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

Citation: *G. B. v Canada Employment Insurance Commission*, 2019 SST 69

Tribunal File Number: AD-18-434

BETWEEN:

**G. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 31, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed.

### OVERVIEW

[2] After being laid off from his employment, the Appellant, G. B. (Claimant), applied for and began receiving Employment Insurance regular benefits. However, the Respondent, the Canada Employment Insurance Commission (Commission), subsequently determined that the Claimant had not been available for work when the employer purportedly attempted to recall him for short periods of work. The Commission issued an indefinite disentitlement and a notice of debt for overpayment of benefits. The Commission maintained its decision on reconsideration. The Claimant appealed the Commission's reconsideration decision to the General Division, claiming that he had always been available for work. The General Division dismissed the appeal.

[3] The Claimant is now appealing the General Division's decision on several grounds. The Commission now agrees that the General Division erred in law under section 58(1) of the *Department of Employment and Social Development Act* (DESDA). The Commission recommends that the Appeal Division return the matter to the General Division for reconsideration or, alternatively, find that the Claimant is entitled to benefits. I must decide whether the General Division erred. I find that the General Division erred in law by failing to provide sufficient reasons. I am allowing the appeal and rendering the decision that the General Division should have given. Given the parties' agreement, I accept that the Claimant was capable of working, that he was available for work, and that he was making reasonable and customary efforts to find suitable employment.

### ISSUES

[4] The issues are:

Issue 1: Did the General Division err in law by failing to provide sufficient reasons?

Issue 2: Did the General Division fail to observe a principle of natural justice by restricting the Claimant's representative from participating in the proceedings?

Issue 3: Did the General Division base its decision on an erroneous finding of fact without regard for the material before it when it decided that work was available for the Claimant?

**ANALYSIS**

[5] 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.

**Issue 1: Did the General Division err in law by failing to provide sufficient reasons?**

[6] After the hearing before the General Division, the Claimant filed a letter in which he listed his job search efforts from December 21, 2016, to April 10, 2017, a brief description of the job duties, and rates of pay.[1] He wrote that, during a lockout in November 2016, he immediately contacted his union to ensure that his name was placed on a call list for work that might become available. He claims that he regularly contacted the union. Additionally, he claims that he conducted daily job searches on web sites, updated his résumé, and mailed it to several potential employers, including one that offered him employment several months later in August 2017.

[7] At paragraph 20 of its decision, the General Division examined whether the Claimant had established that he wished to return to the labour market through efforts to find a suitable job.

[1] Claimant's letter filed after General Division hearing, at GD6.

The General Division member wrote that "the job search description [the Claimant] provided after the hearing does not contain sufficient information to meet this burden." The member also found that the Claimant should have promptly started looking for work when his benefit period began and that he should have demonstrated why the type of work he considered suitable was not also available during the winter months.

[8] The Commission argues that the General Division erred in law at paragraph 20 when it failed to explain why it found that the Claimant had provided insufficient information to establish that he had tried to find suitable work. In citing *Bellefleur v Canada (Attorney General)*,[2] the Commission submits that the General Division has a duty to weigh the evidence before it and to justify its determinations.

[9] Given the information that the Claimant provided in his letter after the General Division hearing, I agree with the Commission that it is unclear why the member found that the Claimant had provided insufficient information. The Claimant's documentation suggested that he had made earnest efforts early on—even before his benefit period began—to return to the labour market. Despite this, the member did not attempt to explain why this documentation could not have shown that the Claimant wished to return to the labour market. This was insufficient to explain the General Division's reasons. This constitutes an error of law.

**Issue 2: Did the General Division fail to observe a principle of natural justice by restricting the Claimant's representative from participating in the proceedings?**

[10] As I have determined that the General Division erred in law by failing to provide sufficient reasons, it is unnecessary for me to address any other grounds of appeal. However, I granted leave to appeal on the ground that the General Division may have failed to observe a principle of natural justice when it failed to clarify the role of the Claimant's representative. There were instances when it appeared that the representative expected to represent the Claimant and other instances when he appeared to give evidence. I will therefore briefly address this issue.

