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

Citation: *P. D. v. Canada Employment Insurance Commission*, 2018 SST 1024

Tribunal File Number: AD-18-322

BETWEEN:

P. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: October 18, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, P. D. (Claimant), collected Employment Insurance benefits at the same time as he attended a university program of studies. During this time, he reported that he was available for work. When the Respondent, the Canada Employment Insurance Commission (Commission), investigated, it determined that the Claimant was not available for work and imposed a penalty on him for knowingly making false statements about his availability.

[3] The Claimant asked the Commission to reconsider, but the Commission maintained its original decision. The Claimant next appealed to the General Division of the Social Security Tribunal, which allowed the appeal on the penalty but dismissed the appeal on the issue of the Claimant's availability for work. The Claimant now appeals to the Appeal Division.

[4] The appeal is allowed. The General Division based its decision that the Claimant had not proven he was capable of and available for work on the erroneous findings that the Claimant had not made reasonable and customary efforts to obtain suitable employment, that he did not desire to return to the labour market as soon as suitable employment was offered and, that he unduly limited his chances of return. The General Division made these findings in a perverse or capricious manner or without regard for the material before it.

ISSUE

[5] Did the General Division consider irrelevant evidence and ignore relevant evidence to find that the Claimant had not made reasonable and customary efforts to obtain suitable employment?

ANALYSIS

Standard of Review

[6] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review in the Courts, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division.

[7] However, I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*[1] was of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[8] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of a decision of the Appeal Division. The Federal Court of Appeal was not required to rule on the applicability of standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[9] While certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] I am nonetheless persuaded by the reasoning of the Court

[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] See for example *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147 and *Thibodeau v. Canada (Attorney General*), 2015 FCA 167

in *Huruglica* and *Jean*. I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only.

General Principles

[10] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[11] However, the Appeal Division may only intervene in a decision of the General Division, if it can find that the General Division has made one of the types of errors described by the grounds of appeal in s. 58(1) of the DESD Act.

[12] The grounds of appeal are stated below:

(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.

Introduction

[13] The July 27, 2017, reconsideration decision that was on appeal to the General Division maintained the Commission's May 4, 2017, decision. That decision involved a determination that the Claimant had been on a training course and that he had knowingly made false representations. It imposed a penalty and anticipated a repayment. The initial decision letter lacks detail, but it is apparent from reading the summary of the conversation between the Claimant and the Commission on February 17, 2017 (GD3-25) and its own notes on May 4, 2017 (GD3-33, GD3-35) that the Commission's decision involved the Claimant's availability for work

(and his representations relating to availability) from September 2016 to December 2016. This is also apparent in the discussions about the Claimant's request for reconsideration (GD3-44).

[14] There is also a previous decision in the reconsideration file (GD3) dated February 17, 2017. In that decision, the Commission stated that it was unable to pay benefits from January 4, 2017. However, the February 17, 2017, decision was not reconsidered and was not on appeal to the General Division.

[15] The General Division found that the Claimant had not knowingly made false representations, and the Claimant has not challenged that determination. However, the General Division determined that the Claimant was not capable of and available for work.

[16] Paragraph 18(1)(*a*) of the *Employment Insurance Act* (EI Act)states that 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 capable of and available for work and unable to obtain suitable employment.

Issue: Did the General Division consider irrelevant evidence and ignore relevant evidence to find that the Claimant had not made reasonable and customary efforts to obtain suitable employment?

[17] The General Division found that the claimant was not capable of and available for work on the basis that he had not made reasonable and customary efforts to obtain suitable employment, because he did not demonstrate a desire to return to the labour market as soon as suitable employment was offered, and because he had limited his chances of returning to the labour market by returning to school.

Reasonable and customary efforts

[18] Section 50(8) of the EI Act states that, "For the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment".

