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

Citation: *K. D. v Canada Employment Insurance Commission*, 2019 SST 1232

Tribunal File Number: AD-19-319

BETWEEN:

K. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 23, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] This is an appeal of a decision dated April 5, 2019, by the General Division, which decided that the Appellant, K. D., was disentitled from receiving Employment Insurance benefits. The Claimant enrolled in a full-time hairdressing program. She had already done a similar program overseas, so this was a refresher program. Once she finished the program, she would earn a certificate that would make it easier to find hairdressing work in Canada.

[3] The General Division found that the Claimant had not proven that she was available for work or that she was making reasonable and customary efforts to find suitable employment. The Claimant argues that the General Division failed to observe a principle of natural justice by not making sure that she got a fair hearing. She also argues that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it. She claims that she was available for work and had been looking for work. She notes that while she was still in the hairdressing program, she found part-time employment, which she claims proves that she had been looking for work.

[4] For the reasons that follow, I find that the General Division made erroneous findings of fact and, as such, I am allowing the appeal in part. I find that the Claimant was not available for work for the purposes of the *Employment Insurance Act* throughout the hairdressing program, but I find that she became available during the summer 2018, when she no longer felt constrained by her school schedule and when she began an earnest job search in different areas. I find that her job search efforts waned after she found part-time work in a hairdressing salon in September 2018, and that the Claimant no longer demonstrated her availability by then.

ISSUES

[5] Did the Claimant get a fair hearing before the General Division?

[6] Did the General Division base its decision on an erroneous finding of fact that it made without regard for the material before it, in finding that she had not proven that she was available for work and was not making reasonable and customary efforts to find suitable employment?

ANALYSIS

Did the Claimant get a fair hearing before the General Division?

[7] The Claimant suggests that she did not get a fair teleconference hearing before the General Division because of technical and language-related issues. She relied on an interpreter, whose voice she claims was "breaking" over the telephone. Although there was an interpreter, the Claimant testified in both Punjabi and English, but because of this, she claims that the General Division member either missed or did not fully understand vital information.

[8] The Respondent, the Canada Employment Insurance Commission (Commission), on the other hand, argues that the audio recording of the General Division hearing shows that the Claimant received a fair hearing. The Commission argues that the General Division member made sure that the Claimant understood everything. The member repeated everything that the Claimant or the interpreter said. The member also asked questions to make sure that she understood what they said. The interpreter also spelled out some words. The member spoke slowly to make sure that the Claimant and the interpreter could follow what she was saying. The Commission also says that the interpreter's voice was not "breaking" over the recording.

[9] The Claimant did not identify specific areas of the hearing where the interpreter's voice was "breaking." She also did not identify any specific areas where the General Division member missed key information or misunderstood her, other than when she told the member that she had applied for work at X, a grocery store. The member mistakenly thought she said that she had applied for work at a furniture store. However, this error was not important because what mattered was whether the Claimant had applied for work and how many job applications she made. The General Division accepted the Claimant's evidence that she had applied for some work. The General Division rejected her testimony that she applied for more than 50 jobs, preferring instead the statement she gave to the Commission.

[10] Apart from this, if there were any language issues, such as misinterpretation, the Claimant has to provide concrete evidence of any problems. It is not enough to say that there were problems and that because of any problems, the General Division must have missed or misunderstood the evidence.

[11] The General Division endeavoured to understand the oral evidence. There were many times when the Claimant testified in English without an interpreter. Occasionally, the General Division member asked the Claimant to repeat her evidence.[1] Or, when the member was unable to understand the Claimant, the member asked for the interpreter's assistance. When the member was unable to understand the interpreter (who, like the Claimant, had a thick accent), he spelled out words for her, such as "furniture." It is clear that the General Division member made every effort to understand the Claimant's evidence. Having listened to the audio recording, I am satisfied that the member's efforts overcame any language barriers or technical issues and, as such, I am satisfied that the Claimant was given a full and fair hearing and that the General Division member fully understood the evidence.

