Citation: *Canada Employment Insurance Commission v SS*, 2024 SST 683

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Jessica Earles
Respondent:	S. S.
Representative:	J. Kyle Bienvenu

Decision under appeal:	General Division decision dated March 1, 2024 (GE-23-3463)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	May 29, 2024
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	June 19, 2024
File number:	AD-24-194

Decision

[1] I am allowing the Canada Employment Insurance Commission's (Commission) appeal.

[2] The General Division made an important factual error. I fixed the General Division's error by making the decision the General Division should have made.

[3] I have decided that the Claimant voluntarily left her job without just cause. This means she is disqualified from getting Employment Insurance (EI) benefits.

Overview

[4] S. S. is the Claimant in this case. She worked for a retail sales system company, and the company owner was her boss/supervisor (company or employer). When her job ended, she applied for EI regular benefits.

[5] The Commission decided that she quit her job without just cause because she had a reasonable alternative to quitting when she did. So, the Commission could not pay her EI benefits.

[6] The Claimant asked the Commission to reconsider its decision. The Commission upheld its decision.

[7] The Claimant appealed to this Tribunal's General Division. The General Division allowed her appeal. It found there would have been antagonism with her boss if she had stayed at her job. Because of this, she could not have stayed until she found other employment.[1] So, it decided she had just cause (in other words, a reason the law accepts) for leaving her job when she did.

[8] The Appeal Division gave the Commission permission to appeal the General Division's decision.

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[1] See paragraph 41 of the General Division decision.

Issues

[9] There are two issues in this appeal:

- Did the General Division make an important factual error when it decided the Claimant had no reasonable alternative to quitting because of possible antagonism with her supervisor if she had stayed?
- If the General Division made an error, how should I remedy (fix) it?

Analysis

[10] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix a General Division error where a party can show the General Division made an important factual error.[2]

[11] If I find the General Division didn't make an error, I have to dismiss the Commission's appeal.

The General Division made an important factual error when it found the Claimant would have had antagonism with her supervisor

– The General Division's finding of fact the Commission is challenging

[12] The General Division found the Claimant quit her job on August 23, 2023.[3] It also found her employer significantly modified the terms of her wages or salary.[4]

[13] Then it made the findings of fact the Commission is challenging, at paragraphs 35 and 41:

> *[35]* I see no evidence of any antagonistic behavior on the part of either the employer or the Appellant. Everything seems to have been agreeable up to August 22, 2023, however, I opine that had the Appellant remained employed

[2] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." This is what I mean by an error. And I wrote the error under section 58(1)(c) using plain language. I explain more about that error when I analyze the parties' arguments.
[3] See paragraphs 24 and 25 of the General Division decision.
[4] See paragraphs 38 and 39 of the General Division decision.

> for the ensuing 6 weeks, the situation would have changed leading to confrontation regarding the employer's unilateral actions.
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> *[41]* I find the Appellant had no reasonable alternatives available to her other than leave her employment when she did. She could not have remained employed until she sought out and found other, more suitable, employment. [emphasis added]

[14] Because it decided she had no reasonable alternative, the General Division decided she had shown just cause for quitting when she did.[5] This meant she wasn't disqualified from getting EI benefits because she quit.

– The parties' arguments

[15] The Commission argued the General Division made an important factual error when it found the Claimant could not have remained employed and secured another job.[6] It focused its argument on paragraphs 35 and 41 of the General Division decision. The Commission says there is no evidence that the Claimant's situation would have changed leading to confrontation between the Claimant and her employer. This presumption isn't supported by the evidence. So, the General Division's finding was perverse and capricious.

[16] The Commission relies on the *Garvey* and *Walls* decisions.[7] These decisions interpret the important factual error ground of appeal under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).