[11] In my leave to appeal decision, I suggested that the Claimant should be prepared to provide a summary of the evidence that he expected his representative would give and to explain

[2] *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

how that evidence was material. The Claimant's representative notes that he did not have any evidence to give at the General Division hearing, but he maintains that the General Division denied him the opportunity or, at the very least, discouraged him from making submissions regarding certain issues.

[12] Having listened to the audio recording, I do not find that to be the case. Although the member stated early on in the proceedings that she would not allow the representative to give evidence because he did not have firsthand knowledge of any of the issues, ultimately the member allowed him to give evidence, make submissions, and explain certain issues. He was a full participant in the proceedings. Therefore, I find that there was no breach of the principles of natural justice in this case.

**Issue 3: Did the General Division base its decision on an erroneous finding of fact without regard for the material before it when it decided that work was available for the Claimant?**

[13] Finally, the Claimant submits that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, the Claimant argues that the General Division erred in preferring the employer's evidence to his evidence regarding a shipping schedule. The General Division found that the shipping schedule showed that the Claimant failed to demonstrate a desire to return to the labour market as soon as he received a suitable job offer. The General Division found that the shipping schedule showed that work became available, but the Claimant did not make himself available for this work.

[14] The fact that the General Division preferred the employer's evidence to that of the Claimant does not represent a ground of appeal under section 58 of the DESDA. In any event, the General Division was entitled to rely on the evidence before it. The Claimant did not produce any documentary evidence to support his claim that the shipping schedule was other than what his employer presented. As such, I find that the General Division did not err by preferring the employer's statements, in the absence of documentary evidence to support the Claimant's testimony.

[15] The wrinkle in this however is that the Claimant alleges that the employer altered the shipping schedule in an effort to show that it had offered the Claimant work by contacting him

several days ahead of a ship-loading assignment.[3] The Claimant alleges that the employer was motivated to alter the shipping schedule following a bitter labour dispute. The General Division member acknowledged the Claimant's allegations that the employer had falsified records, but she found that the Claimant had failed to substantiate his claim because he did not provide any documentary evidence.

[16] The Claimant did not know, however, that he would receive a copy of a second shipping schedule in June 2018—after the General Division had already rendered its decision. The Claimant states that this second shipping schedule shows that the employer's evidence was unreliable, if not altogether untruthful. This second schedule certainly would cast doubt on the employer's claims that it contacted him on January 14 and 15, 2017, in connection with loading a ship that arrived on January 19, 2017, and the employer's claims that it provided him with advance notice of work. The Claimant argues that the second shipping schedule shows that that same ship had arrived in port on January 11, 2017, and departed on January 19, 2017. The employer's first shipping schedule showed a load date, yet this coincided with the ship's departure date; the employer also stated that the ship's arrival date was January 19, 2017.[4] The General Division accepted that the supposed load date on the initial shipping summary was the arrival date, when the second shipping schedule later showed that the supposed load date was the ship's departure date. In other words, if the second shipping schedule is accurate, the employer would have been unable to offer him work for January 19, 2017, because the ship was departing or would have departed on that date.

[17] The Claimant produced a copy of the second shipping schedule after the Appeal Division hearing. It is unclear whether this second shipping schedule proves that any work was available to the Claimant if the employer allegedly called him for work on January 19 and February 1, 2017, on the days when ships were scheduled for departure. (The employer also claims that it

[3] Employer's letters dated March 6, 2017, and July 20, 2017, at GD3-17 and GD3-25, and shipping summary dated June 21, 2017, at GD3-29.
[4] Employer's letter dated July 20, 2017, at GD3-25.

contacted the Claimant on February 3, 10, and 22, 2017,[5] for ships supposedly arriving/departing on February 12, 20, and 25, 2017.[6])

[18] If this second shipping schedule had been before the General Division, the General Division could have concluded not only that the Claimant had little notice of upcoming work opportunities but, more importantly, that the employer's evidence was unreliable. Additionally, the General Division could have decided in the Claimant's favour when it assessed whether the Claimant had demonstrated a desire to return to the labour market as soon as he received a suitable job offer.

