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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. A. B.,* 2017 SSTADEI 35

Tribunal File Number: AD-16-997

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 26, 2017

DATE OF DECISION: January 27, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision of July 22, 2016, is rescinded, and the Respondent's appeal to the General Division is dismissed.

INTRODUCTION

[2] On July 22, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent was available for work under paragraph 18(1)(*a*) of the *Employment Insurance Act* (Act).

[3] On August 5, 2016, the Appellant applied for leave to appeal to the Appeal Division. Leave to appeal was granted on August 18, 2016.

FORM OF HEARING

[4] The Tribunal determined that the hearing of this appeal would be held by teleconference due to:

- the complexity of the issue or issues;
- the fact that the credibility of the parties is not a prevailing issue;
- the cost-effectiveness and expediency of the hearing choice; and
- the requirement to proceed as informally and as quickly as possible, while observing the rules of natural justice.

[5] At the hearing, Louise Laviolette represented the Appellant. The Respondent also attended the hearing.

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, whether or not the error appears on the face of the record.

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

[7] The Tribunal must decide whether the General Division erred in determining that the Appellant was available for work under paragraph 18(1)(*a*) of the Act.

SUBMISSIONS

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

- The General Division had erred in law in making its decision and based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner without regard for the material before it.

- The General Division had erred in law in determining that the Respondent was available for work, and it had incorrectly applied the case law in allowing the Respondent's appeal.

- *Canada (Attorney General) v. Cloutier*, 2005 FCA 73, confirmed the principle of case law that a claimant's availability for work is assessed by working day in a benefit period for which the claimant can prove that on that day he or she was capable of and available for work, and unable to obtain suitable employment.

- In the present case, the Respondent works every other week and confirmed to a member that, due to medical reasons, she cannot work more than every other week. She claimed that she had two medical certificates that substantiate those restrictions.

- Notwithstanding her desire to work full-time, the Respondent works to the maximum of her ability and is unavailable for every working day as defined in the Act and the case law. She is therefore ineligible to receive benefits for each working day that she does not work under paragraph 18(1)(*a*) of the Act.

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

- The General Division had not erred either in fact or in law, and it had properly exercised its jurisdiction.

- The General Division had validated her wish to receive Employment Insurance owed to her.

STANDARDS OF REVIEW

[10] The Appellant maintains that the Appeal Division does not have to defer to the General Division's conclusions regarding questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, the General Division must show deference to the General Division. It can intervene only if 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 – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) 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."

[12] 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.

[13] The Federal Court of Appeal concludes by emphasizing that "Where 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 Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 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, or its decision was unreasonable, the Tribunal must dismiss the appeal.

ANALYSIS

[16] When it allowed the Respondent's appeal, the General Division concluded the following:

> [53] The Tribunal finds that the Appellant qualifies for benefits under paragraph 18(*a*) of the Act, because she proved that she was available for work but that she had been unable to obtain suitable employment that aligns with her state of health and her physical capabilities.

> [54] The Tribunal relies on *Cloutier* 2005 FCA 73, which establishes that a claimant's availability is assessed by working day in a benefit period for which the claimant can prove that on that day he or she was capable of and available for work, and unable to obtain suitable employment. The appeal is allowed.
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> [Emphasis added by the undersigned.]

[17] 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 (CEIC)*, A-56-96.

[18] Furthermore, availability is assessed for each working day in a benefit period for which the claimant can prove that on that day he or she was capable of and available for work, and unable to obtain suitable employment – *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

[19] It seems clear to the Tribunal that the General Division did not properly apply the case law of the Federal Court of Appeal to assess the Respondent's availability for work.

[20] The uncontested evidence before the General Division shows that the Respondent is incapable of working full time every other week for medical reasons (Exhibit GD6-1). Notwithstanding her desire to work full-time, the evidence shows that the Respondent is working to the maximum of her ability.

[21] Although availability implies that a person is motivated by a sincere desire to work, willingness to work is not in itself necessarily synonymous with availability.

[22] In order to decide whether an individual is available for work, one must determine whether that individual is struggling with obstacles that are undermining his or her willingness to work. Obstacle signifies any constraint of a nature to deprive someone of his or her free choice, such as family obligations or a lessening of the individual's physical strength – *Canada (Attorney General) v. Leblanc*, 2010 FCA 60.

[23] The Tribunal finds that the Respondent, given her medical situation, is in a situation that prevents her from being available as defined in paragraph 18(1)(*a*) of the Act.

CONCLUSION

[24] The appeal is allowed, the General Division's decision of July 22, 2016, is rescinded, and the Respondent's appeal to the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division