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

Citation: *J. D. v Canada Employment Insurance Commission*, 2019 SST 438

Tribunal File Number: AD-19-70

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 7, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. D. (Claimant), was a full-time student when she voluntarily left her part-time job due to a conflict with her manager. When she applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim, finding that she had voluntarily left her employment without just cause. In a separate decision, the Commission also disentitled the Claimant to benefits because it found that she was not available for work. The Claimant asked the Commission to reconsider.

[3] The Commission maintained its decision that the Claimant had voluntarily left her employment without just cause. When it reconsidered her disentitlement based on unavailability for work, it agreed that the Claimant was available for work as of April 27, 2018, but it maintained that she was unavailable for work from February 12, 2018, to April 27, 2018.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division found that the Claimant had just cause for leaving and allowed her appeal on that issue but it dismissed her appeal on the issue of availability. The Claimant now appeals this dismissal to the Appeal Division.

[5] The appeal is allowed. The General Division erred in law by failing to analyze whether there were exceptional circumstances to rebut the presumption of non-availability or failing to provide adequate reasons for finding that the Claimant had not rebutted the presumption. It also erred in law in by failing to consider whether the limits the Claimant had placed restrictions on her availability for work that were unduly limiting.

ISSUES

[6] Did the General Division err in law by failing to,

- determine whether the Claimant had rebutted the presumption of non-availability for work while attending school by establishing exceptional circumstances, or;
- provide reasons for finding that the Claimant had not rebutted the presumption of or non-availability?

[7] Did the General Division err in law by failing to analyze whether the Claimant imposed limits on her availability in an "undue" or unreasonable manner?

ANALYSIS

[8] The Appeal Division may intervene in a decision of the General Division, only 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 *Department of Employment and Social Development Act* (DESD Act).

[9] The only grounds of appeal are 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.

Issue 1: Did the General Division err in law by failing to,

- **determine whether the Claimant had rebutted the presumption of non-availability for work while attending school by establishing exceptional circumstances, or;**
- **provide reasons for finding that the Claimant had not rebutted the presumption of**

or non-availability?

[10] In support of the Claimant's appeal, the Commission argued that the General Division may have misunderstood the evidence or law when it found that the Claimant's history of part-time employment did not rebut the presumption of non-availability. It also argued that the General Division had failed to provide transparent and intelligible reasons for this finding.

[11] The General Division correctly stated that there is a rebuttable presumption that when a claimant is enrolled in full-time studies they are not available for work. This is derived from the case law including the cases cited by the General Division.[1] However, the only evidence that the General Division reviewed, in advance of its finding that the presumption had not been rebutted, was the evidence that the Claimant had a history of continued employment during her full time studies, but that this employment was only part-time employment. This point was emphasized in the General Division's conclusion, "the Claimant's history of part-time employment does not rebut the presumption of non-availability."

[12] It would therefore appear that the General Division must either have considered the number of years and/or the number of hours per week to be inadequate to rebut the presumption, or else it must have misunderstood the law as to what was required to rebut the presumption.

[13] The General Division's only apparent conclusion is that part-time would be insufficient, which suggests that the General Division would require that the Claimant have a history of full-time employment. The General Division cited *Canada (Attorney General) v. Rideout,*[2] which found that that the presumption of non-availability may be rebutted by a history of **full-time employment** while studying.

[14] However, *Rideout* does not stipulate that the only employment history that may be considered is a history comprised of full-time employment. Furthermore, employment history is not the only basis on which the presumption of availability may be rebutted. The General

[1] General Division decision, para. 28
[2] *Canada (Attorney General) v. Rideout,* 2004 FCA 304

Division referred to *Canada (Attorney General)* v. *Wang*,[3] which states that the presumption can be rebutted through proof of exceptional circumstances. *Landry v The Deputy Attorney General of Canada*[4] is another decision that confirms that the presumption can be rebutted by proof of exceptional circumstances. The court in *Landry* noted, "The work record mentioned by the Umpire is only one example of such exceptional cases, although in fact it may be the one most frequently encountered. There may certainly be others." None of these decisions suggested that exceptional circumstances could not be associated with a history of part-time employment.

[15] While the General Division appears to have been aware that the presumption could be rebutted by exceptional circumstances, its decision relies only on the fact that the Claimant's work history was part-time and not full-time. The General Division does not explicitly analyze whether the Claimant's circumstance were exception and makes no finding in that regard. As a result, I find that the General Division did not correctly apply the jurisprudence in determining that the Claimant did not rebut the presumption, an error under section 58(1)(b) of the DESD Act.

[16] However, even if I had found that the General Division applied the legal test correctly, its reasons do not reveal the factual basis on which it found the Claimant's circumstances not to be exceptional. The General Division implies that a history of part-time employment does not rebut the presumption in itself, but the decision does disclose what evidence, if any, was considered or how it was analyzed to find the Claimants circumstances to be unexceptional.

[17] The decision that the Claimant had not rebutted the presumption is unsupported by intelligible or transparent reasons. I find that the General Division also erred in law under section 58(1)(b) of the DESD Act by providing inadequate reasons.

Issue 2: Did the General Division err in law by not addressing whether the Claimant imposed limits on her availability in an "undue" or unreasonable manner?

---

[3] *Canada (Attorney General)* v. *Wang*, 2008 FCA 112
[4] *Landry v The Deputy Attorney General of Canada,* A-719-91

[18] In her leave to appeal application, the Claimant stated that the General Division did not consider her particular "exceptional circumstances", which included her lengthy history of working while attending school, and her course flexibility. The Claimant's representative cited a Canadian Umpire Benefit (CUB) decision[5] that is similar to the present facts. The claimant in that case was attending school when she left a part-time position, but she still remained available to work the same number of hours. The Umpire in that case allowed the Claimant's appeal, stating, "the claimant would be available for work as much as she was previously where her employment only consisted of [part-time] hours."

