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

Citation: *D. G. v Canada Employment Insurance Commission*, 2019 SST 557

Tribunal File Number: AD-19-101

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 10, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed with modification.

OVERVIEW

[2] The Appellant, D. G. (Claimant), established a benefit period and received Employment Insurance sickness benefits until January 27, 2018. The Claimant then requested regular benefits, stating she was available for work as of February 1, 2018. On February 26, 2018, she left her New Brunswick home, to visit family in Toronto for about two months. The Respondent, the Canada Employment Commission (Commission), determined that she was not available for work during the period that she was in Toronto, and it disentitled her to benefits from February 26, 2018, to May 3, 2018.

[3] The Claimant requested the Commission to reconsider, but the decision was maintained. She appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She now seeks leave to appeal to the Appeal Division.

[4] The General Division erred under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act) by overlooking or misunderstood the Claimant's testimony that she looked for work during the time she was in Toronto.

[5] I have made the decision that the General Division should have made. Having considered the record including the evidence that the General Division overlooked or misunderstood, I must still confirm the General Division decision. The appeal is therefore dismissed.

ISSUE(S)

[6] Did the General Division finding that the Claimant was not available for work, ignore or misunderstand the Claimant's job search evidence?

ANALYSIS

[7] 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 section 58(1) of DESD Act.

[8] 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.

Did the General Division finding that the Claimant was not available for work ignore or misunderstand the Claimant's job search evidence?

[9] The Claimant originally sought leave to appeal on the basis that the General Division had made an error of law, however the Claimant did not identify any error of law and none is apparent on the face of the decision. In her submissions to the Appeal Division, and at the Appeal Division hearing, the Claimant did not identify or rely on any other ground of appeal.

[10] Leave to appeal was granted on the basis that there was an arguable case that the General Division made an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it, an error under section 58(1)(c) of the DESD Act.

[11] According to the General Division, the Claimant testified that she applied for and got work "*upon her return* to [New Brunswick]".[1] The decision continues: "There is *nothing* to refute her previous statements that she was not seeking employment in Toronto."[2] (Emphasis added.) The

[1] General Division decision at para. 15.
[2] General Division decision at para. 16.

General Division also stated that the Claimant presented *no evidence* to counter the Commission's assertion that she was not seeking full-time employment *while in Toronto.*[3]

[12] The Claimant's testimony provides some evidence that she continued to seek employment during the time that she was in Toronto, although it was employment that would have required her to return to New Brunswick. The Claimant testified that she was still looking for work, "getting" or" doing" her resumé, and applying for jobs. Based on the context, the Claimant appears to have been relating this search to the time that she was in Toronto.[4] At an earlier point in the hearing, the Claimant testified that she had told the Commission she was in Toronto, and she then said, "in the meantime I had applied… I had three job offers."[5] These jobs were apparently back in New Brunswick. The Claimant did not dispute that she was not looking for a job that would be located in Toronto

[13] I find that the General Division erred because it found that the Claimant was not capable of and available for work during her time in Toronto without regard to the Claimant's evidence that she was looking for work.

[14] In her oral submissions to the Appeal Division, the Claimant also insisted that the General Division erred in its understanding that she was in Toronto to care for her brother. She states that she was visiting her grandchildren in Toronto, and that her brother lives in New Brunswick.

[15] The General Division file includes notes of a conversation in which the Claimant is said to have stated that she was in Toronto to care for her brother.[6] At the same time, there was other evidence on the file that would support her claim that her brother was not in Toronto, including her application for benefits[7].and an earlier conversation with the Commission.[8] However, regardless of whether the General Division failed to consider all the evidence when it referred to the Claimant caring for her brother in Toronto,[9] there is neither evidence nor argument to suggest

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[3] General Division decision at para. 16.
[4] Audio recording of General Division hearing at timestamp 00:10:00
[5] *Ibid*. at timestamp 00:07:08
[6] GD3-24
[7] GD3-10
[8] GD3-19
[9] General Division decision at para. 7.

that this question is relevant to the issue of the Claimant's availability for work while she was in Toronto.

[16] A mistake of fact based on a misunderstanding of the evidence can only be an error under section 58(1)(c) of the DESD Act if the General Division actually based its decision on that finding. I do not accept that General Division decision is based on whether the Claimant was caring for her brother in Toronto. Therefore, the General Division did not err under section 58(1)(c) of the DESD Act by referring to the Claimant's visit to Toronto as a visit to care for her brother.

REMEDY

[17] I have found that the Claimant has established grounds for appeal under section 58(1)(c) of the DESD Act. This means that I must consider the appropriate remedy.

[18] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, to refer the matter back to the General Division with or without directions, or to confirm, rescind or vary the General Division decision in whole or in part.

[19] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

[20] The General Division decision that the Claimant was not available for work was based on the three factors described by the Federal Court of Appeal in *Faucher v Canada (Attorney General).*[10] The General Division correctly noted that all three factors must be considered and that the factors include:

- 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.

[10] *Faucher v Canada (Attorney General),* A-56-96.

[21] The General Division found that the Claimant did not demonstrate a sincere desire to return to the labour market as soon as possible, that she restricted her job search while she was in Toronto, and that she did not demonstrate an ongoing effort to obtain employment.

[22] I will consider each of the *Faucher* factors in turn.

Desire to return to the labour market as soon as a suitable job is offered.

