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

Citation: *I. K. v. Canada Employment Insurance Commission,* 2017 SSTADEI 337

Tribunal File Number: AD-17-115

BETWEEN:

I. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 14, 2017

DATE OF DECISION: September 18, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 27, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disentitlement had been imposed in accordance with section 18 of the *Employment Insurance Act* because the Appellant had not proven his availability for work.

[3] The Appellant is deemed to have requested leave to appeal to the Appeal Division on February 2, 2017. Leave to appeal was granted on March 16, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue(s) under appeal
- the fact that the parties' credibility was 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 as 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 whether the General Division erred when it concluded that a disentitlement was to be imposed to the Appellant pursuant to paragraph 18(1)(*a*) of the Act for failing to prove his availability for work.

SUBMISSIONS

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

- The General Division erred when it refused the evidence that he had been available for work from April to July 31, 2016, because he held a valid permit that authorized him to work full-time during the vacations, which was April 5 to August 31, 2016.

- The General Division refused his arguments and his evidence that his previous study permit, with an expiration date of July 2016, would be renewed after July 31, 2016.

- The General Division refused his arguments and evidence that his study permit had been renewed after July 31, 2017, for the next four years, namely, until the year 2020.

- The General Division ignored his arguments and evidence that he had been available for work and authorized by his study permit to work full-time on the campus of his educational institution.

- The General Division refused his arguments and his evidence that Garda World had employed him full-time as a security guard from June 5, 2015, to August 4, 2017, even though he had been in a labour dispute with his employer regarding the employer limiting his working hours.

- The General Division refused his statement that he was seeking to find another employer.

- In addition to being authorized to work full-time during the summer vacation and other school breaks, he was also authorized to work full-time on the campus. Furthermore, he was authorized to work full-time after being accepted to the Express Entry Program of Citizenship and Immigration Canada.

- He had not received the appeal docket prior to the hearing before the General Division.

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

- The Appellant has not rebutted the presumption of non-availability while attending his course of instruction between January 18 and April 14, 2016.

- The Appellant stated that, as of April 15, 2016, he was actively looking for a full-time job because his classes were finished until September 2016 (GD3-23).

- The Appellant's availability must be supported by actions and evidence, as entitlement to benefits does not depend solely on the fact that one states that he or she is available for work, but rather on proving it. The evidence does not support the fact that the Appellant was actively looking for work during the period between January 18 and April 14, 2016. A mere statement of availability is not sufficient.

- The General Division found that the Appellant's statements had changed over time, and the evidence supports that he had not been available for work between January 18 and April 14, 2016, as required by the section 18 of the Act.

- The General Division weighed the evidence and applied the proper legal test. Moreover, the Tribunal's findings were reasonable and they conform to the Act, as well as established case law.

- There is nothing in the General Division's decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially, nor is there any evidence to show that there was a breach of natural justice present in this case.

- The Appellant neglected to mention to the General Division that he had not received the full docket prior to the hearing.

STANDARD OF REVIEW

[9] The Appellant made no representations regarding the applicable standard of review.

[10] The Respondent submits that Appeal Division does not owe any deference to the General Division's conclusions with respect to questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, as well as for questions of fact, the Appeal 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 had 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 "[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 (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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

Natural justice

[16] The Appellant argues that he had not received the full appeal docket prior to the hearing before the General Division. Therefore, the General Division failed to observe a principle of natural justice.

[17] A principle of natural justice refers to the fundamental rules of procedure exercised by persons and tribunals with judicial or quasi-judicial jurisdiction. The principle exists to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear, that he or she is allowed every reasonable opportunity to present his or her case and to defend himself or herself, and that the decision given is free of bias or the reasonable apprehension or appearance of bias.

[18] In view of the Appellant's above submissions, the Tribunal proceeded to listen to the recording of the General Division hearing. When the General Division member asked the Appellant whether he had received the appeal docket, the Appellant initially confirmed that he had received it and that he had it with him. Later in the hearing, the Appellant stated that he did not have the docket, even though he had received the notice of hearing.

