



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. A. v. Canada Employment Insurance Commission*, 2018 SST 1107

Tribunal File Numbers: AD-18-532, AD-18-533 and AD-18-534

BETWEEN:

M. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: November 9, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, M. A. (Claimant), worked as a licensed practical nurse for two employers, which I will refer to as the Health Authority and the Rest Home. The Claimant took a leave of absence from both jobs so that she could pursue a degree in nursing. This involved doing one practicum in Edmonton in October 2017 and another in Calgary in May 2018. The Claimant applied for Employment Insurance regular benefits, claiming that she was available for work during her leave of absence and that she had made efforts to find work since she began her school program. However, the Claimant subsequently informed the Respondent, the Canada Employment Insurance Commission (Commission), that she would not abandon her schooling to accept employment because she already had full-time employment to which she would be returning.¹

[3] The Commission informed the Claimant that it was unable to pay her Employment Insurance benefits because she had stopped working by voluntarily taking leave from her job with the Health Authority without just cause. The Commission also determined that the Claimant was taking a course on her own initiative and that she had not proven her availability for work.²

[4] The Claimant requested a reconsideration of the Commission's initial decision regarding her employment with the Health Authority.³ She argued that she should be eligible to receive Employment Insurance benefits because she was upgrading her education by attending a registered nursing program that would enable her to work as a registered nurse.⁴ The Commission issued two reconsideration decisions: one relating to the Health Authority and the other to the Rest Home. It maintained its earlier decision regarding her employment with the

¹ Supplementary Record of Claim obtained on October 30, 2017, at GD3-31 (AD-18-532).

² Commission's letter (initial decision) dated November 14, 2017, at GD3-32.

³ Request for Reconsideration dated December 9, 2017, at GD3-33.

⁴ Request for Reconsideration, dated December 9, 2017, at GD3-33 (AD-18-532).

Health Authority,⁵ but it overturned its earlier decision regarding her leave of absence from the Rest Home.⁶ In other words, the Commission found that the Claimant had just cause for taking leave from her employment with the Rest Home.

[5] The Claimant appealed both reconsideration decisions to the General Division, arguing that she had “never been not available for work if there was a meaningful schedule an employer could have given.” She also argued that it was inconsistent for the Commission to deny her claim for benefits when, at the same time, it accepted her appeal regarding her employment with the Rest Home. The General Division dismissed the appeals. It found that taking leave to pursue studies did not constitute just cause for taking leave from her employment with the Health Authority under the *Employment Insurance Act*. The General Division also determined that it was moot whether the Claimant had just cause to take leave from her employment with the Rest Home or whether she was available for work.

[6] The Claimant sought leave to appeal the General Division’s decisions. I granted leave to appeal because I was satisfied that the General Division may have erred in law when it concluded that the issues of just cause for voluntarily taking leave from the Rest Home and her availability for work were moot, without recognizing that these two issues were distinct from the issue of whether the Claimant had just cause for taking leave from her employment with the Health Authority.

[7] The Commission acknowledges that the Claimant has grounds to appeal the General Division’s decision under section 58(1) of the *Department of Employment and Social Development Act* (DESDA) and that the Claimant’s appeal should be returned to the General Division for reconsideration in accordance with section 59(1) of the DESDA.

[8] I am, however, dismissing the appeal because the evidence shows that the Claimant failed to establish availability for work during the entire period of her leave of absence.

⁵ Commission’s letter dated January 25, 2018, at GD2-5, GD2-6 and GD3-37 to GD3-38 (AD-18-532).

⁶ Commission’s letter dated January 25, 2018, at GD2-7 (AD-18-532).

ISSUES

[9] There are three issues before me:

Issue 1: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction, err in law, or base its decision on any erroneous findings of fact when it decided that the Claimant did not have just cause for taking leave from her employment with the Health Authority?

Issue 2: Did the General Division exceed its jurisdiction on the issue of whether the Claimant had just cause for leaving her employment with the Rest Home?

Issue 3: Did the General Division err in law or refuse to exercise its jurisdiction by failing to address the issue of whether the Claimant was available for work during her first practicum?

ANALYSIS

[10] Section 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

[11] Section 58(1) of the DESDA sets out limited grounds of appeal. It does not confer any jurisdiction on the Appeal Division to conduct reassessments.

Issue 1: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction, err in law, or base its decision on any erroneous findings of fact when it decided that the Claimant did not have just cause for

taking leave from her employment with the Health Authority?

