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

Citation: *C. H. v. Canada Employment Insurance Commission,* 2017 SSTADEI 255

Tribunal File Number: AD-16-765

BETWEEN:

C. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: June 20, 2017

DATE OF DECISION: July 5, 2017

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. The Appellant and the Commission each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (the DESDA), 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.

ANALYSIS

[6] The only issue before me is whether or not the Appellant was available for work while at school.

[7] The Appellant argues that she is entitled to benefits, and disagrees with the suggestion that she voluntarily left her employment to return to school. She submits that although she was in class every weekday afternoon she could have worked graveyard shifts,

mornings, or weekends, and was therefore available for work. Although she did not provide a job search to the General Division member, she submits that she did not know she needed to do so and that she had been looking for work. She asks that her appeal be allowed.

[8] The Commission admits that the General Division decision may not be as clear as it could have been. That being said, they maintain their position that given the uncontested evidence the conclusion of the General Division member's conclusion was the only possible outcome. They maintain that the Appellant was unavailable within the meaning of the *Employment Insurance Act*, and ask that the appeal be dismissed.

[9] The General Division member, after considering the law and the evidence, applied the facts to the law and found that, as a consequence of her classes, the Appellant was not available for work. He then dismissed the appeal.

[10] Section 18 of the Act establishes that a claimant is not entitled to benefits unless they can demonstrate that they are capable of and available for work. In *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA), the Federal Court of Appeal outlined the three factors to be considered when determining availability as follows:

> [T]he 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…

[11] The Court has considered the issue of availability while attending a course of instruction many times, such as in *Duquet v. Canada (Employment and Immigration Commission)*, 2008 FCA 313. In that case, the Court denied the claimant benefits, holding in part that:

> [T]here can be no doubt that owing to his university courses, the claimant was only available at certain times on certain days, which restricted his availability and therefore limited his chances of finding employment.

[12] In the case before me, the Appellant stated in her “Training Questionnaire” (found at GD3-10) that she would have only accepted employment as long as it did not interfere with her course work. I also note that it is uncontested that the Appellant’s availability was restricted (as defined in *Duquet*) by approximately five hours of classes per weekday.

[13] Finally, I observe that the Appellant has not demonstrated any exceptional circumstances that might mitigate or rebut the above.

[14] Giving due consideration to the above, I can find no reviewable error in the General Division member’s decision. In fact, although I agree that the decision could have been clearer, given the evidence in the file and the jurisprudence of the Court, the member had no choice but to reach the conclusion that he did.

CONCLUSION

[15] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division