[17] The Claimant argued the General Division's decision falls within possible, acceptable outcomes which are defensible in respect of the facts because there was evidence to support its decision. She also argued I should use the palpable and overriding error standard.[8] That test is whether there was "no evidence" to support a

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[5] See paragraph 44 of the General Division decision.
[6] The Commission's made the argument in writing at AD2-5 and at the hearing.
[7] In its written submissions, the Commission cites *Garvey v Canada (Attorney General)*, 2018 FCA 116 at paragraph 6, at AD2-3. Neither party used the more recent decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 in their written arguments. So, I sent a letter (see AD7) to the parties asking them to be prepared at the hearing to make arguments or answer questions based on Walls.
[8] See paragraphs 18 to 20 of the Claimant's written argument, at AD6-6. The Claimant cites *Benhaim v St. Germain*, 2016 SCC 48; *Sandegren v Hardy*, 1999 BCCA 221; and *Housen v Nikolaisen*, 2022 SCC 33

finding of fact.[9] So, where there is any evidence to support a finding of fact, I can't overturn it.

[18] The Claimant says there was ample evidence before the General Division, which it referred to in its decision.[10] So, the Appeal Division must accept the General Division's findings of fact and not interfere with the General Division decision.[11]

[19] At the hearing, the Claimant acknowledged the *Walls* decision sets out the legal test for an important factual error. But she said that I should use the palpable and overriding error standard when I apply *Walls*. Although the tests are slightly different, both are based on a high degree of deference. And both include language that a decision maker on appeal can only interfere with a finding of fact where there was "no evidence to support" that finding. The Claimant argues that is what *Walls* says.

[20] Finally, at the hearing the Claimant argued that "made in a …. capricious manner" means I can only interfere with a finding of fact where the General Division intentionally and willfully went against the evidence. And the Commission hadn't shown that in this appeal.

– The legal test for an "important error of fact" that I have to apply

[21] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding the evidence.[12] In other words, the evidence goes squarely against or doesn't support a factual finding the General Division made.

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[9] See paragraph 28 of the Claimant's written argument, at GD6-7
[10] See paragraph 29 of the Claimant's written argument, at GD6-7.
[11] See the Opening Statement in the Claimant's written arguments, at AD6-3.
[12] Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

[22] This is my understanding of the test I have to apply—in plain language—based on the leading Federal Court of Appeal decisions. [13] These decisions explain the phrase "made in a perverse or capricious manner or without regard for the material before it," used in section 58(1)(c) of the DESD Act.

[23] The law also says I can presume the General Division reviewed all the evidence—in its decision it doesn't have to refer to every piece of evidence.[14]

[24] I can't accept the Claimant's interpretation of the legal test under section 58(1)(c) of the DESD Act. The test I have to apply is clear. It is set out in that section and has been interpreted by the courts. So, I can't add other elements to it or interpret it differently.

– **The General Division's factual finding isn't supported by the evidence**

[25] The General Division's finding of fact that the Claimant and her employer would have had antagonism in the future isn't supported by the evidence. That finding goes against the General Division's finding that there was no antagonism up until the Claimant quit. These contradictory findings are both in paragraph 35 of the decision.

[26] Only evidence about circumstances that existed at the time the Claimant quit is relevant to the legal issue the General Division had to decide.[15]

[27] None of the Claimant's documents contain evidence of antagonism up until the time she quit. In her EI application, the Claimant says she quit due to a shortage of work.[16] She told the Commission her employer told her that her work hours would be reduced. So she got legal advice. She told the Commission her lawyer told her to hand in her laptop and other work equipment.

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[13] See *Garvey* v *Canada (Attorney General),* 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[14] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.
[15] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44; *Canada (Attorney General) v Thompson*, 2007 FCA 391; *Canada (Attorney General) v Furey*, A-819-95 (FCA); and *Tanguay v Unemployment Insurance Commission*, A-1458-84 (FCA).
[16] See GD3-7.

[28] Then, her lawyer took over for her. Her lawyer prepared her reconsideration request and her appeal to the Tribunal's General Division. These documents included her lawyer's characterization of the facts. These characterizations support her arguments about anticipatory breach, constructive dismissal, and a significant modification of terms and conditions respecting wages or salary.

[29] At the hearing, the Claimant testified that her hours were reduced during the COVID pandemic.[17] After COVID subsidies ended, her employer said he wanted to change her job to part-time. She told her employer she was not agreeing to work part-time. She said her employer took her response "not so well." He asked her to write down her job duties, as a way to justify her full-time position. She dutifully did that.