[23] The Claimant provided two statements to the Commission about her ability to return to work as soon as a suitable job was offered. In her first statement, she said that she was not looking for work while in Toronto and that she would not return home to New Brunswick within 24–48 hours if a job opportunity arose.[11] She was also recorded to have said that she understood that she was not eligible for benefits "at this time" but that she would let the Commission know when she returned home and would be available for work. Five months later, the Claimant made a second statement in which she denied having made the first statement and she observed that it was only a 16-hour drive from Toronto to New Brunswick.[12]

[24] The Claimant has not reconciled these two statements to my satisfaction and I prefer the first statement. The Claimant stated that she had been misunderstood when she gave her first statement. In that first statement, the Claimant had also confirmed her understanding that she would be ineligible for benefits during the time she was in Toronto (which is the consequence of her other admissions that she was neither looking for work nor available to accept work as soon as offered) and she also agreed to contact the Commission when she returned home and was available for work. I find it unlikely that the Commission agent and the Claimant misunderstood one another to this extent.

[25] Furthermore, the Claimant was still in Toronto when she made the first statement. Presumably, this is when she would have been most likely to accurately relate what were her then-current actions and intentions, in terms of job search efforts. The Claimant's second statement was based on her recollection of events five months earlier, after the Commission made the decision that disentitled her to benefits during the time that she was in Toronto.

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[11] GD3-25
[12] GD3-32

[26] I also note that the Claimant said only that it was possible to drive home within 24–48 hours of a call (from an employer) because it is only a 16-hour drive, but she did not actually state that she would have returned home within 24–48 hours of a call.

[27] I find that the Claimant has not established on a balance of probabilities that she had a desire to return to work as soon as a suitable job was found, during the time that she was in Toronto. This *Faucher* factor supports a finding that the Claimant was not available for work.

Expression of that desire through efforts to find a suitable job

[28] The Claimant's evidence is that she made some sort of effort to find work while she was still in Toronto, but she did not provide any specifics of those efforts. She testified she was still looking for work, "getting" or" doing" her resumé, and applying for jobs, but her testimony is unsupported on the record by any corroborative documentary evidence, or by any statement that offers any more detail.

[29] The General Division said that the Claimant had not made "reasonable and customary efforts" to obtain work. This is a reference to section 50(8) of the *Employment Insurance Act* under which the Commission may require the Claimant to prove, "reasonable and customary efforts to obtain suitable employment". "Reasonable and customary efforts" are defined further in section 9.001 of the *Employment Insurance Regulations*.

[30] The Claimant submitted a further statement in which she claims to have met on one occasion with an employer in Toronto for a job in New Brunswick. She stated in the Appeal Division hearing that she forgot to mention this at the General Division hearing. However, this job interview or meeting was not in evidence before the General Division and I am not permitted to consider it to decide this appeal. The Appeal Division does not have the jurisdiction to consider new evidence.[13]

[31] The Claimant's efforts are so lacking in detail as to amount to no more than a bald assertion that she was making efforts to find a job. I do not find that the Claimant has established

[13] *Canada (Attorney General) v O'Keefe* 2016 FC 503.

that she expressed a desire to return to work through efforts to find a suitable job. This *Faucher* factor supports a finding that the Claimant was not available for work.

Not setting personal conditions that might unduly limit the chances of returning to the labour market.

[32] This appeal is concerned only with the Claimant's availability for work during the time that she was in Toronto. The Claimant was visiting Toronto but does not ordinarily reside in Toronto. The Claimant resides in New Brunswick, and she asserted that she was looking for work in her home community as well as two other small cities in New Brunswick,[14] both within an hour's drive.

[33] The fact that the Claimant's job search, while she was in Toronto, was limited to employment in New Brunswick does not mean that she was setting a personal condition that might unduly limit her chance of returning to the labour market. She is not obligated to look for work in a city that is many hours away from her home by car.

[34] In my view, the question is whether the distance between Toronto and her home in New Brunswick would prevent the Claimant from returning to New Brunswick in time to accept any job offers. I have already found that the Claimant has not proven that she would return as soon as a suitable job was found. Even so, I do not accept that the Claimant is "unduly limiting her chances of returning to work" just because she would not be able to accept those jobs that required her to start work immediately. The Claimant has not set personal conditions to unduly limit her chances of returning to the labour market. This *Faucher* factor does *not* support a finding that the claimant was not available for work.

[35] I have considered all of the *Faucher* factors, and I give greater weight to the first two factors than the final one: The fact that the Claimant did not place personal conditions on the what employment she would accept makes little difference to whether she was actually available for work while she was in Toronto because, at the same time, she has not shown a desire to return to work as soon as any kind of suitable work was offered, or that she made any significant

[14] GD3-30

effort to find work. I find that the Claimant was unavailable for work while she was in Toronto and that she is therefore disentitled to benefits.

Modification

[36] The Commission has requested that I dismiss the appeal "with modification" because the actual period in which the Claimant was unavailable for work should be the period between February 26, 2018, and April 27, 2018, and not the period between February 26, 2018, and May 3, 2018.

[37] This modification reduces the period of disentitlement and therefore does not prejudice the Claimant. Furthermore, the modification is consistent with the evidence on the file.[15] I find that the period of disentitlement should be that period between February 26, 2018, and April 27, 2018.

CONCLUSION

[38] The General Division erred under section 58(1)(c), but I have made the decision that the General Division should have made. I vary the General Division decision to find the period of disentitlement to be that period between February 26, 2018, and April 27, 2018, but the decision is otherwise confirmed. The Claimant's appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	June 4, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. G., Appellant

[15] GD3-28