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

Citation: *Canada Employment Insurance Commission v. L. L.*, 2016 SSTADEI 449

Tribunal File Number: AD-16-127

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON June 9 and 13, 2016

DATE OF DECISION: August 31, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative of the Appellant	Louise Laviolette
Respondent	L. L.

INTRODUCTION

[1] On December 23, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal from a disentitlement imposed by the Canada Employment Insurance Commission (Commission) for non-availability pursuant to the *Employment Insurance Act* (EI Act). The GD determined that the Respondent was available for work as of December 13, 2013 and entitled to EI benefits pursuant to section 18 of the EI Act.

[2] The Commission (Appellant) filed an application for leave to appeal the GD decision with the Appeal Division (AD) of the Tribunal on January 11, 2016 and leave to appeal was granted on March 2, 2016.

[3] This appeal proceeded by teleconference hearing for the following reasons:

a) the complexity of the issues under appeal;

b) the information in the file, including the need for additional information; and

c) the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The appeal hearing was convened on June 9, 2016 at the scheduled time. However, the hearing could not be completed in the time that had been allotted, and the hearing continued and was completed on June 13, 2016.

FACTS

[5] The following facts are not in dispute:

a) The Respondent worked until October 24, 2013; she needed to take a leave of absence from her employment with the TD Bank in order to give primary care to her elderly parents;

b) Under the terms of her leave of absence (for up to one year), her employer did not hold positions after a one month period of leave; the employee must apply for positions within the organization to secure a position to return to work;

c) During the leave, the Respondent was in receipt of company benefits but not income;

d) The Respondent began seeking employment on December 13, 2013, when the situation with her parents had begun to stabilize;

e) She was barred, under the terms of her contract with the TD Bank, from accepting employment outside that organization while on leave; therefore, she applied only to positions within the organization from December 13, 2013 to December 19, 2014, when she was terminated;

f) She expanded her job search in December 2014 after the termination;

g) She applied for regular EI benefits on January 7, 2015;

h) The Commission advised the Respondent that she could not be paid EI benefits because:

   1. She voluntarily left her employment without just cause; and

   2. She had failed to prove her availability for work because her family responsibilities prevented her from accepting a job;

i) The Respondent requested reconsideration of the Commission's decision. The Commission reversed its decision on the issue of voluntary leaving and found that the Respondent had shown just cause for voluntarily leaving her position. However, it maintained its decision on the issue of availability.

[6] At the AD hearing, the Appellant noted that the Respondent's claim was antedated, and that her benefit period was October 2013 to October 2014. It also agreed on the following facts:

a) The Respondent did everything she could to look for work within the TD Bank and she was unable to expand her job search until she was terminated in December 2014;

b) That she could not seek work outside of the TD Bank while on the leave of absence was outside of the Respondent's control; and

c) It does not dispute that the Respondent made every effort to return to work in a position at TD Bank from December 13, 2013 until she was terminated.

ISSUE

[7] Whether the GD erred in law in making its decision, whether or not the error appears on the face of the record.

[8] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the matter to the GD for reconsideration, or confirm, rescind or vary the GD decision.

THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the only grounds of appeal are that:

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.

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons which fell into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraph 58(1)(b) of the DESD Act.

[11] Subsection 59(1) of the DESD Act sets out the powers of the AD.

[12] Relevant provisions of the EI Act include subsection 18(1):

> 18 (1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> (a) capable of and available for work and unable to obtain suitable employment;
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> (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
>
> (c) engaged in jury service.

[13] Paragraph 18(1)(a) is the situation applicable to this matter.

SUBMISSIONS

[14] The Appellant submitted that:

a) The GD found that the Respondent was available for work as of December 13, 2013 based on an error of law and erroneous findings of fact;

b) The AD does not owe any deference to the conclusions of the GD with request to questions of law;

c) For questions of mixed fact and law and questions of fact, the AD must show deference to the GD and can only intervene if the GD 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;

d) Availability is a question of fact to be considered on the basis of all the circumstances of each individual case;

e) The legal test to prove availability is set out in the *Faucher* decision (*Faucher v. Canada (Employment and Immigration Commission)*, A-56-96);

f) The GD erred in law in its application of the legal test to the facts of this case;

g) The GD based its decision on erroneous findings of fact when it found that the Respondent was available for work; she could not be considered available for work

when there was an impediment to her availability for work as she was only seeking work within TD Bank.

