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

Citation: *T. S. v. Canada Employment Insurance Commission,* 2016 SSTADEI 238

Tribunal File Number: AD-15-858

BETWEEN:

T. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON April 26, 2016

DATE OF DECISION: April 28, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 31, 2015, the General Division of the Tribunal determined that:

> - A disentitlement was to be imposed to the Appellant in accordance to subsection 18(a) of the *Employment Insurance Act* (the "*Act*") for failing to prove her availability for work while attending a course of instruction.

[3] The Applicant requested leave to appeal to the Appeal Division on July 17, 2015 after receiving the General Division decision on June 16, 2015. Permission to appeal was granted on September 12, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal.
- The fact that the credibility of the parties is not a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

THE LAW

[5] 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.

ISSUE

[6] The Tribunal must decide if the General Division erred when it concluded that a disentitlement was to be imposed pursuant to subsection 18(a) of the *Act* for failing to prove her availability for work while attending a course of instruction.

ARGUMENTS

[7] The Appellant submits the following arguments in support of the appeal:

- A principle of natural justice was ignored when the General Division decided to proceed with a teleconference hearing instead of an in person hearing in view of the issue of credibility;
- The General Division erred when it concluded that her history of working and going to school did not overcome the presumption of non-availability;
- She would have preferred to find a part time job since she had invested too much money in the course. She did not want to drop school;

- It is not fair to ask her to be available from 9 to 5 from Monday to Friday since she works unusual hours as a nurse.

[8] The Respondent submits the following arguments against the appeal:

- There was no breach of natural justice as the Appellant was offered a teleconference of 60 minutes in which to present her argument concerning availability for work while attending a course of her own initiative;

- Availability is established by three factors: the sincere desire to return to the labour market as soon as suitable work is offered, the expression of such desire through job search efforts, and not setting personal conditions that unduly limit the chances of returning to the labour market;

- The General Division applied the correct legal test to the facts and its decision is consistent with the legislation and jurisprudence. The General Division provided reasoning for its determination that availability had not been proven pursuant to section 18 of the *Act*.

- Although recognizing the Appellant had a previous history of attending school while working, the General Division determined that there was insufficient evidence provided by the Appellant to prove her claim and that it must consider the second ground for a non-availability determination, that the Appellant placed restrictions on her availability;

- The General Division assigned more weight to the Appellant's initial statements, prior to the disentitlement placed on her claim, that her course attendance was during regular hours of work, that she was only available to work Monday and Friday, that she would accept full-time employment only if she could delay the start date until after her course was completed and that she would not leave her course to accept work;

- The General Division decision is one of the reasonable outcomes given the facts before it. There is no evidence that the General Division breached a principle of

natural justice, erred in law or made an erroneous finding of fact in a perverse or capricious manner.

STANDARD OF REVIEW

[9] The Appellant made no representations regarding the applicable standard of review. The Respondent submits that the applicable standard of review for questions of mixed fact and law is that of reasonableness - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

[10] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.

[11] The Federal Court of Appeal further indicated that not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[12] The Court concluded that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*.

[13] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada*, 2015 FCA 274.

ANALYSIS

[14] The Appellant raises the argument that a principle of natural justice was ignored when the General Division decided to proceed with a teleconference hearing instead of an in person hearing in view of the issue of credibility.

[15] The principle of natural justice refers to the fundamental rules of procedure exercised by persons and tribunals with judicial or quasi-judicial jurisdiction. The principle exists to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear and is allowed every reasonable opportunity to present his case and that the decision given is free of bias or the reasonable apprehension or appearance of bias.

[16] The Tribunal finds that the Appellant was given every opportunity to present her case and that the General Division listened to her arguments and provided all the details of her position in its decision. The Appellant did not demonstrate to the Tribunal that she suffered a prejudice because the hearing was held by teleconference instead of in person.

[17] For the above reasons, the Tribunal finds that this argument of the Appellant has no merits and that no rules of natural justice were breached in the present matter.

[18] Attending full-time studies creates a rebuttable presumption that the person pursuing the studies is not available for work. That presumption may be rebutted by evidence of "exceptional circumstances"- *Landry v. Canada (AG)*, A-719-91.

[19] The burden of proving the “exceptional circumstances” is on the claimant. The General Division concluded that there was not enough evidence provided by the Appellant to prove her claim.

[20] During the appeal hearing, the Tribunal reviewed with the Appellant her history of combined work and study. It appeared to the Tribunal that the Appellant had a limited history of combining work and full time school (approx. 6 months) and, unfortunately for the Appellant, did not establish a pattern sufficient to rebut the presumption of non-availability.

[21] Furthermore, the evidence before the General Division clearly demonstrates that the Appellant’s primary goal was her studies and that employment was secondary.

[22] To the simple question “If you found full time work but the job conflicted with your course/program, what would you do?” the Appellant answered she would accept the job as long as she could delay the start date to allow her to finish the course.

[23] The jurisprudence has clearly established that the desire to finish a course, notwithstanding and employment opportunity, shows non-availability.

[24] Therefore, the General Division did not err when it concluded that there was not enough evidence to support a history of combining work and full time school to rebut the presumption of non-availability and that more weigh was to be given to the Appellant’s initial statements, prior to the disentitlement placed on her claim.

[25] It is apparent, by reason of the Appellant's significant personal investment in her education, by reason of the full-time course with extensive weekly hours, by reason of the Appellant's obvious dedication to taking and completing the course and her reluctance to leave before the completion of the course, that the Appellant's real interest was in taking and completing the course in which she had enrolled and not in seeking employment.

[26] The Tribunal, after carefully reviewing the file and the decision of the General Division, finds that there is no evidence to support the Appellant’s grounds of appeal. The decision of the General Division is based on the evidence before it and is one that complies with the law and the decided cases.

CONCLUSION

[27] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division