[30] She testified that she received an email from her employer on August 22, 2023.[18] Her employer explained they hadn't gotten a big new client. She was a great worker and he wanted to keep her on. But her wanted her to work ten hours a week starting in September or October. The rest of her brief testimony focused on the fact she didn't ask or agree to have her hours reduced.

[31] Based on my review of the evidence, there is no evidence to rationally support the General Division's finding that there would be future antagonism between the Claimant and her employer.

[32] The General Division based its decision on that unsupported factual finding. It decided that because of possible future antagonism the Claimant could not have remained employed and looked for work until the changes to her wages and hours came into effect on October 1, 2023. So, the General Division found that quitting was her only reasonable option. In other words, it decided she had just cause for quitting.

[33] So, the General Division based its decision on a finding of fact that went against and wasn't supported by the evidence. When it did that, it made an important factual error.

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[17] Listen to the hearing recording at 12:00.
[18] Listen to the hearing recording at 13:16.

[34] The Claimant argued there was ample evidence before the General Division to support its decision.[19] But the crucial issue is whether there is evidence to support the General Division's finding of fact that the Claimant had no reasonable alternative to quitting when she did because of antagonism.

[35] The Claimant lists the evidence that the General Division relied on.[20] But only one item is about antagonism—the General Division's opinion that there would be future antagonism. But that was a finding, not evidence, and that finding went against the evidence.

– The General Division made a legal error when it considered circumstances after the Claimant quit

[36] There is another way to look at the important factual error. The General Division makes a legal error when it doesn't use the correct legal test or follow a binding court decision.

[37] When the Tribunal applies the section 29(c) test for voluntary leaving without just cause, it can only consider circumstances that existed **at the time a person left their employment**.[21] The General Division was bound to follow the Federal Court of Appeal decisions that say this. But it went against them. It considered future antagonism—that might have existed **after she quit**—when it decided the Claimant had just cause for quitting in all the circumstances.

[38] So, the General Division used the wrong test to decide whether the Claimant had just cause. This was a legal error.

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[19] See paragraph 29 of the Claimant's written argument at GD6-7.
[20] See the Claimant's written argument at paragraph 29 on AD6-7.
[21] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44; *Canada (Attorney General) v Thompson*, 2007 FCA 391; *Canada (Attorney General) v Furey*, A-819-95 (FCA); and *Tanguay v Unemployment Insurance Commission*, A-1458-84 (FCA).

Fixing the error: I have made the decision the General Division should have made

[39] The law gives the Appeal Division the power to fix a General Division error.[22]

[40] The Commission argued I should give the decision the General Division should have given. It said the General Division file is complete and the Claimant had a full and fair hearing at the General Division. The Claimant argues that I should send her appeal back to the General Division. It says this would allow the case to be heard on its full merits and give the Claimant an opportunity to respond to findings of fact made in error.

[41] I will make the decision the General Division should have made, based on the evidence before the General Division.

[42] The Claimant was represented. The Claimant's lawyer didn't raise any procedural fairness concerns during the General Division hearing. And the Claimant didn't raise procedural fairness as a ground of appeal (error) at the Appeal Division.

[43] I have reviewed the General Division record and listened to the hearing. These show me the Claimant had a full and fair opportunity to present evidence and make arguments before the hearing and at hearing. She sent documents before the hearing. At the hearing, she answered questions from her lawyer, and her lawyer made legal arguments.

– The Claimant voluntarily left (quit) her job and hasn't shown just cause

Voluntary leaving

[44] I am adopting the General Division's finding that the Claimant voluntarily left her job on August 23, 2023 (paragraphs 24 and 25). Neither party argued the General Division made an error about this. And my review of the evidence (documents and testimony) shows me this finding is supported by the evidence.

[22] See section 59(1) of the DESD Act.

[45] At the General Division, the Claimant argued she didn't quit. But that argument was based on her employment law argument about anticipatory breach and constructive dismissal. That is an argument. It isn't evidence of the events that took place. And I can't rely on those employment law grounds to decide under section 29 of the EI Act whether she voluntarily left her job.

