Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. B. v. Canada Employment Insurance Commission,* 2016 SSTADEI 95

Tribunal File Number: AD-15-244

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON February 9, 2016

DATE OF DECISION: February 17, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 11, 2015, the Tribunals' General Division found that:

> - The Appellant was not available for work under section 18(1) of the *Employment Insurance Act* (Act).
>
> *Loi sur l'assurance-emploi* (la « *Loi* »).

[3] On May 7, 2015, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted by the Appeal Division on June 22, 2015.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- The fact that the parties' credibility was not one of the main issues;
- The cost-effectiveness and expediency of the hearing choice;\
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant did not participate in the hearing but was represented by Mr. Gilles Moreau. The Respondent was represented by Luce Nepveu.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) The General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must determine whether the General Division erred in fact and in law in finding that the Appellant was not available for work pursuant to paragraph 18(1)(*a*) of the Act.

SUBMISSIONS

[8] The Appellant submitted the following arguments in support of her appeal:

- The Record of Employment should state a lay-off rather than retirement.
- The Appellant has been capable to and available for work for 40 years.
- A claimant should not be disentitled to benefits based on the mere fact that they are looking for part-time work during their benefit period.
- The Act nowhere states that the employment being sought must be full-time, particularly given that she had accumulated insurable hours through part-time employment.
- The Appellant had made an effort to find work and was actually able to return to work.

- The Appellant is a long-tenured worker and her unemployment is unintentional; she cannot be held responsible for this situation.

[9] The Respondent's submitted the following arguments against the Appellant's appeal:

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction.

- The General Division decision is not patently unreasonable in light of the relevant evidence.

- The General Division had before it an issue in which it had to assess the facts. That being said, the courts have repeatedly stated that the Board of Referees (now the General Division) is best placed to assess evidence and credibility.

- The General Division had to rule on the issue of whether the Appellant was available and looking for work within the meaning of paragraph 18(1)(*a*) of the Act.

- The Federal Court of Appeal reiterated that, under paragraph 18(1)(*a*) of the Act, availability must be proven through a desire to return to the labour market, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market.

- The case law on availability is clear and is based largely on the claimant's intentions. Claimants must not only declare themselves to be available for and capable of work, but must also make reasonable efforts to obtain employment;

- Based on the evidence and submissions presented by the parties, the General Division found that the Appellant did not, on a balance of probabilities, prove that she was making the necessary efforts to find suitable employment. Moreover, the General Division found that the Appellant set personal conditions that could limit her chances of employment and was not ready to return to the

labour market as soon as a suitable job is offered to her as she did not want to, amongst other things, take a full-time job.

- Contrary to the criteria related to earnings and to the type of work offered [see Regulation 9.002 (e) and 9.003], the Act does not state the hours of work related to work history during the qualifying period. Also contrary to the criteria related to earnings and to the type of work offered based on which claimants can limit the type of work they are able to accept during certain periods, the criteria related to work hours stated in the Act do not include any provisions regarding time line nor any flexibility [see 9.002 (b)].

- Notwithstanding work history during the qualifying period, claimants cannot limit their willingness to work during certain hours; rather, they are required to, as of the beginning of their benefit period, be available for all work hours offered in the job market, including full-time hours, part-time hours, evenings, nights, and shift work, including work that could entail an inconvenient schedule or long hours, or even overtime—they must seek these work hours and accept them when offered.

- The role of the Appeal Division is limited to deciding whether the interpretation of the facts by the General Division was reasonably consistent with the evidence in the file. The General Division properly assessed the evidence and its decision is well-founded.

STANDARDS OF REVIEW

[10] The Appellant made no submissions regarding the applicable standard of review.