Did the General Division err in law or base its decision on any erroneous findings of fact that it made without regard for the material before it, in finding that she had not proven that she was available for work and was not making reasonable and customary efforts to find suitable employment?

[12] The Claimant argues that the General Division erred in law and based its decision on erroneous findings of fact that it made without regard for the material before it in finding that she had not proven that she was available for work and was not making reasonable and customary efforts to find suitable employment.

a. The number of job search applications the Claimant made

[13] The Claimant notes that she had testified that she had sent out at least 50 job applications. The Claimant suggests that the General Division either overlooked this evidence or failed to accept it. As I noted in my leave decision, the General Division specifically referred to this evidence. However, there was conflicting evidence.

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[1] At approximately 11:00 of the General Division hearing (in English).

[14] The General Division explained that it preferred the Claimant's evidence that she had sent out less than 50 application, particularly because the Claimant had not provided any evidence to support her testimony that she had indeed applied for 50 jobs. For instance, the General Division found that the Claimant had failed to provide any evidence of the dates and times that she applied for work.

[15] The General Division was entitled to either accept or reject the Claimant's testimony, if it explained why it did so. Here, the General Division explained why it preferred some of the evidence to others. No erroneous finding of fact arose when it did this because there was an evidentiary basis for the General Division's findings.

b. The hours the Claimant worked after December 2018

[16] At paragraph 15, the General Division found that the Claimant had explained that after she finished the hairdressing program in December 2018, her hours at the hair salon (where she started working in mid-September 2018) increased to 35 or 40 hours per week. The Claimant argues that the General Division erred in making this finding. The Claimant argues that the evidence showed that even four months after she finished the program in December 2018, she still worked only 25 hours a week because her employer did not have any additional hours to offer her.[2] The Claimant suggests that this evidence is important because the General Division found that if she limited herself to 25 hours of work a week while she was schooling, she was not available for full-time work. The Claimant argues that the 25 hours of work per week had nothing to do with her availability.

[17] The Claimant suggests that she would have worked more than 25 hours during school if her employer had more work available for her. After she finished her schooling, she still worked only 25 hours a week because that was all the work that she could find or that her employer

[2] See Claimant's submissions in Application to the Appeal Division – Employment Insurance at AD1-6. The Claimant wrote, "I also informed the General Division that after completing my course, I am still only working 25 hours per week (4 months after completing the course) because they do not have any more work currently to the day."

offered. In her application to the Appeal Division– Employment Insurance, she wrote that four months after completing her program, she was still working only 25 hours per week.[3]

[18] I find that the Claimant is mistaken about the evidence. The Claimant produced a letter from her employer dated February 28, 2019. The employer stated that the Claimant started working as a full-time hair stylist on September 17, 2018 and that she was now receiving 35 to 40 hours per week. In other words, she worked more than 25 hours per week after she finished schooling and got her hairdressing certificate. Indeed, she testified that after she finished the hairdressing program, she was able to increase her hours of work, sometimes to 40 hours per week.[4]

[19] The General Division did not make an erroneous finding of fact when it concluded that her hours increased to 35 or 40 hours per week after her training program ended in December 2018.

c. Whether the Claimant had to attend classes on a full-time basis and was only available for work during certain hours

[20] The Claimant argues that the General Division overlooked the fact that she had already completed a hairdressing program in India, so the program she was taking was just a refresher course. She claims that the course manager was prepared to make an exception for her and not require that she attend classes on a full-time basis. The Claimant testified that she could skip classes whenever she wanted. She could just tell the teacher that she would not be attending class. She insisted that she could attend the program on a part-time basis, or if she found full-time work, could have dropped the program altogether and all of her classes.