The legal test for just cause under the EI Act

[46] The Claimant has to prove it is more likely than not that her **only reasonable option in the circumstances was to quit**.[23] Having a good reason for quitting isn't enough to prove just cause. The law says I have to consider the circumstances that existed when the Claimant quit, including those listed in section 29(c).[24]

[47] First, I will consider the circumstances that apply in her case. Then I will consider whether she has shown she had no reasonable alternative to quitting in those circumstances.

The Claimant's circumstances

[48] The Claimant argued she had just cause based on four circumstances listed in section 29(c) of the EI Act:

- antagonism with a supervisor if a claimant isn't primarily responsible for that antagonism
- significant modification of terms and conditions respecting wages or salary
- undue pressure by an employer to leave employment
- significant changes in work duties

[23] See *Canada (Attorney General) v White*, 2011 FCA 190 at paragraph 4.
[24] See *Canada (Attorney General) v White*, 2011 FCA 190 at paragraph 3; and section 29(c) of the EI Act.

[49] I adopt the General Division's finding of fact that there was **no antagonism between the Claimant and her supervisor** (the company owner) up to the time she quit. Above, I decided this finding was supported by the evidence and doesn't ignore or go squarely against the evidence.

[50] I have reviewed the evidence from the General Division file and listened to the Claimant's testimony before the General Division. I accept the following facts because they are either accepted by both parties, or aren't contradicted:

- Around the beginning of April 2022, the Claimant's employer told her that her job would be changed from full-time to part-time. The employer asked the Claimant to identify the work tasks she did frequently, or on a regular basis, which she did. But the employer didn't move forward with the change at that time.

- In an August 22, 2023 email to the Claimant, the employer informed her that:
    - the company didn't get a 65-location retail store contract;
    - effective October 1, 2023, he would be reducing her hours to ten hours per week (guaranteed) and increasing her salary from $24 to $50 per hour;
    - the employer had identified tasks the Claimant did frequently or occasionally in her current job, which he wanted her to continue doing; and
    - he enjoyed working with her and hoped to continue in this part-time format.[25]

[25] See that email at GD2-26 and GD2-26.

- The Claimant didn't agree to or accept these changes. In other words, her employer was going to unilaterally imposed those changes on her employment.

- The Claimant stopped working effective August 23, 2023. She took the position that she was constructively dismissed, on the advice of her lawyer.

[51] The EI Act says a claimant has just cause for voluntarily leaving if the claimant had no reasonable alternative to leaving where their **employer significantly modified the terms and conditions of employment respecting wages or salary**.[26] Significant means "something above the normal" or "fundamentally different and new terms. And the EI Act should not be used to disqualify a worker where they left their job because they were being exploited.[27]

[52] I find that, **at the time she quit**, the Claimant's employer hadn't significantly modified the terms and conditions respecting her wages or salary. Her employer had told her those changes would come into effect in roughly five weeks (the time between August 23 and October 1, 2023).

[53] Nothing shows me the Claimant was being exploited by her employer. I accept that as of October 1, 2023, there would have been a significant modification in terms of wages or salary. Although her employer was doubling her hourly wage, he was significantly decreasing the number of hours worked—down from an average of over 40 hours per week to ten hours per week.[28]

[54] Given the law, this future significant modification can't meet the just cause test. But she knew about the changes when she quit because her employer had put it in an email to her. So, I will consider her knowledge of this significant modification when I decide whether she had a reasonable alternative.

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[26] See EI Act section 29(c)(vii).
[27] See *CUB 12252*.
[28] This is a rough average based on the hours her employer reported on her record of employment, see GD3-17.

[55] The law says that where an employer puts **undue pressure on a person to leave their job**, the person has just cause for leaving if they had no reasonable alternative.[29] "Undue" means excessive[30], or to a level that is more than necessary, acceptable, or reasonable[31].

