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

Citation: *Canada Employment Insurance Commission v. D. M.,* 2016 SSTADEI 423

Tribunal File Number: AD-16-263

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 21, 2016

DATE OF DECISION: August 17, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division is set aside and the appeal of the Respondent to the General Division is dismissed.

INTRODUCTION

[2] On February 1, 2016, the General Division of the Tribunal determined that a disentitlement was not to be imposed to the Respondent pursuant to paragraph 18(1)(*a*) of the *Employment Insurance Act* (*Act*).

[3] The Appellant requested leave to appeal to the Appeal Division on February 11, 2016. Permission to appeal was granted on February 26, 2016.

TYPE OF HEARING

[4] The Tribunal held a teleconference 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 *Department of Employment and Social Development Act* (*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 not to be imposed to the Respondent pursuant to paragraph 18(1)(*a*) of the *Act*.

ARGUMENTS

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

- The General Division erred in law under paragraph 58(1)(*b*) of the *DESD Act* by failing to apply the correct legal test for availability to the facts of this case;

- Paragraph 18(1)(*a*) of the *Act* provides that a claimant is not entitled to be paid benefits for any working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment;

- The Federal Court of Appeal has determined that the legal test to prove availability within the meaning of the *Act* 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;

- Furthermore, availability is a question of fact to be considered on the basis of all the circumstances of each individual case. In accordance with subsection 50(8)

of the *Act* and jurisprudence, demonstrating availability requires the making of reasonable and customary efforts to obtain suitable employment;

- That following his separation from employment on February 24 until April 3, 2015, the Respondent did not conduct a job search and has therefore not met the legal test for availability up to that date;

- 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, pursuant to paragraph 58(1)(*c*) of the *DESD Act*;

- The General Division relied on the fact that the record of employment (ROE) was not on file and that the Respondent returned to work within two months to determine that the Respondent should have been given a reasonable period of time to find suitable employment in his area of residence;

- The information contained on the ROE is not disputed and is irrelevant to the issue of resolving the Respondent's availability. Furthermore, the reason for separation from employment was allowed, and the Respondent confirmed both prior to and at the hearing that his last day worked was February 24, 2015;

- The requirement of availability cannot be waived, regardless of whether the separation from employment is found to be justified;

- The evidence in this matter is undisputed that notwithstanding his transportation issues, the Respondent had not looked for work after his temporary separation from employment until the week of April 5, 2015 (GD3- 10, GD3-11, GD3-19). This information was not contradicted at the hearing;

- The Federal Court of Appeal has also found that a claimant's statutory requirement to prove availability under paragraph 18(1)(*a*) of the *Act* cannot be ignored, whatever the extenuating circumstances may be. Furthermore, payment of benefit is subject to the availability of a person, not the justification of his or her unavailability;

- That a proper application of the facts of this case to the legal test for availability leads to the reasonable conclusion that the Respondent has not proven his availability for work within the meaning of the *Act* and jurisprudence. Consequently, he should be subject to disentitlement while on claim up to April 3, 2015, pursuant to paragraph 18(1)(*a*) of the *Act*.

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

- Due to weather and the distance to his previous employer, and prior to speaking to the Appellant on April 2, 2015, he was not prepared or capable of travelling to work with his previous employer and even if there had been work available closer to him, there were still issues with major weather and severe snowstorms for all of March.

STANDARD OF REVIEW

[9] The Appellant submits that the applicable standard of review for questions of law is correctness and for questions of mixed fact and law is reasonableness – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[10] The Respondent made no representations regarding the applicable standard of review.

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (A.G.) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it 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."

[12] The Federal Court of Appeal further indicated that:

> "[n]ot 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."

[13] The Court concluded that "[w]he[n] it 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*."

[14] 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 (A.G.)*, 2015 FCA 274.

[15] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[16] The Appellant raises the argument that the evidence before the General Division is undisputed that notwithstanding his transportation issues, the Respondent had not looked for work after his temporary separation from employment until the week of April 5, 2015. The Appellant pleads that this evidence was not contradicted at the hearing.

[17] At the appeal hearing, the Respondent stated that he did not testify before the General Division that he was looking for work during the period of February 24 until April 3, 2015.

[18] Paragraph 18(1)(*a*) of the *Act* provides that a claimant is not entitled to be paid benefits for any working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[19] Contrary to the conclusions of the General Division, the Respondent did not prove he was available for work for the said period in accordance with the requirements of the *Act* - *Faucher v. Canada (Employment and Immigration Commission),* 1997 CanLII 4856 (FCA).

[20] The General Division also granted the appeal of the Respondent on the basis that the Appellant did not give proper warning to the Respondent regarding his availability. The General Division wrote the following:

> "The Tribunal Member finds that it is an error of law for the Member to not consider the case law relating to giving notice and a reasonable period of time prior to disentitling the Claimant for an unreasonable restriction and it is also an error of law for the Member to fail to consider the Commission's responsibility to give the Claimant warning."

[21] The Tribunal does not disagree with the General Division that a warning might be necessary when a claimant has established satisfactorily that his or her efforts to obtain suitable employment were reasonable. It is certainly not necessary when the warning would serve no purpose as in the present matter where the Respondent admitted that he was not seeking work or making a job search effort prior to April 4, 2015.

[22] The Federal Court of Appeal has clearly took the position that it could not accept that in a clear instance of unavailability, a claimant would be entitled to benefits under the *Act* simply because the Appellant would have omitted to give an advance warning, however regrettable that omission may be - *Canada (A.G.) v. Stolniuk*, A-687-93.

[23] The evidence in this matter is undisputed that the Respondent had not looked for work after his temporary separation from employment until the week of April 5, 2015. Consequently, he is subject to a disentitlement while on claim up to April 3, 2015, pursuant to paragraph 18(1)(*a*) of the *Act*.

CONCLUSION

[24] The appeal is allowed, the decision of the General Division is set aside and the appeal of the Respondent to the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division