[15] The Respondent submitted that:

a) The GD applied the appropriate legal test correctly to the facts;

b) The use of the expression "reasonable person" does not override the fact that the GD applied the proper legal test to the facts;

c) There was nothing "perverse" or "capricious" about the findings of fact in the GD decision;

d) The GD found that she was making reasonable and customary efforts to find work and was available for work as of December 13, 2013; these findings were based on the evidence before the GD and should stand;

e) She was restricted by contract with her employer TD Bank to applying for work only within that organization until December 2014 when it terminated her; and

f) Her situation is unique and does not fall within the cases cited by the Appellant.

STANDARD OF REVIEW

[16] The Respondent submits that the applicable standard of review for questions of law is correctness, and the applicable standard of review for questions of mixed fact and law is that of reasonableness: *Pathmanathan v. Office of the Umpire*, 2015 FCA 50 (paragraph 15).

[17] The Federal Court of Appeal has determined, in *Canada (A.G). v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[18] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[19] However, in *Canada (A.G.) v. Paradis; Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of employment insurance decisions rendered by the GD.

[20] The Federal Court of Appeal, in *Canada (A.G.) v. Maunder*, 2015 FCA 274, referred to *Jean, supra* and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the AD to decisions of the GD. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan*.

[21] In the recent matter of *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the AD which had dismissed an appeal from a decision of the GD. The AD had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The AD had concluded that the decision of the GD was "consistent with the evidence before it and is a reasonable one…" The AD applied the approach that the Federal Court of Appeal in *Jean, supra,* suggested was not appropriate, but the AD decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[22] There appears to be a discrepancy in relation to the approach that the AD of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the GD, and in particular, whether the standard of review for questions of law and jurisdiction in employment insurance appeals from the GD differs from the standard of review for questions of fact and mixed fact and law.

[23] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

ANALYSIS

Background

[24] The Respondent filed an initial claim for employment insurance benefits in January 2015. The Commission had first determined that:

a) She voluntarily left her employment without just cause; and

b) She had failed to prove her availability for work because her family responsibilities prevented her from accepting a job.

[25] At the reconsideration stage, the Commission found that the Respondent had shown just cause for voluntarily leaving her position. Her claim was antedated to October 27, 2013. However, the Commission maintained its decision on the issue of availability.

[26] Before the GD, the Commission's written submissions on the issue of availability argued that:

> In the present case, the claimant has demonstrated a sincere desire to return to work, but only for TD Bank, in a different role. The claimant is clearly restricted to one employer as positions in the labour market cannot be explored due to a condition of her leave of absence. Furthermore, while the claimant may have a sincere desire to work, she is clearly unable to do so for the sole reason that she took a leave of absence to care for her parents. Otherwise, had the claimant been available for work, she would not have requested the leave.
>
> Consequently, the claimant fails to prove her availability for work as she is not available for work in the labour market. Further, the very reason for taking the leave simultaneously proves her non-availability as the claimant's primary focus is to care for her parents.
>
> […]
>
> In the present case, while the claimant may be desirous of working, the very reason for taking a leave of absence simultaneously proves that obstacles exist to prevent the claimant from being available for work in the labour market.

[27] As the Appellant did not attend the GD hearing, it did not hear the testimony of the Respondent or her submissions before the GD. It did not supplement its written submissions with further oral submissions.

[28] The GD decided on the issue of availability by concluding at paragraph [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.

[29] The Appellant sought leave to appeal on the basis of errors of law and erroneous findings of fact made by the GD. Leave to appeal was granted on the ground that "there may be an error of law and errors of mixed fact and law".

[30] The Appellant's primary argument on the issue of availability is now related to the Respondent's restricted availability to one employer. In other words, the Respondent cannot prove availability under subsection 18(a) of the EI Act as she was not seeking suitable employment with any other employer and this restriction unduly limited her chances of returning to the labour market.

