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

Citation: *A. S. v Canada Employment Insurance Commission*, 2018 SST 1291

Tribunal File Number: AD-18-237

BETWEEN:

A. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant (Claimant) was employed under a temporary work permit but lost his job when his permit renewal application was rejected. The Claimant applied for Employment Insurance, but the Respondent, the Canada Employment Insurance Commission (Commission), determined that he was disentitled to benefits because he could not prove his availability to work. In response to the Claimant's reconsideration application, the Commission maintained its original decision. The Claimant appealed to the General Division of the Social Security Tribunal, but his appeal was dismissed. He now seeks leave to appeal to the Appeal Division.

[3] The Claimant has no reasonable chance of success. Regardless of the circumstances that resulted in the expiry of his work authorization, he could not prove that he was capable of and available for work, as required by section 18(1)(a) of the *Employment Insurance Act* (EI Act), during a period in which he was not legally authorized to work. There is no arguable case that the General Division erred in dismissing his appeal.

PRELIMINARY MATTERS

[4] The Claimant suggests that the Commission no longer considers that he was unavailable for work from June 12, 2017, to December 19, 2017, and makes reference to "2018-02-06 EI-6091", which I presume to be a document reference.[1] If this reference represents evidence, it is not evidence that was before the General Division and is not material to the question of whether the General Division erred in its consideration of the evidence then available. Furthermore, it is not part of the appeal file even now, and I have no ability to consider it.

[5] If the document represents a decision or position, I note that the Commission has not filed anything to suggest that its position has changed since the submissions it filed with the General

[1] AD1-4.

Division.[2] Even if the Commission had changed its position, I am now required to determine whether there is an arguable case that the General Division erred in any of the ways set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). My decision is necessarily independent of the Commission's position or any subsequent action of the Commission.

[6] I note that the Claimant made an application to the General Division to rescind or amend its decision, an application in which the General Division would have the ability to consider new evidence. As a result, I have deferred this decision to wait for the decision from the General Division on that other application. However, the General Division refused the Rescind and Amend application on November 29, 2018.[3]

ISSUES

[7] Is there an arguable case that the General Division erred in law or failed to exercise its jurisdiction by not considering the application and effect of section 50(10) of the EI Act?

[8] Is there an arguable case that the General Division otherwise erred in law in its application of the test for "availability?"[4]

[9] Is there an arguable case that the General Division based its decision on an erroneous finding of fact that was made without regard to the circumstances surrounding the lapse of the Claimant's work authorization?

ANALYSIS

General Principles

[10] The General Division is required to consider and weigh the evidence that was before it and to make findings of fact. It is also required to consider the law. The law would include the statutory provisions of the EI Act and the *Employment Insurance Regulations* that are relevant to the issues under consideration and could also include court decisions that have interpreted the

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[2] GD8.
[3] GE-18-2331.
[4] For the purpose of section 18(1)(a) of the *Employment Insurance Act*.

statutory provisions. Finally, the General Division must apply the law to the facts to reach its conclusions on the issues that it must decide.

[11] The appeal to the General Division was unsuccessful, and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a decision of the General Division only if the General Division has made certain types of errors, which are called "grounds of appeal".

[12] Section 58(1) of the DESD Act sets out the grounds of appeal as follows:

> 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.

[13] Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion and the result.

[14] At this stage, I must find that there is a reasonable chance of success on one or more grounds of appeal in order to grant leave and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case.[5]

Issue 1: Natural justice and jurisdiction

[15] The Claimant argues that the General Division failed to observe a principle of natural justice by limiting the scope of his appeal and ignoring the circumstances leading up to his unavailability for work.[6] The Claimant did not identify in what way the appeal process at the General Division could be viewed as procedurally unfair, and therefore, I cannot find an arguable case that the General Division failed to observe a principle of natural justice.

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[5] *Canada (Minister of Human Resources) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259).
[6] AD1-4.

[16] However, the Claimant's submissions suggest that he is concerned that the General Division may have refused to exercise its jurisdiction (also under section 58(1)(a) of the DESD Act).

[17] Section 18(1)(a) of the EI Act stipulates 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." The Claimant argues that the Commission had the discretion to dispense with this requirement under section 50(10) of the EI Act and that the General Division should have taken this into account.[7]

[18] Section 50 lists certain administrative requirements for adjudicating and claiming benefits. Section 50(10) grants the Commission discretion to waive or vary any or the requirements of the *section*, which is to say the requirements of section 50 of the EI Act. However, section 50(10) does *not* grant the Commission discretion to vary the requirement of section 18(1)(a); that a claimant be capable of and available for work.

[19] There is just one particular intersection between section 50 and section 18: Section 50(8) allows the Commission to require claimants to prove that they are making reasonable and customary efforts to obtain suitable employment in order to establish that they are available for work and unable to obtain suitable employment.

[20] Section 50(10) permits the Commission, within its discretion, to satisfy itself that a claimant is capable and available *in the absence of that evidence described in section 50(8)*, but it does not authorize the Commission to waive the requirement that a claimant be capable of and available for work or to ignore other evidence that the claimant is not capable or reasonably available for work.