[21] The Claimant also argues that the General Division overlooked the fact that she found work at a hair salon on September 16, 2018, after which she stopped attending classes on Wednesdays and Thursdays and weekends. She argues that this proves that she was not only looking for work, but that she was also prepared to stop attending classes so that she could go to

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[3] See Claimant's submissions that after completing her course, she was still working only 25 hours per week (4 months after completing the course) because her employer did not have more work available, at AD1-3 and AD1-6.
[4] At approximately 25:40 to 28:50 of the General Division hearing, the member asked the Claimant whether she was able to increase her hours after the hairdressing course ended in December 2018. The Claimant testified that sometimes she gets 40 hours of work, but she usually got 30 to 35 hours of work.

work. She argues that the General Division also overlooked the fact that her instructor did not require her to make up any missed course work. Despite missing Wednesdays and Thursdays from mid-September to early December 2018, she completed the course without having to make up any missed classes.

[22] At paragraph 15, the General Division noted the Claimant's testimony that she was working approximately 25 hours per week. It found that "she could miss the odd day of school," however, the General Division did not mention whether, after mid-September 2018, the Claimant no longer went to school every Wednesday and Thursday.

[23] The General Division determined that the Claimant did not have a desire to return to the labour market as soon as someone offered a suitable job because it found that she was available only on certain times on certain days. The General Division found that the Claimant was committed to full-time course work. At paragraph 15, the General Division also wrote, "By registering for a full time course this does not show a sincere desire to return to the labour market as soon as a suitable job is offered."

[24] The General Division also found that the Claimant set personal conditions that unduly limited her chances of returning to the labour market. At paragraph 24 of its decision, the General Division found that the Claimant was looking for work that was available around her school schedule, as the hairdressing program was not available in the evenings or on weekends. In other words, the General Division concluded that the Claimant looked for only evening and weekend work so she could continue going to school without missing any classes. The General Division seemed to suggest that the Claimant continued to attend school on a full-time basis.

[25] These conclusions—that the Claimant was committed to a full-time course load and that she looked for only evening and weekend work—however ignored the fact that after mid-September 2018, the Claimant worked on a part-time basis during school hours. The General Division made no mention of the fact that once the Claimant started working part-time on Wednesdays and Thursdays, she stopped attending classes on those days. This showed that the Claimant did not limit herself to looking for and working only around her school schedule, or that she was committed to a full-time course load.

[26] The General Division made an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. It erred by finding that the Claimant was committed to attending classes on a full-time basis and that she limited herself to working around her schooling. As a result, the General Division found that the Claimant did not have a desire to return to the labour market as soon as someone offered her a suitable job. It also found that she did not demonstrate a desire to return to the labour market through efforts to find a suitable job, and that she set personal conditions that limited her chances of returning to the labour market. Yet, the evidence showed that when the Claimant found a job, she worked during school hours. By mid-September 2018, the Claimant attended school on Mondays, Tuesdays, and Fridays, and otherwise worked every Wednesday and Thursday.[5]

REMEDY

[27] Because the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, I may refer the matter back to the General Division for reconsideration, give the decision that the General Division should have given, or vary the decision of the General Division in whole or in part.[6]

[28] I will give the decision that the General Division should have given. Ideally, there would more evidence of the Claimant's job search efforts, but I find that there is sufficient evidence for me to address the issue of the Claimant's availability.

Was the Claimant available for full-time work?

[29] The Claimant argues that she was available for work throughout her schooling. She claims that her primary goal was to find work, but because she was unable to find any work, she enrolled in a hairdressing program to improve her prospects of finding work. She claims that she would have quit her schooling if she had been able to find full-time work. The Claimant claims that, if she had found full-time work, she could have done the hairdressing program on a part-

[5] See Claimant's oral testimony, at approximately 24:09 of General Division hearing.
[6] Subsection 59(2) of the *Department of Employment and Social Development Act* gives the Appeal Division the authority to 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.

time basis or dropped the program altogether. This claim alone however is insufficient to establish availability under the *Employment Insurance Act*.