Leave to Appeal

[31] The decision granting leave to appeal noted:

> [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.

Decision of the GD

[32] The GD reviewed the evidence, set out the applicable legal test from *Faucher* and concluded:

> [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.
>
> **CONCLUSION**
>
> [33] The Member finds that, having given due consideration to all of the circumstances, the Appellant had done what a reasonable person would be expected to do given the circumstances therefore I find that she was available for work as of December 13, 2013 and entitled to benefits as that date as per section 18 of the Act.

Errors Asserted

[33] At the AD hearing, the Appellant narrowed its position to the issue of availability and specifically argued that the error of the GD is an error in the application of the *Faucher* test. It does not dispute the GD's underlying findings of fact. The Appellant now argues only that the GD did not apply the third factor in the *Faucher* test correctly.

[34] The third factor in the *Faucher* test is that the claimant shall "not set personal conditions that might unduly limit the chances of returning to the labour market".

[35] The Appellant relies on *Canada (A.G.) v. Leblanc*, 2010 FCA 60 wherein the Federal Court of Appeal set aside the decision of an Umpire on the issue of whether the claimant was or was not available for work. The Umpire had not considered the issue of whether, notwithstanding the claimant's desire to get to work, the claimant was not available within the meaning of the EI Act because of obstacles preventing him from coming in to work. Mr. Leblanc "was unable to work for two weeks because of a fire that destroyed his house and all of his possessions, including his work clothes. Even though Mr. Leblanc wanted to go to work nonetheless, he was unable to do so because he did not have the proper clothing and could not get to his workplace, which was some distance from his house."

[36] The Appellant argues that the *Leblanc* case stands for the general principle that a claimant who is limited by factors outside of his or her control, nevertheless, has limited availability, and a claimant who has limited availability is not available for work within the meaning of the EI Act. By analogy, the Respondent here was unable to expand her job search beyond one employer, which is a limiting factor outside of her control, and because of this limiting factor, she cannot be found to be available for work within the meaning of the EI Act.

[37] I do not agree that the *Leblanc* case is one of general application as argued by the Appellant, nor that it is analogous to the facts in the present matter. In *Leblanc*, the claimant could not physically get to his workplace and did not have the proper clothing because of a fire that destroyed his house and all of his possessions. Also, the Federal Court of Appeal identified one of the errors of the Umpire as allowing the claimant's appeal on the basis of a concession

made by the Commission which the Commission maintained had not been made. This case is distinguishable from the present matter.

[38] The Appellant was unable to cite jurisprudence “with similar factual underpinnings” although it noted that “this does not mean that none exists”.

[39] Another case is referred to by the Appellant in its written submissions, *Canada (A.G.) v. Cornelissen-O’Neill*, A-652-93, to stand for the proposition that “a claimant’s statutory requirement to prove availability under s. 18(a) EIA 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.”

[40] In *Cornelissen-O’Neill*, the claimant was a teacher who maintained that she was available to work during the summer period for which she claimed benefits. The Federal Court of Appeal held “That it may appear reasonable for a claimant not to seek work is insufficient reason to ignore the law” and “If a teacher wishes to collect unemployment insurance during the summer months, and intends to return to work as a teacher in September, then he or she must be prepared to seek work during the summer of a kind in which he or she is really employable e.g. as a camp counsellor or for other types of work in which employment for a two month duration is acceptable.” Ms. Cornelisson-O’Neill did not seek work which is not at all similar to the present case wherein the Respondent applied for and pursued more than ten different positions from December 2013 to December 2014.

[41] Availability is a question of fact to be considered on the basis of all the circumstances of each individual case. Demonstrating availability requires the making of reasonable and customary efforts to obtain suitable employment. (*Canada (A.G.) v. Whiffen (1994),* 165 N.R. 145 (F.C.A.) A-1472-92)

[42] The GD decision refers to “reasonable and customary efforts”, for example in paragraphs [5] and [25]. It is in this context that I read the GD’s conclusion in paragraph [33] of its decision: “the Appellant had done what a reasonable person would be expected to do given the circumstances”. The GD did not err in law in making its decision by using the phrase “reasonable person”. In any event, the GD had found at paragraph [32] that the Respondent had

“shown a sincere desire and willingness to work as soon as possible evidenced by her continued efforts to seek out and apply for such.” The GD considered the circumstances of this case and found that the Respondent had demonstrated availability.

