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

Citation: *Canada Employment Insurance Commission v A. D.*, 2018 SST 1290

Tribunal File Number: AD-18-52

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: December 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, A. D. (Claimant), applied for Employment Insurance (EI) benefits. She maintains that after she was laid off, she wanted to return to her position and was, therefore, available for work.

[3] The Appellant, the Canada Employment Insurance Commission, disentitled the Claimant from receiving benefits because it found that the Claimant had failed to prove that she was capable of and available for work. The Appellant had determined that Claimant had not looked for work and she was waiting to be recalled by only one employer.

[4] To qualify for EI benefits, the Claimant had to establish that she was capable of and available for work and unable to obtain suitable employment.

[5] The General Division of the Social Security Tribunal of Canada found that it was an error of law for the Appellant not to give the Claimant notice and a reasonable period of time to find employment. Furthermore, it found that the Claimant had demonstrated that she was available for work and had a desire to return to the workforce.

[6] The Appellant appealed to the Appeal Division and submitted that the General Division had based its decision on errors of law and serious errors in its findings of fact. Leave to appeal was granted based on possible errors of law.

[7] The General Division erred in law by relying on inapplicable jurisprudence and by not applying binding jurisprudence. The appeal is allowed.

ISSUES

[8] Did the General Division err in law in making its decision by misapplying binding jurisprudence or by relying on inapplicable jurisprudence?

[9] If the General Division did err, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

PRELIMINARY MATTERS

[10] The appeal hearing was first scheduled for August 7, 2018. The Claimant advised that she would not attend another Tribunal hearing.[1]

[11] The August 7, 2018 hearing date was rescheduled to September 27, 2018, because the Appellant was unable to attend on August 7.[2] Both parties were sent a notice of hearing for the rescheduled date, and the Tribunal verified that the notice of hearing had been delivered.[3]

[12] When the hearing proceeded on September 27, 2018, the Claimant was not present. Because she had previously stated that she would not attend the hearing, the hearing was held in the Claimant's absence.

[13] This appeal relates to the Claimant's 2014 application for EI benefits. The Claimant established other benefit periods in other years, but they are not part of this appeal.

[14] The Appellant appeals only one part of the General Division's decision: the part related to the Claimant's availability in the period from the end of June to end of August 2014. The part related to providing false information is not under appeal.

ANALYSIS

[15] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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.[4] Because the General Division may have erred in law when making its decision, the Appeal Division granted leave to appeal.

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[1] AD4, letter from Claimant dated June 28, 2018, received by the Tribunal on July 6, 2018.
[2] AD7, memorandum from the Appellant explaining that due to problems in their office, no one was assigned to attend the hearing.
[3] Proof of service, August 31, 2018,
[4] *Department of Employment and Social Development Act* (DESD Act), s. 58(1).

[16] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, or law.[5] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[6]

[17] Where an erroneous finding of fact is alleged, the decision must be based on that finding of fact, and the finding must have been made in a perverse or capricious manner or without regard for the material before it, rather than just erroneous.[7]

[18] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under section 58(1) of the *Department of Employment and Social Development Act*.[8]

[19] The appeal before the General Division turned on the question of whether the Claimant was available for work, which is a question of mixed fact and law. The Appellant submits that there are distinct errors of law or errors of fact. Because the legal test for availability is defined by jurisprudence, the mixed question on appeal here discloses distinct legal issues in which the Appeal Division may intervene.

Issue 1: Did the General Division err in law in making its decision by misapplying binding jurisprudence or by relying on inapplicable jurisprudence?

[20] The General Division erred in law by misapplying binding jurisprudence and by relying on inapplicable jurisprudence.

[21] The Federal Court of Appeal has held that the legal test to prove availability is determined by three factors: the desire to return to the labour market as soon as a suitable employment is offered; the expression of that desire through efforts to find suitable employment; and not setting personal conditions that might unduly limit the chances of return to the labour market.[9] This criteria is well-established in the jurisprudence.

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[5] *Canada (Attorney General) v Paradis*; *Canada (Attorney General) v Jean*, 2015 FCA 242, at para. 19.
[6] DESD Act, s 58(1)(b).
[7] *Ibid.* s 58(1)(a).
[8] *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[9] *Faucher v Canada (Attorney General)* A-56-96; *Canada (Attorney General) v Bois*, 2001 FCA 175.