[30] As the General Division properly noted, when assessing whether a claimant is available for work, for the purposes of the *Employment Insurance Act*, there are three factors to consider:[7]

i. The desire to return to the labour market as soon as a suitable job is offered;

ii. The expression of that desire through efforts to find a suitable job; and

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

[31] This requires me to examine the circumstances surrounding the Claimant's schooling, her past employment history, and her job search efforts.

a. Evidence before the General Division

[32] The evidence before the General Division is as follows:

- In a questionnaire from the Commission, the Claimant claimed that she intended to find full-time work while taking classes. She had work experience as a restaurant manager, gym trainer and aesthetician. She claimed that she did not usually work during the day or from Monday to Friday[8]

- By her own admission, the Claimant had applied to only one job by February 20, 2018[9]

- The Claimant spoke with the Commission on February 5, 2019. The agent asked the Claimant how many jobs she had applied for between February and December 2018. The agent recorded the Claimant's response as "fifteen jobs." They were for part-time and full-time jobs, in hairdressing, restaurant services and aesthetics. She confirmed that she started working in September and worked on Wednesdays, Saturdays and Sundays. She did not mention that she worked on Thursdays. She also reported that if she changed her

[7] The Federal Court of Appeal *Faucher*
[8] See Training Course Information dated February 20, 2018, at GD3-24.
[9] See Training Course Information dated February 20, 2018, at GD3-25.

schedule to part-time, she would finish the hairdressing program in 12 months instead of 10 months.[10]

- The Claimant testified at the General Division hearing that for the first three to four months after she started going to school, she was available only between 4 to 11 and all day on Saturdays and Sundays. After this, she became "fully available for work, not within these hours, even without these hours."[11]

- The Claimant also testified that, between February and December, she applied for "like more than 50" jobs. Because she knew yoga, she also distributed pamphlets for yoga, so she could teach yoga at home.[12] When asked why she had told the Commission that she had applied for 15 positions, the Claimant explained that she did not fully understand what the Commission asked her and she gave only an approximate answer. She estimates that, if she had managed to gather all of her records, she would have seen that she had applied to more than 50 or 70 jobs. She recalled that she applied to restaurants, food stores, studios for beautician work, hotels, retail shops, furniture shops, and anywhere where she felt she could do the work. She dropped off resumes and attended interviews, but no one offered her work.[13]

- The Claimant testified that she had interviews in perhaps June or July. She testified that she "did quite a bit in the summer. June, July, and August." She also testified that she applied for jobs in other months too, eventually landing work with a salon in September. She stated that she looked for work throughout her course.[14]

- The employer's letter dated February 28, 2019, indicates that the Claimant started working as a full-time hair stylist on September 17, 2018. She was not under any probation at that time and was receiving 35 to 40 hours of work per week.[15]

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[10] See Supplementary Record of Claim dated February 5, 2019, at GD3-31 to GD3-32.
[11] At approximately 8:15 to 8:42 of the audio recording of the General Division hearing.
[12] At approximately 12:05 of the General Division hearing.
[13] At approximately 13:59 of the General Division hearing.
[14] At approximately 17:48 to 23:24 of the General Division hearing.
[15] The employer's letter dated February 28, 2019, can be found at GD2-7.

- The Claimant testified that she worked Wednesdays, Thursdays, Saturdays and Sundays. She did not work fixed hours because the employer changed the schedule every week.[16] She also testified that she needed a certificate to get full-time work.[17]

[33] The employer did not confirm whether the Claimant's workdays included Wednesdays and Thursdays.