[43] The Appellant argues that the Respondent did not meet the third condition of the *Faucher* test, and that having misapplied the test, the GD erred in law in making its decision.

New Issue before AD

[44] The GD considered the personal condition of the Respondent’s focus on care for her parents. This was the Commission’s primary argument relating to personal (or limiting) conditions before the GD.

[45] Regarding the Respondent not expanding her job search beyond one employer, the GD stated only the following:

> [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.

[46] Before the GD, the Appellant’s position on the issue of availability was not primarily based on the Respondent not seeking suitable employment beyond one employer.

[47] The Appellant’s argument that the Respondent was “not available” within the meaning of the EI Act was not advanced in the same manner before the GD. However, this is not an impediment to the Appellant being able to advance it before the AD, as paragraph 58(1)(b) of the DESD Act includes as allowable grounds of appeal an error in law “whether or not the error appears on the face of the record”.

Availability and Personal Conditions

[48] The question for the AD now is: Did the GD err in law by finding that the Respondent was available under the *Faucher* test, despite limiting her job search to one employer?

[49] The third factor in the *Faucher* test is that the claimant shall not set personal conditions that might unduly limit the chances of returning to the labour market.

[50] The following facts are important to note:

a) The Respondent did not set a personal condition limiting her job search; she was contractually barred from seeking employment outside of TD Bank until December 2014; this condition was imposed by a contract;

b) She applied for "any and all jobs within the organization in addition to seeking out other possible positions through her extensive network of co-workers";

c) She pursued more than ten possible positions in a one year period;

d) The Appellant conceded that:

    1. The Respondent did everything she could to look for work within the TD Bank and she was unable to expand her job search until she was terminated in December 2014;

    2. That she could not seek work outside of the TD Bank while on the leave of absence was outside of her control; and

e) The Appellant does not dispute that the Respondent made every effort to return to work in a position at TD Bank from December 13, 2013 until she was terminated and that she expanded her job search in December 2014.

[51] In the circumstances, the GD did not find that the Respondent "set personal conditions that might unduly limit the chances of returning to the labour market".

[52] Availability is a question of fact to be considered on the basis of all the circumstances of each individual case. The question of availability is an objective one: whether a claimant is sufficiently available for suitable employment to be entitled to employment insurance benefits.

[53] As a general rule, a claimant who imposes unreasonable restrictions fails to prove availability. Whether a restriction or a personal condition is unreasonable is a question of fact, again an objective one. The *Faucher* test uses the expression "personal conditions that might unduly limit the chances of returning to the labour market" (emphasis added) and not all personal conditions.

[54] The GD is the trier of fact, and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[55] It is not my role, as a Member of the AD of the Tribunal on this appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew.

[56] Based on review and evaluation of the evidence before it, the GD found, implicitly, that the limiting of the Respondent's job search to one employer until that employer terminated her was reasonable in the circumstances. While the Appellant objects to the GD's use of the phrase "the Appellant had done what a reasonable person would be expected to do given the circumstances", the GD's finding of fact was not made in a perverse or capricious manner or without regard for the material before it.

[57] Although the GD may not have determined the broad question that the Appellant postulates – that a claimant who has any limiting condition is not available for work within the meaning of the EI Act – the GD did not commit a reviewable error. The GD did not err in law in making its decision, and the GD did not base 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.

[58] On the broad application of the third factor of the *Faucher* test which the Appellant advances – that a claimant who is limited by factors, even factors outside of his or her control, nevertheless, has limited availability, and a claimant who has limited availability is not available for work within the meaning of the EI Act – I disagree. The established jurisprudence of the Federal Court of Appeal does not extend this far. The *Faucher* test uses the expression "personal conditions that might unduly limit the chances of returning to the labour market" and not all personal conditions.

[59] Therefore, the Appellant's appeal to the AD cannot succeed.

CONCLUSION

[60] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division