[12] No. I find that the General Division did not fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction, err in law, or base its decision on any erroneous findings of fact when it decided that the Claimant did not have just cause for taking leave from her employment with the Health Authority.

[13] I addressed these issues in my leave to appeal decision that I rendered on September 6, 2018. I determined that the Claimant did not have an arguable case on any of these grounds.

[14] None of the Claimant's allegations in her request for leave to appeal addressed any issues of procedural fairness or of natural justice as they related to the General Division.

[15] The Claimant argues that the General Division erred in law and that it based its decision on erroneous findings of fact. In particular, she argues that, by training to become a registered nurse, she was fulfilling a pressing societal need for registered nurses. She argues that the General Division erred by overlooking this fact when it decided whether she had "just cause" for taking leave from her employment. In my leave to appeal decision, I determined, however, that the *Employment Insurance Act* does not consider whether there is a net societal benefit to training people in any particular occupation. This factor was irrelevant to the General Division's determination.

[16] As I noted in my leave to appeal decision, the courts have consistently held that taking leave or leaving employment for educational purposes does not qualify as just cause. I find that the Claimant has failed to provide any legal basis or authority to support her claims that there are exceptions to this basic principle.

[17] The Claimant has not raised any additional arguments that would warrant examining whether the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, erred in law, or based its decision on any erroneous findings of fact on the issue of whether the Claimant had just cause for taking leave from her employment with the Health Authority.

[18] If the Claimant is seeking a reassessment, as I have noted above, section 58(1) of the DESDA sets out limited grounds of appeal and does not confer any jurisdiction on the Appeal Division to conduct reassessments.

Issue 2: Did the General Division exceed its jurisdiction on the issue of whether the Claimant had just cause for leaving her employment with the Rest Home?

[19] Yes. I find that the General Division exceeded its jurisdiction on the issue of whether the Claimant had just cause for leaving her employment with the Rest Home. The Commission had already determined in one of its reconsideration decisions that the Claimant had just cause to take leave from her employment with the Rest Home.⁷ The Claimant did not appeal this reconsideration decision concerning the Rest Home. Therefore, the General Division did not have the jurisdiction to re-examine this issue and determine—one way or the other—whether she had just cause to take leave from her employment with the Rest Home.

Issue 3: Did the General Division err in law or refuse to exercise its jurisdiction by failing to address the issue of whether the Claimant was available for work during her first practicum?

[20] Yes. I find that the General Division erred in law under section 58(1)(b) of the DESDA by declaring the issue of whether the Claimant was available for work moot. I also find that, by declaring the issue moot, the General Division refused to exercise its jurisdiction under section 58(1)(a) of the DESDA.

[21] Because the Claimant may have been eligible to receive benefits on the basis of her employment with the Rest Home if she could establish that she was available for work, the General Division should have examined the issue of the Claimant's availability.

[22] The Commission submits that the General Division was obligated to make a finding on the Claimant's availability and, by failing to do so, erred in law under section 58(1)(b) of the DESDA. The Commission further submits that it was outside the General Division's jurisdiction

⁷ The Commission's initial decision regarding the Rest Home did not form part of the hearing file, but it is evident from the reconsideration decision at GD2-7 that, having found in the Claimant's favour, the Commission determined that the Claimant had just cause to take leave from her employment with the Rest Home.

to waive the requirement of having to address the issue of the Claimant's availability, which was clearly before the member.

[23] In *Canada (Attorney General) v Maughan*,⁸ the Federal Court of Appeal determined that the claimant in that case had just cause for leaving his employment. It also determined that both the Board of Referees and the Umpire (the predecessors to the General Division – Employment Insurance Section and the Appeal Division) “had the obligation to determine whether the claimant met this condition [of availability].” Similarly, since the Commission had determined that the Claimant had just cause for leaving her employment with the Rest Home, the General Division was obligated to address the issue of whether she was available for work.

[24] I agree with these submissions that the General Division should have addressed whether the Claimant was available for work during her leave of absence.

RELIEF SOUGHT

[25] Under section 59(1) of the DESDA, the Appeal Division may dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

[26] The Commission recommends that the Appeal Division return the matter to the General Division for reconsideration, in accordance with section 59(1) of the DESDA. The Claimant, on the other hand, asks me to award her Employment Insurance benefits, on the basis that her studies are vital to meeting society's demands for registered nurses. In other words, she argues that I should find that she had just cause for leaving her employment.