[21] Regardless of whether the Commission exercised its discretion under section 50(10) of the EI Act appropriately or judicially when it required the Claimant to prove his availability through reasonable and customary efforts under section 50(8)[8], the Claimant would still have had to prove his availability somehow. The General Division determined that the Claimant could not

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[7] AD1-4.
[8] GD3-28

work without a work permit or status and that he was therefore *unable* to prove his availability for work. It was therefore unnecessary for the General Division to determine whether the Commission had exercised its discretion judicially. There is no arguable case that the General Division erred by refusing to exercise its jurisdiction.

[22] I note that the Claimant has also argued that the General Division erred in determining that the role his employer played in the loss of his work permit should be pursued in some other forum[9] (from paragraph 35 of the decision). The General Division determined that the employer's role in the Claimant's work permit renewal and the issue of whether the employer acted in a discriminatory manner were not questions that were before it. While the General Division did reference Employment Standards and the Human Rights Tribunal, these were only suggested to the Claimant as alternate courses of action: They were not necessary to the decision.

[23] The only issue before the General Division was whether the Claimant was disentitled from receiving benefits under section 18(1)(a) of the EI Act. There is no arguable case that the General Division should have assumed jurisdiction over the Claimant's concern that his employer acted in a discriminatory manner by not supporting his work status renewal application in a timely fashion.

[24] There is no arguable case that the General Division made an error of jurisdiction under section 58(1)(a) of the DESD Act when it failed to consider whether the Commission had properly exercised its discretion under section 50(10) of the EI Act and when it refused to address the Claimant's concern that his employer had discriminated against him.

Issue 2: Error of law

[25] In completing his application for leave, the Claimant also asserted that the General Division erred in law. He has not clearly specified the nature of this error, but I note that he argued that his lack of a valid work permit cannot be considered a "personal" requirement that would unduly limit the opportunities for him to return to the labour market,[10] presumably for the purpose of determining the applicability of section 18(1)(a) of the EI Act to his circumstances.

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[9] AD1-4
[10] *Ibid.*

[26] The General Division member correctly noted the basic test for availability under section 18(1), which was outlined by the Federal Court of Appeal in *Faucher v Attorney General of Canada*.[11] The test requires that the following three factors be analyzed:

- 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.

[27] After referring to the three criteria,[12] the General Division found that the Claimant's lack of a work permit unduly limited the opportunities for returning to the labour market,[13] and it determined on that basis that the Claimant was not available for work under section 18(1)(a) of the EI Act.

[28] The application of section 18(1)(a) is not discretionary; it is prescriptive. This means that the Commission and the General Division are required to apply it. If the Claimant was not capable of and available for work, he is disentitled to benefits.

[29] In my view, the General Division appropriately considered the section 18(1)(a) requirement that a claimant must be "capable of and available for work", and it correctly articulated and applied the test described in *Faucher*. I can find no arguable case that the General Division erred in law.

[30] I appreciate that the Claimant does not agree that his lack of a valid work permit ought to be characterized as a "personal circumstance" or condition. However, whether a particular circumstance may be considered a "personal condition" within the meaning of the EI Act and as it is interpreted by *Faucher* is a question of mixed fact and law. The Federal Court of Appeal has recently confirmed that the Appeal Division has no jurisdiction to intervene on a question of mixed fact and law.[14]

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[11] *Faucher v Attorney General of Canada* (A-56-96).
[12] General Division decision, para 33.
[13] *Ibid.*, para 34.
[14] *Quadir v Canada (Attorney General of Canada)*, 2018 FCA 21.

[31] The Appeal Division is bound by the Federal Court of Appeal, and it cannot therefore consider mixed errors of fact and law. Therefore, there is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act by considering the Claimant's lack of a work permit to be a personal condition under which the Claimant unduly limited his employment prospects.

Issue 3: Consideration of the circumstances surrounding the lapse of the Claimant's work authorization

[32] The Claimant concedes that he was unavailable for work as a result of the loss of his work authorization, but he asks that the circumstances that led up to his loss of status be taken into account. Implicit in this request is a claim that the General Division ignored or misunderstood his circumstances.

[33] The General Division outlined its understanding of the fact that the Claimant applied for an extension of his work permit before it expired[15] as well as the Claimant's explanation that his employer had not cooperated with the renewal application process by supplying a necessary employment identification.[16] However, the General Division did not accept that the Claimant's justification for losing his work permit altered the essential fact that he was not available for work, as required by section 18(1)(a), and as the Claimant himself acknowledged.[17]

[34] The Federal Court of Appeal, in *Vezina v Canada (Attorney General)*[18] held as follows:

> The question of availability is an objective one–whether a claimant is sufficiently available for suitable employment to be entitled to [Employment Insurance] benefits–and it cannot depend on the particular reasons for the restrictions on availability, however, these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it.

[35] The Claimant has not identified any evidence that the General Division ignored or misunderstood. The Claimant simply disagrees with the General Division's conclusion that he was disentitled by his unavailability, despite the unfortunate circumstances surrounding the loss

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[15] General Division decision, para 36.
[16] *Ibid.* para 38.
[17] AD1-5.
[18] *Vezina v Canada (Attorney General)*, 2003 FCA 198.

of his work permit. It is not my function to reassess the evidence or reweigh the factors that considered by the General Division in determining that the Claimant was unavailable to work.[19]

[36] I do not find that the Claimant has made out an arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence before it under section 58(1)(c) of the DESD Act.

[37] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

[38] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	A. S., self-represented

[19] *Tracey v Canada (Attorney General)*, 2015 FC 1300.