[19] When listening to the recording of the hearing, the Tribunal found that the Appellant was fully aware that the Respondent had refused his benefits on the basis that his study permit had unduly limited his chances of obtaining full-time employment during non-break periods. He clearly expressed his position that he had been available to work full-time during his academic sessions and that he disagreed with the Respondent's position that he had been limited in doing so by his study permit.

[20] The Tribunal finds that the Appellant received proper notice of hearing, and that he was given every opportunity to present his case and to defend himself. The General Division member listened to his arguments and provided all the details of his position in his decision.

[21] For the above reasons, the Tribunal finds that this argument by the Appellant has no merits and that no rules of natural justice were breached in the present matter.

Availability

[22] The Appellant essentially submits that the General Division erred in fact and in law because he had been available for work and had been authorized by his study permit to work full-time, both on and off the campus of his educational institution during the academic sessions. He submits that the Respondent contradicts itself because he had no previous problems in getting the Respondent to recognize his availability for full-time work.

[23] The Tribunal informed the Appellant during the appeal hearing that it had jurisdiction only to address the issue before it, namely, his availability between January 18 and April 14, 2016. The Tribunal also advised the Appellant that it would consider only the evidence that had been filed before the General Division for review and consideration.

[24] Paragraph 18(1)(*a*) of the Act provides clearly 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.

[25] 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 (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA) (A-56-96)

[26] Furthermore, in order to decide 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 (CanLII).

[27] In applying the criteria of *Faucher supra*, the General Division found, on the basis of the Appellant's study permit restrictions and the fact that he had not legally been able to work more than the hours permitted, that the Appellant had not been available for work during the period in question, namely, January 18 until April 14, 2016. By being unable to work due to the restrictions placed upon him by his study permit, the Appellant, from that moment, had "personal requirements" that unduly limited his opportunities for returning to the labour market.

[28] The Appellant vigorously insists that he was available to work full-time, and that his study permit allowed him to work full-time on and off the campus of his educational institution during the academic sessions—not only during regular breaks.

[29] However, the study permit of the Appellant (GD3-15), valid from September 16, 2014, to July 30, 2017, contains the following conditions and remarks:

> Conditions
>
> 1. MAY ACCEPT EMPLOYMENT ON THE CAMPUS OF THE INSTITUTION AT WHICH REGISTERED IN FULL-TIME STUDIES.
>
> Remarks/Observations
>
> MUST ACTIVELY PURSUE STUDIES AT A DESIGNATED INSTITUTION. MAY WORK 20 hours OFF-CAMPUS OR FULL-TIME DURING REGULAR BREAKS IF MEETING CRITERIA OUTLINED IN SECTION 186(V) OF IRPR. AVL/OSC

[30] Subsection 186(V) of the *Immigration and Refugee Protection Regulations* clearly indicates that the holder of a study permit, although he or she is permitted to engage in full-time work during a regularly scheduled break between academic sessions, is not allowed to work more than 20 hours per week during a regular academic session.

[31] As the General Division concluded, the Appellant had been struggling with an obstacle, more precisely, a legal barrier, depriving him of his free choice and undermining his willingness to work. His study permit unequivocally set personal conditions that unduly limited his chances of returning to the labour market.

[32] Furthermore, in an interview dated April 15, 2016, the Appellant confirmed that he had not been available for full-time work, during the relevant period, when he stated that he had just finished school, that he was then actively looking for a full-time job and that he had applied for one on that day (GD3-23). The Federal Court of Appeal has established the principle according to which more weight must be given to initial, spontaneous statements than to subsequent statements made following an unfavourable decision by the Respondent—*Marc Lévesque*, A-557-96; *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13 (A-139-07).

[33] For the above-mentioned reasons, the Appellant cannot be considered available for work from January 18 to April 15, 2016, pursuant to section 18 of the Act, as he was enrolled in school full-time and had to adhere to the conditions imposed within the context of his study permit.

CONCLUSION

[34] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division