[22] The General Division referred to the Federal Court of Appeal decisions in *Faucher* and *Bois* but did not apply them properly, as follows:

a) It concluded that the Claimant was not obligated to meet the three *Faucher* factors to be found to be available for work, but the General Division stated no the authority for this principle;

b) It found that the Claimant had not looked for work, was not looking for work, and was waiting to be recalled to her previous job. The Claimant expressed no desire to find other employment and made no efforts to do so. Applying the binding case law would have resulted in a finding that the Claimant had no desire and made no efforts to find employment and, therefore, did not meet the *Faucher* criteria.

[23] The General Division erred in law by misapplying binding jurisprudence.

[24] Furthermore, the General Division found that "it has been held that a claimant on a temporary lay-off should not be immediately or in this case retroactively be disentitled to benefits;"[10] the "case law is consistent in holding that when a person is subject to recall, the person must be granted a reasonable amount of time before he or she is deprived of unemployment insurance benefits;"[11] and "other jurisprudence has required that claimants should receive a warning when restricting their job search for too much or too long."[12]

[25] However, the General Division did not state what case law and jurisprudence stood for those principles. The General Division also failed to consider whether the case law about recall or temporary lay-off is applicable to the Claimant's situation. It did not properly determine whether the Claimant was in a recall or temporary lay-off situation.

[26] In addition, the General Division cited a Canadian Umpire Benefit (CUB) decision and relied on it to "suggest" a legal principle.[13] While CUB decisions may be persuasive, they are not binding on the Tribunal. Federal Court and Federal Court of Appeal jurisprudence, on the other hand, is binding.

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[10] General Division decision at para 49.
[11] *Ibid*. at para 53.
[12] *Ibid*. at para 54.
[13] *Ibid*. at para 41.

[27] The requirement to provide a warning is not applicable when a claimant expresses no intent or makes no efforts to secure other employment. The Federal Court of Appeal has held that a warning is not necessary when a person is not available.[14]

[28] Here, the Claimant had no intention to secure other employment and made no efforts to do so. She wanted to return to the job she had held until the end of June, she had decided it was futile to look for other work between the end of June and the end of August, and she did not look for other work. The requirement to provide a warning was not applicable in the Claimant's specific circumstances.

[29] The General Division erred in law in by relying on inapplicable jurisprudence.

Issue 2: Should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

[30] I have found that the General Division erred in law in making its decision.

[31] The Appellant submits that the evidence that was before the General Division is available to the Appeal Division and, therefore, it would be more expedient for the Appeal Division to render the decision that the General Division should have rendered than to refer the matter back to the General Division.

[32] The Claimant submitted in writing that the General Division decision was supposed to be final and that the Appellant should have just accepted it.

[33] I find that the appeal record is complete, and I am able to render the decision that the General Division should have rendered. Where the General Division has committed a reviewable error and the appeal record is complete, the Appeal Division has the authority to render the decision that the General Division should have rendered.

[34] After the Claimant's job as an administrative secretary ended on June 27, 2014, due to a shortage of work, she applied for and received EI benefits. She was selected to attend a Claimant Information Session in August 2014 and required to submit a job search covering a period before

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[14] *Canada (Attorney General) v Leduc*, A-134-95; *Canada (Attorney General) v Solniuk*, A-686-93.

the session. She submitted a job search form indicating only that she accepted a job with her previous employer starting at the end of August. After the session and as follow-up, the Appellant contacted the Claimant. It was in this context that the issue of the Claimant's availability between the end of June and the end of August 2014 was raised.

[35] The Claimant said that she had not been looking for work during the relevant period, she was not interested in working anywhere else, she had not looked for any other jobs, she had had no intentions to look for another job, and she was going back to her old job.[15] She also said that for previous EI claims, she had sought other work but stopped doing this because it was futile.[16] Nevertheless, the Claimant maintains that she was ready, willing, and able to work.

[36] In these circumstances, the Claimant could not meet the *Faucher* criteria. She could not prove that she was available for work because she had no intention of looking for other work, she made no efforts to obtain other work, and she waited out the summer months until her old job was available again.

[37] The Claimant had no desire to return to the labour market except to her old job; she made no efforts to find other suitable employment; and she only wanted to return to her old job at the end of the summer. None of the three *Faucher* factors were met.

[38] Applying binding Federal Court of Appeal jurisprudence, I conclude that the Claimant did not meet the legal test to prove availability.

[39] Because the Claimant was not available within the meaning of the *Employment Insurance Act* and *Employment Insurance Regulations*, she was not entitled to benefits in the relevant period. The Appellant properly imposed a disentitlement.

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[15] General Division decision at para 12.
[16] *Ibid*. at para 20.

CONCLUSION

[40] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	September 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Annick Dumoulin, Representative for the Appellant