[34] The Claimant did not give any evidence about whether she continued to look for either part-time or full-time work after she began working in mid-September 2018, although she did testify that she looked for work throughout her course.

b. General presumption of non-availability when schooling

[35] There is a general presumption that a claimant who attends a full-time course or program is not available for work, but, in exceptional cases, a claimant can rebut this presumption. For instance, if there is a history of a claimant who attended school and worked at the same time, the presumption may be rebutted. This does not apply in the Claimant's case. A claimant can also rebut the presumption by showing that the employment is claimant's primary goal, and that the course is secondary. The best proof of this would be a serious, constant and intensive job search. The Claimant argues that this applies in her case. She argues that employment was her primary goal, and that the course was secondary. She explained during the hearing that she already had training and experience as a hairdresser when she lived overseas, so did not actually have to attend classes to obtain her hairdressing certificate, or that she could attend them on a part-time basis. She also claims that she never stopped looking for work. I will examine this argument further.

c. Schooling – the first few months

[36] It is clear from the evidence that the Claimant was unavailable for work in at least the first three to four months of the hairdressing program. The Claimant stated that she became fully

[16] At approximately 24:09 of the General Division hearing.
[17] At approximately 23:42 of the General Division hearing.

available, even during school hours, only after three to four months after the program started. From this, I find that the Claimant was not available between February 5, 2018 and May 2018.

[37] The question then becomes whether the Claimant was available for work after May 2018.

d. Schooling – summer 2018

[38] The Claimant states that she looked for work throughout her schooling and that she sent out more than 50 to 70 job applications. Regrettably, for the Claimant, she did not document her job search efforts. I do not doubt that the Claimant looked for work; after all, she found work with a hairdressing salon in mid-September, but without any paper record setting out her job search efforts, it is more difficult for her to prove that she looked for work as earnestly as she claims.

[39] The General Division noted that one shows availability during regular hours for every working day. One cannot restrict oneself to irregular hours because of a school schedule that significantly limits availability. In this case, however, the Claimant had a work history where she worked outside regular business hours. Even so, she clearly also looked for employment during regular business hours. This is borne out by the fact that she secured employment during regular hours with the hairdressing salon, which then caused her to miss classes on Wednesdays and Thursdays.

[40] The evidence also shows that the Claimant applied for work outside the hairdressing industry, in a wide range of areas, from retail to the hospitality industry. Indeed, she distributed pamphlets so she could teach yoga in her home. She testified that she taught yoga to two women through her efforts.

[41] The evidence suggests that, for the most part, the Claimant's job search efforts were concentrated during the summer months of June, July, and August, when she had "interviews" with prospective employers. She discovered that many of the positions were already filled by students. (These do not seem to be the type of interviews where an employer set up an interview with an applicant. It makes no sense that an employer would call the Claimant for a job that it had already filled.) Possibly, the Claimant was not responding to any job advertisements but was simply dropping off applications with any employers and directly speaking with them when she

did this. When she spoke with the Commission in February 2019, she explained that she went in person to multiple places to drop off her resume.[18]

[42] The Claimant testified that while she looked for work "throughout her course," she applied "quite a bit in the summer."[19]

[43] Although the Claimant did not document her job search efforts, I am prepared to find that for the summer months, she demonstrated a desire to return to the labour market as soon as an employer offered her a suitable job. I am also prepared to find that the Claimant expressed a desire through her efforts to find a suitable job, and that she did not set personal conditions that might have unduly limited her chances of returning to the labour market. I am also prepared to find that the Claimant made reasonable and customary efforts to find suitable employment under subsection 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[44] The Claimant was enrolled in a full-time program that was not offered or available on evenings or weekends, but the evidence shows that the Claimant looked for work that would necessarily require her to drop her classes. She found work in a salon that required her to miss classes on Wednesdays and Thursdays.

[45] If the hairdressing salon had provided the Claimant with full-time employment in mid-September without requiring her to be certified, I find that the Claimant would have accepted full-time employment. She would have accomplished what she set out to do when she enrolled in the hairdressing program. Her goal simply was to get full-time employment. She did not see the need to go through the hairdressing program, other than to get a certificate to ensure full-time work in the hairdressing field. She had also gone through the hairdressing program and had work experience from overseas, so felt that she did not have to attend classes or spend much, if any, time studying.