[56] I accept the Claimant didn't agree to the changes her employer proposed, to come into effect October 1, 2023. She viewed these changes as part of an on-again, off-again attempt by her employer to unilaterally change the terms of her employment.

[57] But the Claimant hasn't shown her employer put undue pressure on her to leave her job. I find the changes the employer proposed to the Claimant's job were a reasonable response to business conditions. They weren't part of a pressure campaign, not excessive, and not made to pressure the Claimant to quit.

[58] The evidence shows me the employer held off changing the Claimant's job to part-time for about 16 months. And when the employer made those changes, he increased the Claimant's salary and hoped that she would continue doing the tasks he identified, at least until she found a new job. While I find the employer was aware the Claimant might quit, the evidence shows that he wanted her to continue working on the tasks he had identified. In other words, he didn't put undue pressure on her to leave her job.

[59] I find the Claimant hasn't shown the employer had **made significant changes in her job duties** at the time she quit, for two reasons. First, the proposed changes took effect in the future, not at the time she quit. Second, there wasn't evidence to show what changes, if any, her employer proposed to her job duties. The evidence showed she would continue to do the job duties she was already doing (once or twice a month, occasionally, or very occasionally).

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[29] See section 29(c)(xiii) of the EI Act.
[30] See the Miriam Webster on-line dictionary at Undue Definition & Meaning - Merriam-Webster.
[31] See the *Cambridge Dictionary* on-line at UNDUE | English meaning - Cambridge Dictionary.

[60] The Claimant didn't give evidence about what duties, if any, she would no longer be responsible for doing. And she didn't give evidence about whether her ongoing job duties were different from what she had been doing.

Reasonable alternatives in the circumstances

[61] When I consider whether the Claimant had a reasonable alternative to quitting, I have to take look at all the circumstances that existed at the time she quit. I have to look at them cumulatively—in other words, altogether. The Claimant has to show that quitting when she did was her only reasonable option.

[62] At the time the Claimant quit, she knew about the significant modification of terms and conditions respecting wages or salary that were coming in effective October 1, 2023. I will take this circumstance into account. She hasn't shown I have to consider circumstances listed in section 29(c), for the reasons I set out above. And she didn't raise any other circumstances I need to consider.[32]

[63] The Commission argued the Claimant had two reasonable alternatives to quitting when she did:

- discussing her concerns about the new proposed work arrangement with her employer
- staying in her job until she secured another job[33]

[64] I find that the first alternative proposed by the Commission wasn't reasonable. The evidence showed that the employer had wanted to change the Claimant's job to part-time for over a year, for financial reasons. He had reviewed her job duties and the company's ongoing administrative support needs. Then he presented her with his decision, in his August 22, 2023 email. This wasn't an invitation to discuss concerns or

[32] See makes her just cause arguments at paragraphs 49 to 63 of her appeal, at GD2-15 to GD2-17.
[33] See the Commission's written argument at GD4-7.

negotiate. So, discussing her concerns with her employer wasn't a reasonable alternative.

[65] I find the second alternative proposed by the Commission—remaining employed and securing another job—was reasonable in the Claimant's circumstances.

[66] The Claimant didn't make any arguments about why remaining employed wasn't a reasonable alternative, other than antagonism that might have taken place in the future. But that antagonism was speculative, and not supported by evidence.

[67] There was no evidence the Claimant looked for work before she quit. She received the employer's email about the job changes, sought legal advice, and quit—in a day.

[68] The documents before the General Division show there was antagonism between the Claimant and her employer **after she quit**. This antagonism developed because she threatened to sue her employer for constructive dismissal. The negotiations to avoid that lawsuit became antagonistic. But this antagonism wasn't a circumstance that existed when she quit.

[69] So, the Claimant hasn't shown that staying employed and trying to secure another job—at least until October 1, 2023—was an unreasonable option in her circumstances. This means she didn't have just cause for quitting her job when she did.

– I don't accept the Claimant's other arguments about just cause

[70] The Claimant argues that it is well established that an employee has just cause to leave their employment where they are forced to choose between continuing or leaving their employment where the employer unilaterally decides to fundamentally change the terms of their employment.[34] She cites the *Peppard* decision to support that argument.[35]

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[34] See paragraphs 36 to 39 of the Claimant's written argument at GD6-28.
[35] See *Canada (Attorney General) v Peppard*, 2017 FCA 110 at paragraphs 4 and 5.