[19] The General Division correctly stated that it was not bound to follow CUB decisions, but it also said that the CUB decision was "in direct contradiction with the prevailing case law" and that it relied on *Faucher v Canada (Attorney General).*[6] Apparently, the General Division rejected the Umpire's reasoning and the applicability of the cited CUB decision on the basis that it was contrary to the decision in *Faucher.*

[20] *Faucher* stated that a claimant may not unduly limit his or her chances of returning to the labour market. However, the facts in *Faucher* did not involve the availability of students or the availability for work of a claimant who had been working part-time only. The *Faucher* decision did not define "unduly" to exclude the Claimant's kind of circumstances, or at all, and it has nothing to say about whether a claimant in such circumstances has "unduly" limited his or her chances of employment.

[21] *Faucher* is not the only Federal Court of Appeal decision to approve the principle that a claimant may not "unduly limit" his or her chances, a circumstance which has also been described as imposing "unreasonable restrictions".[7] However, as the court in *Faucher* noted, availability is a question of fact. The case law does not define what kind of restriction is "unreasonable" or what kind of limit must be considered "undue" such that a claimant should be found to be unavailable.

---

[5] CUB 52365
[6] Faucher v Canada (Attorney General), A-56-96.
[7] *Whiffen v Canada (Attorney General)*, A-1472-92.

[22] In the CUB cited by the Claimant, the claimant left her job to take a course that left her with the ability to work from 6:00 to 10:00 each day, six days of the week for a total of 24 hours a week. The Umpire considered that it was significant that the claimant's current availability (in that case) was not less than it had been when the Claimant had been working:

> The facts therefore support that the claimant would be available for work as much as she was previously where her employment only consisted of 20 hours. In considering this evidence, I am satisfied that this claimant has shown that she was available for work. In addition to this, there was evidence before the Board that she had worked previously in 1997 when she took a 12-week course for the care of Altzeimer's patients. This course ran during daytime hours and the claimant worked the night shift. This evidence further supports the fact that this claimant was available for work.[8]

[23] In the present case, the Claimant stated her availability to work under the same or better conditions.[9] The Claimant told the Commission that she would have accepted 16 to 20 hours of work around her school schedule at minimum wages, and that she was looking for work in retail but would look for any employment for which she was qualified.[10] She testified that she had worked at her retail job from 14 to 18 hours per week while attending school, in addition to her tutoring hours (which she continued). Although the Claimant had not changed her availability for work relative to her availability to work at the job she had left, the General Division found that she had unduly restricted her chances of returning to the labour market.

[24] That means that it is incumbent on the General Division to assess whether the Claimant's circumstances represent an undue limitation. It cannot be presumptively found, without evidence or analysis, that the Claimant unduly limited her availability because she was unwilling to make herself even more available for work than she was when she was still working. The General Division must weigh the evidence and explain why the Claimant's restrictions are unduly

---

[8] *Supra,* note 5
[9] GD3-18
[10] GD3-35

limiting. It is not sufficient to note that the Claimant has put restrictions on her availability, or to simply label the Claimant's restrictions as unduly limiting.

[25] The General Division failed to analyze whether the Claimant had limited her chances of unemployment “unduly”, and therefore erred in law under section 58(1)(b) of the DESD Act.

CONCLUSION

[26] The appeal is allowed.

REMEDY

[27] Having allowed the appeal, I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind, or vary the General Division decision in whole or in part.

[28] In written submissions to the Appeal Division, the Commission acknowledged that the General Division had erred and it invited me to give the decision that the General Division should have given. The Commission also took the position that the Claimant had rebutted the presumption of unavailability from a full-time return to school and established exceptional circumstances, and that I should allow the appeal.[11] I consider the record complete and I will give the decision that the General Division should have given.

[29] Neither party suggested that the General Division erred in finding that the Claimant had a desire to return to the labour market and that she expressed that desire through her efforts to find a suitable job. I have not discovered any error in connection with these findings and I do not disturb them.

---

[11] AD3-3

[30] The disputed issues in this appeal were whether the Claimant had rebutted the presumption of non-availability that arose because she was a full-time student and whether the Claimant had unduly restricted her availability for work by seeking only part-time work that would not conflict with her school schedule.

[31] The law does not require that the claimant have maintained a history of full-time employment while attending school to rebut the presumption that, as a full-time student, she is unavailable for work under section 18(1)(a) of the EI Act. Instead, the law allows that the Claimant may rebut the presumption by proof of exceptional circumstances. I accept that the part-time nature of the Claimant's previous employment and her demonstrated ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, is an exceptional circumstance sufficient to rebut the presumption of non-availability.

[32] Like the General Division, I am not bound to follow a decision of the former Umpire. However, I consider the reasoning in CUB 52365 to be persuasive. The Claimant's expressed intention to seek only part-time work that does not interfere with her full-time school schedule likely excludes employment opportunities that might otherwise be available. Regardless of this, the Claimant remained available to accept employment with the same or greater number of work hours as her prior employment, to coordinate with her school requirements within scheduling constraints that would be similar to those that pre-existed her loss of employment. I find that the Claimant's continuing studies do not limit her work prospects any more than they did before her job loss and that she has therefore not unduly limited her chances of returning to the labour market.

[33] Having considered the Claimant's exceptional circumstances to have rebutted the presumption of non-availability, and having assessed the three *Faucher* factors relevant to availability, I find that the Claimant was capable of and available for work from February 12, 2018, to April 27, 2018. She is not therefore not disentitled during that period to receiving Employment Insurance benefits under section 18(1)(a) of the EI Act.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
Submissions:	J. D., Appellant S. Prud'Homme Representative for the Respondent