[46] However, the Claimant also showed that she was prepared to work in areas unrelated to hairdressing. Her job search was wide-ranging, considering the limitations with her language.

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[18] See Supplementary Record of Claim, dated February 5, 2019, at GD3-32.
[19] At approximately 17:48 to 23:24 of the General Division hearing.

She did not limit herself to working only during regular business hours. She had a work history that included work outside the regular business hours.

[47] I recognize that there is a discrepancy in some of the evidence. The Claimant told the Commission early on that she applied for 15 jobs, whereas she told the General Division that she applied for more than 50 to 70 jobs. Generally, contemporaneous statements or statements given closer in time to when events took place are more reliable. The Claimant argues that when she spoke with the Commission, she did not have the opportunity to collect all of her information, so she was simply giving a rough estimate of the number of applications she sent. I see that when she spoke with the Commission, she had just returned from a trip overseas the day before, so this is not beyond the realm of possibility. Nevertheless, there is a wide gap between 15 and more than 50 to 70 job applications.

[48] The Claimant applied to several different types of business and even distributed pamphlets advertising yoga classes that she would give in her own home. I am prepared to find that the Claimant sent out more than 15 applications overall, and that she advertised her yoga services, but without any documentation, I find that she did not send out more than 50 to 70 applications. I am prepared to accept that she applied for work somewhere between 15 and 50 applications, and that the bulk of these job applications were in June, July and August. She testified that she applied "quite a bit in the summer."[20] She recalls that she spoke with prospective employers during this timeframe. I find that the Claimant demonstrated both a desire to return to the labour market through efforts to find a suitable job, and that she demonstrated reasonable and customary efforts to obtain employment during the summer 2018.

[49] As for the issue of job restrictions, the Claimant found that after three or four months, her school schedule freed up and she became available for work at any time. She looked for and she found work during regular school hours. She showed that she was prepared to miss her classes; she missed two days of schooling a week after mid-September. She testified that she applied for any type of work that she could find—whether part-time or full-time and in different areas,

[20] At approximately 17:48 to 23:24 of the General Division hearing.

unrelated to her field of study. This shows that by the summer, she did not set personal conditions that could have unduly limited her chances of returning to the labour market.

e. Schooling – mid-September to December 2018

[50] It is unclear when the hairdressing salon hired the Claimant, but the Claimant began working on a part-time basis on September 17, 2018.

[51] It is also unclear from the evidence whether the Claimant was content to work part-time and attend classes on a part-time basis or whether, she continued looking for other work, on top of the part-time work at the hairdressing salon. There was insufficient evidence before the General Division that the Claimant's job search efforts between September and December were as intense or serious as they had been during the summer.

[52] The Claimant testified that she had to earn a certificate in Canada before she could expect to get full-time hours from any hairdressing salon. It is reasonable to conclude that the Claimant expected that she would get more hours or full-time hours after she got her hairdressing certificate. Indeed, at some point after she finished her program, the employer provided her with more hours and certainly, by no later than February 28, 2019, the Claimant received 35 to 40 hours per week.[21] With the expectation that she would get more hours of work, I find it unlikely that, after the Claimant found work with the salon in September, she would have continued to look for other part-time or full-time work.

[53] I find that the Claimant's job search efforts went down after she found part-time work in a hairdressing salon in September 2018. There is little evidence—written or oral—that she continued looking for work. She no longer demonstrated that she was available for work for the purposes of the *Employment Insurance Act* by September 2018.

[21] Employer's letter dated February 28, 2019, at GD2-7.

CONCLUSION

[54] The appeal is allowed in part. The Claimant demonstrated that she was available for work from June 2018 to August 2018, but has not demonstrated that she was available from February 5, 2018 to May 2018 and from September to December 5, 2018, when her school program ended.

Janet Lew
Member, Appeal Division

HEARD ON:	August 27, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	K. D., Appellant Anick Dumoulin, Representative for the Respondent (written submissions only)