[19] The initial shipping schedule could have coloured the General Division's perceptions of the Claimant because it supported the employer's arguments that the Claimant was unprepared to be available for work, despite getting advance notice.

[20] However, new evidence is generally inadmissible in proceedings before the Appeal Division, with some exceptions. The Federal Court of Appeal identified three exceptions where new evidence might be allowed: where new evidence (1) provides general background information that might assist in understanding the issues but it does not add new evidence on the merits, (2) highlights the complete absence of evidence before the administrative decision-maker on a particular finding, or (3) raises awareness of defects that cannot be found in the evidentiary record of the administrative decision-maker.[7] Arguably, this new evidence could fall into this last category, given what the Claimant alleges about the nature of the first shipping schedule.

[21] The Claimant could make an application to rescind or amend the General Division's decision, within the deadline imposed under section 66 of the DESDA. This would involve returning the matter to the same General Division member to determine whether any new evidence meets the materiality and discoverability tests under section 66 of the DESDA. In other words, the Claimant would have to establish that that new evidence is material and that he was unable to discover it at the time of the hearing with the exercise of reasonable diligence. The Claimant states that he was unaware of this second shipping schedule. He also claims that he

---

[5] Employer's letter dated March 6, 2017, at GD3-17.
[6] Initial shipping summary dated June 21, 2017, at GD3-29 and second shipping summary, at AD6-2. The second shipping summary has a page number reference GD3-70, which relates to another claim altogether.
[7] *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para. 8.

could not have anticipated that he would subsequently receive a copy of a second shipping schedule that could have supported his claim that the employer had falsified documents.

[22] While making an application to rescind or amend the General Division's decision might be the proper course, I am mindful that any further delay in these proceedings does not serve the interests of justice, particularly because I have already determined that the General Division erred in law and as there is a sufficient evidentiary basis for me to dispose of this matter.

**REMEDY**

[23] 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.

[24] The Commission recommends that the Appeal Division return the matter to the General Division for reconsideration, in keeping with section 59(1) of the DESDA, because the General Division member erred in law at paragraph 20 of its decision. The Commission argues that this is the appropriate disposition because the General Division serves as the trier of fact. If I were to return this matter to the General Division, then it could also consider the significance of the second shipping schedule and determine whether work was in fact available, given that the employer called him for work on days when ships were scheduled to leave port.

[25] However, the Commission argues that the evidence before the General Division established the Claimant's availability for work and that he made reasonable and customary efforts to find suitable employment. It argues that, if I should determine that the Appeal Division has the jurisdiction to come to its own assessment on the evidence, I should allow the appeal. Section 59 clearly empowers me to make my own assessment in order to render the decision that the General Division should have given. Under section 64 of the DESDA, I may also decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[26] There is no dispute that the Claimant was capable of working. The outstanding question is whether the Claimant was available for work and whether he had made reasonable and customary efforts to find suitable employment. The General Division member fully set out the test and the considerations to determine whether a claimant is available for work and whether a claimant has made reasonable and customary efforts to find suitable employment.[8] The parties agree that the Claimant's letter in which he listed his job search efforts from December 21, 2016, to April 10, 2017, show that he met these tests. I accept the parties' submissions in this regard.

**CONCLUSION**

[27] The appeal is allowed in accordance with the above.

Janet Lew
Member, Appeal Division

| | |
|---|---|
| HEARD ON: | November 21, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | G. B., Appellant<br><br>R. L., Representative for the Appellant<br><br>Louise Laviolette and I. Thiffault (observer), Representatives for the Respondent |

[8] General Division decision at paras 3 and 4.