[11] The Respondent submits that, and the Tribunal agrees, that the Federal Court of Appeal ruled that the applicable standard of review for a decision of the Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on a question of law is correctness – *Martens v. Canada (A.G.*), 2008 FCA 240, and that the applicable standard of review for a question of mixed fact and law is reasonableness – *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[12] When it dismissed the Appellant's appeal, the General Division concluded the following:

> [*Translation*]
> [18] Paragraph 18(1)(*a*) of the Act states that to be eligible to receive benefits, claimants must prove that they are capable of and available for work—on any given work day—and are unable to find suitable employment.
>
> [19] Subsection 50(8) states the following:
>
> > *For the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.*
>
> [20] In *Faucher,* the Federal Court of Appeal established three criteria that claimants must meet in order to demonstrate their availability for work. According to the criteria, the claimant must demonstrate their desire to return to the labour market as soon as a suitable job is offered, make the necessary efforts to find a suitable job, and not set personal conditions that might limit their chances of returning to work (*Faucher* A-56-96, A-57-96).
>
> (…)
>
> [34] Finally, the Tribunal takes into consideration the fact that the Claimant indicated that this was the very first time she filed a claim for Employment Insurance since she has held regular and permanent employment from 1974 to 2011. She stated that after having retired from the public service and taken some time to relax and to realign her goals, she chose to return to the workforce on a part-time basis. She claimed Employment Insurance after she was laid off.
>
> [35] The Tribunal is of the opinion that, although this is the Claimant's first time applying for Employment Insurance benefits, to which she had been contributing for many years, she must nonetheless respect the Act and the Regulations in order to receive benefits. She must therefore prove her availability for all working days. The Tribunal thus cannot disregard the Act and is entrusted with applying it.
>
> [36] Based on the evidence and submissions presented by the parties, the General Division found that the Claimant did not, on a balance of probabilities, prove that she was making the necessary efforts to find suitable employment. Moreover, the General Division found that the Appellant set personal conditions that could limit her chances of employment and was not ready to return to the labour market as soon as a suitable job is offered to her as she did not want to, amongst other things, take a full-time job.

[13] There being no precise definition in the Act, the Federal Court of Appeal has held on many occasions that availability must be determined by analyzing three factors - the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market - and that the three factors must be considered in reaching a conclusion - *Faucher v. Canada (EIC),* A-56-96.

[14] It seems clear to the Tribunal that the General Division had properly applied the three criteria developed in case law when assessing a claimant's availability for work.

[15] In fact, the preponderant evidence before the General Division shows that:

- The Appellant left her employment because the employer could not reduce her hours to less than four days per week; she thus made the decision to go back into retirement (GD3-14).

- The Appellant continues to look for work, but not at full-time. If she were offered a full-time position, she would decline it on the spot (GD3-14).

- The Appellant was offered full-time work by her employer, but she turned it down (GD3-20).

- The Appellant is willing to work full-time at five days per week for 40 hours, but only if the position is temporary (GD3-21).

- The Appellant did not conduct a job search as such, and didn't submit any applications, but searched for casual positions within the provincial public service, as well as the municipal and broader public sector (GD3-21).

- The Appellant states that she is a government worker and that she did not look for work in other sectors; she is retired and is not ready to begin a new career (GD3-21).

- The Appellant devotes her Mondays to taking care of her mother following her father's death (GD3-21).

[16] According to section 18, a Claimant that is able to work is eligible for benefits, not on the condition of being available for work but unable to find employment, but rather on the condition that they can prove that they are available and unable to find a job.

[17] The Tribunal finds it impossible that a Claimant could meet this condition if they can't prove that, to find employment, they had made reasonable efforts given the circumstances - *Ricard v. Canada (A.G.)*, (A-298-74).

[18] In applying the teachings of the Federal Court of Appeal to this case, the Tribunal is of the opinion that the fact that the Appellant was looking for a part-time job or a temporary full-time position does not constitute reasonable efforts under the circumstances and thus does not meet the requirements of paragraph 18(1)(*a*) of the Act.

[19] The Tribunal finds that the General Division's decision complies with the requirements of the Act and the established case law. The disputed decision is therefore reasonable and the appeal must be dismissed.

CONCLUSION

[20] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division