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

Citation: *D. I. v Canada Employment Insurance Commission*, 2019 SST 792

Tribunal File Number: AD-19-358

BETWEEN:

D. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 22, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] According to Record of Employment of the Appellant, D. I. (Claimant), his last day of work of was April 30, 2018, and he left because of illness or injury. The Claimant applied for regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), determined that he was not entitled to regular benefits as of April 30, 2018, because he had not proven his availability for work.

[3] When the Claimant requested a reconsideration, the Commission maintained its original decision. The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed his appeal. He now appeals to the Appeal Tribunal.

[4] The application is dismissed. The General Division made no error under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) when it found that the Claimant was not available for work under section 18(1)(a) of the *Employment Insurance Act* (EI Act) and therefore not entitled to benefits.

ISSUES

[5] Did the General Division err in law by misapplying the test to find that the Claimant was not capable of and available for work?

[6] Did the General Division fail to observe a principle of natural justice or make an error of jurisdiction?

[7] Did the General Division base its decision on an erroneous finding of fact that the Claimant was not expressing his desire to work through efforts to find suitable employment?

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 section 58(1) of the 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 misapplying the test to find that the Claimant was not capable of and available for work?

[10] Section 18(1)(a) of the EI Act states that a claimant is not entitled to be paid benefits if the claimant cannot prove he was capable of and available for work and unable to obtain suitable employment.

[11] Leave to appeal was granted on the basis that the General Division might have misapplied the legal test. It is settled law that the General Division must consider the three factors in *Faucher* when it determines whether a claimant was capable of and available for work under section 18(1)(a). The legal question in this case is whether the three factors are the criteria for deciding whether a claimant is capable of and available for work or whether they are only relevant factors to be considered. In other words, does a claimant need to satisfy each and every one of the factors in order to be found to be capable of and available for work?

[12] It is clear that the General Division considered all three *Faucher* factors and that it found the Claimant to have satisfied two of them. The General Division determined the matter on the basis that the Claimant did not meet one of the three factors; he did not express his desire to

return to the labour market as soon as suitable employment was offered through efforts to find a suitable employment.

[13] As noted in the leave to appeal decision, the *Faucher* decision did not describe the three factors as three criteria but only required that the three factors be considered. In fact, *Faucher* determined that the Umpire and Board of Referees (the lower appeal levels in the previous appeal process) had decided the matter on too narrow a basis when they found the claimant not to be available based on only one of the three factors. *Faucher* said as follows:

> On reading the reasons for decision of both the Board of Referees and the umpire, it appears that the third factor was the only one really given any weight, eclipsing the other two, and that the result was a conclusion that seems to have no real connection to the situation as it may be seen from all of the circumstances.
>
> … We do not believe that a finding that the claimants were not available can be made on such a narrow basis…

In *Faucher*, the claimant's failure to meet one of the factors was not decisive.

[14] The Commission has taken the position that a claimant must meet all three factors in order to prove his or her availability. It cited *Canada (Attorney General) v. Bois*[1] and *Canada (Attorney General) v Boland.*[2] Each of these Federal Court of Appeal decision has considered and applied *Faucher*. *Bois* describes the *Faucher* factors as a set of criteria that a claimant must meet. In *Boland*, the Court describes the factors as necessary criteria, each one of which must be met.

[15] I am persuaded by the Commission's argument. I am bound to follow the lead of the Federal Court of Appeal and its interpretation of *Faucher* as expressed in *Bois* and *Borland*. I accept that the General Division did not err in law under section 58(1)(b) of the DESD Act by requiring the Claimant to meet all three of the *Faucher* factors.

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[1] *Canada (Attorney General) v. Bois*, 2001 FCA 175
[2] *Canada (Attorney General) v Boland* 2004 FCA 251

Issue 2: Did the General Division fail to observe a principle of natural justice or make an error of jurisdiction?

[16] When the Claimant completed his leave to appeal application, he selected the section 58(1)(a) ground of appeal. However, he did not argue that there had been an error of natural justice or jurisdiction at the Appeal Division hearing.

[17] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Claimant did not raise a concern with the adequacy of the notice of the General Division hearing, with the pre-hearing exchange or disclosure of documents, with the manner in which the General Division hearing was conducted or the Claimant's understanding of the process, or with any other action or procedure that could have affected his right to be heard or to answer the case. Nor did he suggest that the General Division member was biased or that the member had prejudged the matter.

[18] Therefore, there is no arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by failing to observe a principle of natural justice.

[19] The General Division considered the single issue that arose from the reconsideration decision that was before it, namely; whether the Claimant should be disentitled from benefits because he was not capable and available for work. There is no apparent error of jurisdiction on the face of the record and the Claimant did not suggest an error of jurisdiction.

[20] The General Division did not err under s. 58(1)(a) of the DESD Act by exceeding its jurisdiction or refusing to exercise its jurisdiction.

Issue 3: Did the General Division base its decision on an erroneous finding of fact that the Claimant was not expressing his desire to work through efforts to find suitable employment?

[21] The Claimant argued that the General Division did not take into consideration his health and financial circumstances.

[22] The General Division decision rests on its finding that the Claimant had not expressed his desire to return to work through efforts to find employment. Before making this finding, the

General Division reviewed in detail the Claimant's evidence of his job search efforts. The Claimant did not suggest that the General Division misunderstood or ignored the evidence in relation to that job search.

[23] The General Division also reviewed the manner in which the Claimant's medical condition affected his ability to work, and his ability to look for work, and it noted that he could not afford bus fare or to print out resumes, and that he could only access Wi-Fi where it was free. The Claimant did not point to any error in the General Division's summary of his medical or financial circumstances.

[24] I appreciate that the Claimant does not think that the General Division gave enough weight to his health and financial circumstances. However, I cannot intervene in the General Division decision just because the Claimant disagrees with the manner in which the General Division analyzed or weighed the evidence or with its conclusions.[3]

[25] The General Division considered the Claimant's evidence and determined that he had not expressed his desire to return to work through a sufficient job search. The General Division accepted that the Claimant wanted to work and it accepted that he could not be faulted for his physical condition or the limits that his condition placed on his job search. It also understood that the Claimant's financial circumstances also affected his ability to look for work. However, the evidence that the Claimant faced obstacles to his job search and employment did not assist him to prove that he was capable of and available for work.

[26] The Claimant has not established any error in the manner in which the General Division concluded that the Claimant had not proven that he was capable of and available for work under section 18(1)(a) of the EI Act.

[27] The General Division did not base 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, under section 58(1)(c) of the DESD Act.

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[3] *Griffin v. Canada (Attorney General)*, 2016 FC 874, *Tracey v. Canada (Attorney General)*, 2015 FC 1300

CONCLUSION

[28] The appeal is dismissed.

[29] The Claimant had applied for regular benefits. I could not advise the Claimant, however I did inform him at the hearing that a claimant who is unavailable for work because of illness or injury may still be entitled to certain benefits under section 18(1)(b) of the EI Act. I observed that it did not appear that the Commission had made a decision as to whether he might be entitled to those benefits. The Commission suggested that the Claimant might wish to get a medical certificate and submit an application to the Commission for sickness benefits.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. I., Appellant Angele Fricker, Representative for the Respondent