[19] In finding that the Claimant was not making reasonable and customary efforts to obtain suitable employment, the General Division relied on evidence documenting the Claimant's job search and availability for a period beginning in January 2017. At the close of paragraph 36, the General Division stated that it agreed with the Commission "that contacting one employer and submitting three job postings for summer employment does not indicate a desire to immediately return to the workforce". This appears to be the same evidence that is detailed in paragraph 10 of the General Division decision, and the General Division can be referring only to the following excerpt from the Commission's submissions (GD4-5):

> The [C]laimant has submitted a list of one employer that he has contacted, a copy of three job advertisements for summer employment and a letter from the University advising that [the Claimant] can work full time. One application for benefits between September 2016 and June 2017 and three job postings for summer employment does not indicate a desire to immediately return to the work force full time. Instead it shows a desire to remain out of the workforce while completing a course of instruction.

[20] The appeal to the General Division concerned the question of the Claimant's availability from September 2016 to December 2016. Therefore, when considering the Claimant's job search efforts in 2017, the General Division relied on evidence that was irrelevant to its determination. Furthermore, the Claimant had provided evidence of his efforts to find employment from September 2016 to December 2016. While the General Division also references this evidence in paragraph 36, its finding that the Claimant was not making reasonable and customary efforts to obtain suitable employment was erroneously based on the irrelevant 2017 evidence. There is no analysis or determination on the adequacy of the Claimant's efforts to find employment during the relevant period from September to December 2016.

The Claimant's desire to return to the labour market, and; personal conditions by which he may have unduly limited his chances of returning to the labour market as soon as suitable employment was offered.

[21] The General Division also found that the Claimant had not proven his desire to return to the labour market and that his studies had limited his ability to return. In finding that the Claimant had not proven his desire to return to the labour market, the General Division discounted both the Claimant's testimony that he could rearrange his schedule as well as the July

2, 2017, letter from the university's Registrar's Office which confirmed that he could work full-time within his course schedule. Its justification for doing so was that the Claimant had not confirmed with his professors that he would be allowed out of class (paragraph 34), which it described as "an absence of supporting evidence from the university".

[22] In finding that his studies limited his ability to return to the labour market, the General Division referred back to its prior conclusion that there was an absence of supporting evidence from the university that he was not required to attend classes or that he could rearrange his courses (paragraph 37). There was no other basis for this finding.

[23] In my view, these findings were perverse or capricious or failed to correctly apprehend the letter from the university Registrar's Office. The university reviewed the Claimant's timetables, and confirmed that it would be possible for him to work full time *in addition* to his class schedules. The letter stipulates the Claimant's ability to work full-time *without* requiring him to miss classes or rearrange courses. The General Division might have preferred to have had notes from professors excusing the Claimant from class, but there is not an *absence* of evidence from the university supporting his claim that he was willing to accept offers of employment or that his school attendance did not unduly restrict his chances of returning to work.

[24] Therefore the General Division's finding that the Claimant had not made reasonable and customary efforts to obtain suitable employment, and its two findings that the Claimant did not desire to return to the labour market as soon as suitable employment was offered and that he unduly limited his chances of return were made in a perverse or capricious manner or without regard to the evidence before it; an error under s. 58(1)(c) of the DESD Act.

CONCLUSION

[25] The appeal is allowed.

REMEDY

[26] The Commission agreed in its final submissions that the General Division had erred. The Commission submitted that the General Division is best positioned to revisit the issues raised by

this appeal, and the Claimant also prefers that the matter be returned to the General Division for reconsideration.

[27] I agree. In accordance with my authority under s. 59 of the DESD Act, I return the matter to the General Division for reconsideration. I also direct that the General Division reconsideration be restricted to the issue of whether the Claimant was capable of and available for work from September to December 2016 but that the General Division revisit all three of the factors described in paragraph 33 of the General Division decision, namely; the Claimant's efforts to find suitable employment, his desire to return to the labour market, and any personal conditions that might unduly have limited his chances of returning to the labour market.

Stephen Bergen
Member, Appeal Division

HEARD ON:	October 4, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. D., Appellant Tammy Wohler, Representative for the Appellant Louise Laviolette, Representative for the Respondent