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

Citation: *W. G. v. Canada Employment Insurance Commission*, 2017 SSTADEI 210

Tribunal File Number: AD-17-290

BETWEEN:

W. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 23, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, and the file is returned to the General Division for a new hearing by a different member.

INTRODUCTION

[2] On February 21, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant was to be disentitled to benefits pursuant to sections 18 and 50 of the *Employment Insurance Act* (Act), based on a finding that she was unavailable for work while attending a full time course.

[3] The Appellant requested leave to appeal to the Appeal Division on April 3, 2017, after receiving notice of the General Division decision on March 6, 2017. Leave to appeal was granted on April 13, 2017.

ISSUE

[4] The Tribunal must decide whether the General Division erred when it determined that, based on a finding that she was unavailable for work while attending a full time course, the Appellant was to be disentitled to benefits pursuant to sections 18 and 50 of the Act.

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.

ANALYSIS

[6] The Appellant submitted that the General Division had made an error in law based on the issue of her availability for work while she was taking a full-time course. She has a history of working while attending high school and university, and her job search resulted in her finding a job while she was taking a full-time course. The Appellant further submitted that the General Division had erred in law by failing to correctly apply the legal test for "availability" established by jurisprudence.

[7] The Respondent agreed with the Appellant that the General Division had not considered her evidence that, even though she is considered a full-time student, she attends classes for only a few hours in the morning so that she can take full-time work around the course. The Appellant also subsequently clarified that she is in school for a maximum of 15 hours a week and that she does not have labs, seminars or tutorial commitments, which leaves her with a lot of extra time to work (GD3-28 and GD3-29). The Respondent respectfully submitted that those were relevant factors that were before the General Division and that it had clearly not addressed this evidence in its analysis.

[8] The Respondent also submitted that the General Division had failed to explain its findings in a consistent manner and, consequently, the decision is not defensible in respect of the facts and the law.

[9] In support of its position, the Respondent referred to how the member had stated that "[o]n the surface, it does not appear that the Appellant limited herself to seeking part-time jobs, although it must be noted that she testified that servers rarely get offered more than 30 hours weekly" (paragraph 27) and that "[t]he Tribunal is satisfied that the evidence show that the Appellant showed a desire to return to the labour market in the Greater Toronto Area in a job similar to the ones she held in Prince Edward Island as soon as one was offered"(paragraph 28), before subsequently finding that he was satisfied that, on the

balance of probabilities, the Appellant had limited her search after mid-September 2015 to positions that would enable her to continue her studies (paragraph 38). In addition, the Tribunal member also found that he was satisfied that the Appellant had set personal conditions related to the workplace location that might have limited her chances of returning to the labour market and that, by doing so, she had not undertaken reasonable and customary efforts to obtain suitable employment.

[10] The Tribunal also notes that the General Division found that the Appellant "may have limited her job search" based on the fact that she had paid $4,000.00 in tuition fees. Not only is this an assumption by the General Division but, moreover, the evidence that the Appellant has presented is to the contrary. She stated that she was willing to lose the money if she found full-time employment (GD3-20).

[11] Given the foregoing, the Respondent submitted that the Appellant has grounds for appeal under subsection 58(1) of the DESD Act.

[12] After reviewing the appeal docket and the General Division decision, the Tribunal agrees with the parties' submissions that the General Division failed to explain why it rejected the evidence of the Appellant and erred in fact and in law in applying the factors in *Faucher v. Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA), and the Tribunal therefore allows the Appellant's appeal.

CONCLUSION

[13] The appeal is allowed, and the file is returned to the General Division for a new hearing by a different member.

Pierre Lafontaine
Member, Appeal Division