[27] There is no issue before me regarding whether the Claimant had just cause for leaving her employment with the Rest Home. The Commission had already determined in one of its reconsideration decisions that the Claimant had just cause. Neither of the parties appealed this particular issue. The sole issue for determination concerns the Claimant's availability during her

⁸ *Canada (Attorney General) v Maughan*, 2012 FCA 35.

one-month practicum in Edmonton in October 2017. This is the only time frame that the General Division addressed. The Claimant completed a practicum in May 2018, but it is irrelevant to determining the Claimant's availability for work in October 2017.

[28] I have reviewed the evidence, including the audio recording of the hearing before the General Division on July 5, 2018. During the hearing, the General Division questioned the Claimant on her availability in October 2017. I find that there is a complete evidentiary record for me to assess the Claimant's availability and that it is unnecessary for me to return the matter to the General Division for reconsideration.

Assessment of Availability

[29] Under section 18(1)(a) of the *Employment Insurance Act*, claimants must prove that they are capable of and available for work and unable to obtain suitable employment. Section 50(8) of the *Employment Insurance Act* states that, for the purpose of proving that claimants are available for work and unable to obtain suitable employment, the Commission may require claimants to prove that they are making reasonable and customary efforts to obtain suitable employment. It is insufficient for claimants to simply state that they are available for work.

[30] In *Faucher v. Canada (Employment and Immigration Commission)*,⁹ the Federal Court of Canada determined that availability must be determined by analyzing three factors:

- i. the desire to return to the labour market as soon as a suitable job is offered;
- ii. the expression of that desire through efforts to find a suitable job; and
- iii. not setting personal conditions that might unduly limit the chances of returning to the labour market.

These three factors must be considered when a decision-maker is reaching a conclusion.

[31] In this case, the Claimant testified that she was accustomed to studying and working at the same time. From 2008 to 2010, when she worked as a care-aid in Saskatchewan, she went to

⁹ *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).

college on a part-time basis, and when she began going to university full-time, she continued working on a casual basis. So, when she moved to Alberta for her practicum, she was confident that she could balance work with her practicum, volunteering, studying, and doing school assignments. She applied and paid \$350 for an annual licence so that she could work in her field.

[32] The Claimant noticed that the hospital where she was doing her practicum was short-staffed, so she sought work there, but the hospital required her to submit an application and was not hiring. She did not seek other work outside the hospital. She testified that Edmonton was a large, unfamiliar city and she did not know where to go or how to apply for work. She also testified that she “did not try that hard”¹⁰ to look for work because, when she finished her practicum shift, she had a lot of appointments, examinations, and assignments and “a ton of things to do.”¹¹ She doubted that anyone would hire her because she would be in Edmonton for only one month.¹² She was good at nursing but suggested that no one would consider her for anything outside of nursing because she did not have practical work experience in other areas.

[33] Although the Claimant expressed a willingness and desire to return to the labour market and even applied for a licence, her efforts to find a suitable job were limited. Apart from making enquiries at the hospital where she did her practicum, she did not explore other possible employment opportunities, largely because she thought it was unrealistic that anyone would hire her when she would be in Edmonton for just one month before returning to Vancouver. She also gave conflicting evidence about her scheduling availability: on the one hand, she was confident about balancing work with her other demands, but, on the other hand, she acknowledged that she had “a ton of things to do,” so she did not look for work outside the hospital. I find that it is more likely that the Claimant’s other demands hampered her efforts to find a suitable job.

[34] The Claimant also argued that her employer was based in British Columbia, so it was “very hard to fly between two provinces to be present at [her] work with a reasonable schedule.”¹³

¹⁰ At approximately 22:47 of audio recording of the General Division hearing on July 5, 2018.

¹¹ *Ibid.*

¹² At approximately 22:47, 26:13 and 32:19 of audio recording.

¹³ Application to the Appeal Division – Employment Insurance, filed October 6, 2018, at AD2-3.

[35] Given the Claimant's evidence, I find that she was not available for work during her practicum in October 2017. I also find that she has not proven that she made "reasonable and customary" efforts to obtain suitable employment during this time frame. Although the Commission determined that the Claimant had just cause to take leave from her employment with the Rest Home, I find that the Claimant is disentitled from receiving benefits for the entire period of her leave of absence because she has failed to prove her availability for work.

CONCLUSION

[36] The General Division erred in law and refused to exercise its jurisdiction under sections 58(1)(a) and (b) of the DESDA when it failed to address whether the Claimant was available for work. I am dismissing the appeal, however, because the Claimant has failed to prove her availability for work during the entire period of her leave of absence.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
PARTIES:	M. A., Appellant S. Prud'Homme, Representative for the Respondent