[38] In her application for benefits, the Claimant said her last day worked was March 10, 2023, although she was paid for March 12, 2023 (according to her Record of Employment).

[39] However, the Claimant has always insisted that she did not leave her employment at that time. When the General Division member asked the Claimant if she requested a leave of absence, she testified that she told the employer that she was still available and would accept shifts.¹⁶

[40] The employer stated that the Claimant took a leave of absence on March 13, 2020, because of her fear of Covid. At the same time, it noted that its business had slowed down from March until June 2020, when it recalled employees. The employer did not specifically state that it notified the Claimant of its recall, but it implied that it had. It said she did not return at the time of the recall.¹⁷

[41] The employer also told the Commission that the Claimant quit on her own accord and that there were “no layoffs at the time.”¹⁸ However, it is not clear what time the employer is referring to. If the employer is talking about the period between March and June 2020, its statement would appear to be inconsistent with another of its statements where it said that work had slowed down from March 2020 to June and that it recalled employees in June 2020.

[42] However, I do not accept that it is talking about that period. In other statements, the employer said that it “terminated” the Claimant on January 28, 2021, because she didn’t contact the employer¹⁹ and that it considered her to have “quit” on March 31,

¹⁶ Listen to the audio recording of the General Division decision at timestamp 10:35.

¹⁷ See GD3-25.

¹⁸ GD3-21.

¹⁹ GD3-22.

2021. I find that the employer meant to say that there were no layoffs at the time it finally considered the Claimant terminated or quit.

[43] The Claimant said that the employer did not call her for a recall.²⁰ She also said she tried to call the employer twice “once the Covid wave went down”, and that she left a message, but the employer did not call her back.²¹

[44] I find that the employer laid off some staff and that this likely occurred in March 2020 or just before. I also find that the employer did not formally lay off the Claimant, perhaps because it was not necessary to do so. The Claimant was part-time casual. She said she had no consistent schedule of hours but normally worked 24-25 hours a week. She said she filled in for other employees.²² There is no evidence that she was guaranteed any number of hours. In other words, the employer could stop giving her shifts without laying her off.

[45] The employer’s understanding was that the Claimant asked for a leave of absence. The employer believed the Claimant wanted a leave of absence because she was concerned about Covid.

[46] The General Division member questioned the Claimant about whether she had asked her employer to take a leave of absence because of Covid. She said that was not accurate. She said that the employer was reducing her hours, and that she would take more hours. She said that she was looking for alternative work in the meantime.²³ At the same time, she acknowledged that “it” (presumably, her leaving) was also related to Covid and how the government was telling people to stay home and be safe. She also said that her work wasn’t worthwhile because she had moved to Winnipeg.²⁴

[47] All of this was happening at the same time that the employer was redistributing hours to its full-time staff and even laying off some employees. The Claimant said that

²⁰ Listen to the audio recording of the General Division decision at timestamp 24:15

²¹ Listen to the audio recording of the General Division decision at timestamp 24:20.

²² Listen to the audio recording of the General Division decision at timestamp 12:10.

²³ Listen to the audio recording of the General Division decision at timestamp 10:10.

²⁴ Listen to the audio recording of the General Division decision at timestamp 9:35.

she accepted reduced hours for a short time but then they stopped giving her hours altogether.²⁵ Her understanding was that full-time employees were given priority over her.

[48] The Claimant also said that she used to fill in for other scheduled employees to obtain shifts,²⁶ but that she had to commute an hour and a half to get to work since she moved. The employer knew she had moved some distance away so it knew she could not fill in on short notice.

[49] Given that the Claimant was part-time casual, the employer had no reason to place the Claimant on an involuntary leave or lay her off. I understand the Claimant's testimony that she told the employer she would take more shifts. However, at the time she stopped working in March, she seemed to have little interest in accepting shifts even if there had been any. She told the employer she was looking for other work, and the employer was aware that she was fearful of Covid. At the same time, the Claimant did not believe the commute to work was worthwhile.²⁷

[50] The Claimant said that she thought she was laid off in March 2020,²⁸ and that she never formally quit her job. However, I find it more likely than not that the Claimant voluntarily gave up the prospect of additional shifts - at least for a period, even though there may have been a point where she told the employer she would take additional shifts. She may have asked the employer to hold off on giving her shifts for a time or she may have just agreed to be taken off roster until she was comfortable returning. Either way, I find it more likely that she left voluntarily than that the employer laid her off or forced her off the roster. Given her part-time, casual status, I see no reason that the employer would need to lay her off, but the Claimant has given several reasons why she would not want to take shifts.