[71] I can't accept her argument, for two reasons.

[72] First, it goes against the legal test for just cause in section 29(c) of the EI Act. To win her appeal on that basis, the Claimant had to prove not only a significant modification in wages, salary, or job duties existed at the time she quit. She **also had to prove** that she had no reasonable alternative in those circumstances. The Claimant's argument ignores the second part of the legal test.

[73] Second, the Claimant misstates the principle from the *Peppard* decision.[36] The paragraphs the Claimant cites stand for a different proposition—the General Division's finding about whether a person had just cause is primarily factual and is owed deference. In other words, unless the General Division makes an important factual error, its finding that a person had no reasonable alternative should not be disturbed. Above, I decided the General Division made an important factual error when it decided the Claimant's appeal.

[74] The Claimant also argued that the facts of her case are the same as tribunal and court decisions where a claimant won.[37] The court or tribunal decided that a person faced with an employer's unilateral change to the fundamental terms of employment had just cause to quit. She says I should follow these decisions.

[75] Unless the facts in a court decision are the same as—or very similar to—the Claimant's case, I don't have to follow the decision.

[76] The facts in the Claimant's case are very different from the facts in the *Peppard* case.

[77] Mr. Peppard elected to retire from the Canadian Armed Forces (CAF) so he could continue to collect his pension of $28,000 per year. The court found his pension wasn't wages or salary under section 29(c). He had contributed to the plan over a 20-year career. He continued to work for close to a year after his employer informed him of upcoming legislative changes. Those changes meant that he could not continue to

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[36] See paragraph 38 at AD6-8.
[37] See paragraph 51 at GD2-15 and paragraphs 56, 57, and 58 at GD2-16.

work in the CAF Reserves and collect his pension. He was also retraining to start a new career as a massage therapist.

[78] The Claimant quit the day after her employer told her about changes to her hours and wages that were going to take effect five weeks later. She did this before looking for other work. There is no evidence that she had to quit to save pension or other benefit entitlement she had earned.

[79] I have also reviewed the three tribunal decisions about voluntary leaving under the EI Act the Claimant has cited.[38] The facts in each decision are different in important ways from the Claimant's case. So, these cases don't persuade me that the Claimant had just cause.

– **My decision follows the purpose of EI benefits, which are for people who are involuntarily unemployment**

[80] The courts have said that workers who transform a risk of unemployment into a certainty should not get EI benefits.[39] EI benefits are for people who are involuntarily unemployed.[40] The courts have also said a person can't rely on constructive dismissal to establish their EI claim.[41]

[81] The Claimant made the risk of her unemployment certain. I appreciate that her employer intended to fundamentally change her hours and wages. She stood to lose significant income. I have no doubt the Claimant faced difficult career and financial decisions. She got legal advice. Then she chose to quit her job, the day after she learned of her employer's plan. In these circumstances, her opportunity to get compensation for her unemployment was through her private action against her employer, not through the public EI plan.

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[38] See *CUBs 36391* (claimant demoted and marginalized in the workplace, along with reduction in hours and salary)*, 25050* (claimant looked for work before quitting), and *41132* (Umpire returned case to be decided on the merits), cited at GD2-16.
[39] See *Canada (Attorney General) v Langlois*, 2008 FCA 18; and *Canada (Attorney General) v Marier*, 2013 FCA 39.
[40] See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] SCR 29.
[41] See, for example, Kuk v Canada (Attorney General), 2023 FC 1134 at paragraph 35.

Conclusion

[82] I am allowing the Commission's appeal and have made the decision the General Division should have made.

[83] The Claimant could have stayed at her job and looked for other work. This was a reasonable alternative in the circumstances that existed when she quit. So, she hasn't proven she had just cause for quitting when she did.

[84] This means she is disqualified from getting EI benefits.

Glenn Betteridge
Member, Appeal Division