



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. L. L.*, 2016 SSTADEI 121

Tribunal File Number: AD-16-127

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

L. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 2, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on December 23, 2015. The GD allowed the Respondent's appeal where the Commission had determined that she (the Respondent) was not available for work pursuant to paragraph 18(a) the *Employment Insurance Act* (EI Act).

[2] The Respondent requested a reconsideration of the Commission's decision. The Commission maintained its original decision on the basis that the Respondent had not proven that she was available for work as her family responsibilities prevented her from accepting employment.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on January 11, 2015. The Application was filed within the 30 day time limit.

[4] The grounds of appeal stated in the Application are that the GD erred in law and erred in its findings of fact as follows:

- a) It failed to apply the correct legal test for availability;
- b) Whether the Respondent "had done what a reasonable person would be expected to do given the circumstances" is not the legal test for availability;
- c) The test applied by the GD is not synonymous with "making reasonable and customary efforts to obtain suitable employment";
- d) The GD concluded, in error, that the Respondent was available for work as of December 13, 2013 on the basis that the personal conditions set out as impediments to her availability ceased to be factors when she achieved suitable arrangements for her parents and began applying for jobs with TD Bank on December 13, 2013;

- e) The undisputed evidence shows that throughout the period of the leave of absence and until her employment with TD Bank was terminated, she was not seeking work elsewhere than with TD Bank as she considered herself an employee and the terms of her leave did not permit her to work elsewhere. The Respondent's restricted availability to one employer does not meet the criteria to prove availability, as she was not seeking suitable employment with any other employer, and this restriction unduly limited her chances of returning to the labour market during the period of the leave of absence.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) Act*, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal”.

[7] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

[8] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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, whether or not the error appears on the face of the record; or
- (c) The General Division 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.

[9] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

Errors of Law Asserted

[10] The Tribunal notes that the Respondent was present and testified at the hearing before the GD, but the Applicant chose not to attend.

[11] The GD found, at pages 12 and 13 of its decision, that:

[29] The Appellant could not be expected to know and thereby adhere to the rules governing availability when, on October 27, 2013, the date her claim has been antedated to, she had not applied for benefits.

[30] The Appellant, while living up to her contract with TD Bank regarding her leave of absence, applied for any and all jobs within the organization in addition to seeking out other possible positions through her extensive network of co-workers.

[31] Upon her employment with TD being terminated on December 19, 2014, she immediately expanded her job search to include employers other than TD Bank.

[32] I find that the Appellant, in this case, has shown a sincere desire and willingness to work as soon as possible evidenced by her continued efforts to seek out and apply for such. Although she was not successful in her search, that does not infer that a search was not carried out. The personal conditions set out as impediments to her availability ceased to be factors when she achieved suitable care arrangements for her parents and began applying for jobs on December 13, 2013.

[12] On the basis of these findings, the GD concluded that she “had done what a reasonable person would be expected to do given the circumstances” and therefore it found that she was available for work as of December 13, 2013 and entitled to benefits as that date as per section 18 of the EI Act.

[13] While the GD stated the legislative provisions relevant to the issues on appeal, the Applicant argues that the GD erred in law in applying the wrong legal test and erred in mixed fact and law in finding that the Respondent was available for work despite her personal restrictions on accepting employment.

[14] The GD decision referred to the *Faucher* case (A-56-96/A-57-96 on appeal from CUB 30987 and CUB 380988) and stated the test for availability as:

[20] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision. (*Faucher* A-56-96 & *Faucher* A-57-96)

[15] However, the GD's conclusion that the Respondent "had done what a reasonable person would be expected to do given the circumstances" may not have been the correct application of the legal test in *Faucher, supra*. The finding of mixed fact and law that the Respondent was available for work as of December 13, 2013 follows from this conclusion, and, therefore also warrants review.

[16] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[17] On the ground that there may be an error of law and errors of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[18] The Application is granted.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[20] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division