²⁵ Listen to the audio recording of the General Division decision at timestamp 10:35, also listen to the audio at timestamp 17:20.

²⁶ Listen to the audio recording of the General Division decision at timestamp 12:10.

²⁷ See GD3-32, GD3-36.

²⁸ Listen to the audio recording of the General Division decision at timestamp 12:20

[51] Therefore, even though the Claimant may not have quit or specifically asked for a “leave of absence”, in those words, I find that she voluntarily took a leave from her work following her last paid day on March 12, 2020.

Return to the General Division for reconsideration

[52] I am returning the decision to the General Division because there are other issues that I cannot decide. The appeal record is not complete.

– Just cause

[53] I have found that the Claimant voluntarily took leave. The General Division will need to consider whether the Claimant had just cause for doing so.

[54] The General Division did not consider the Claimant’s reduction in hours as a relevant circumstance when it evaluated the reasonable alternatives to leaving. Therefore, it did not obtain evidence on the extent or period of the reduction in shifts, or income lost as a result. This would be relevant to whether it was reasonable to expect the Claimant to commute.

[55] In addition, the General Division did not consider the impact of the Claimant’s Covid fears on her ability to continue working. It did not collect information on either the objective hazard of Covid within her particular work environment, the communications or mitigation measures by the employer, or the nature and extent of her subjective fear. While I accept that the Claimant’s fear of Covid was a relevant consideration, I do not have evidence by which I can evaluate how this impacted her reasonable alternatives and, in particular, the alternative of staying employed until she found another job.

– Disentitlement or disqualification from leave of absence

[56] The General Division will also have to decide if the Claimant and her employer agreed on a time that she would return after her leave.

[57] The law generally treats a claimant who takes a voluntary leave of absence without just cause in the same way as it would treat a claimant who quits. In both cases, the claimant is disqualified. That means that the claimant could not qualify for benefits

using any of their accumulated hours of insurable employment. However, where the employee and the employer agreed on a time the employee would return, the claimant may be disentitled, rather than disqualified. This means that they cannot receive benefits until the period of the leave ends.

[58] The employer recalled employees in June 2020, and said that it notified the Claimant as well. Its evidence on the Claimant's response was inconsistent and disagrees with the Claimant's evidence that she contacted the employer (although she did not receive the notice).

[59] The circumstances may be such that they agreed on the time of return. I do not have evidence on this issue, so I will have to return this to the General Division for reconsideration.

– **Refusal to resume employment**

[60] The General Division may need to decide if the Claimant should be disqualified for refusing to resume employment without just cause.

[61] It is possible that the General Division will find that the Claimant did not have just cause for voluntarily taking leave in March 2020.

[62] However, it may also find that she did have just cause for taking leave in March 2020. Or, it may find that she did not have just cause for taking leave but that her leave was for an agreed period. In either of these two cases, it will also need to decide whether the Claimant voluntarily left her employment without just cause by failing to resume employment in June 2020 or later.

[63] This is best left to the General Division because it will follow from the General Division's other determinations. In some degree, it will also depend on its view of the Claimant's credibility. It is best to leave such assessments to the General Division as the trier of fact.

Conclusion

[64] I am allowing the appeal in part. I find that the Claimant took a voluntary leave in March 2020, and I am returning the matter to the General Division to reconsider,

- 1) whether the Claimant had just cause for taking a voluntary leave in March 2020,
- 2) if the Claimant did not have just cause, whether her voluntary leave should result in a disentitlement or a disqualification,
- 3) if the Claimant had just cause for taking leave, or was only disentitled for taking leave, whether the Claimant failed to resume employment in June 2020 or later,
- 4) if the Claimant failed to resume employment, whether she had just cause for doing so.

Stephen Bergen
Member, Appeal Division