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

Citation: *Canada Employment Insurance Commission v C. C.*, 2020 SST 351

Tribunal File Number: AD-20-598

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

C. C.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Respondent, C. C. (Claimant), applied for Employment Insurance benefits in September 2019, after he had begun his studies at university. When the Applicant, the Canada Employment Insurance Commission (Commission), received the Claimant's application, it contacted him to explore his availability for work. The Commission determined that the Claimant was not entitled to benefits because it found that he was not available for work. The Commission refused to change this decision when the Claimant asked for a reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed his claim, accepting that he was available for work within the meaning of the Employment Insurance Act (EI Act), despite his studies. The Commission now seeks leave to appeal to the Appeal Division.

[4] The Commission has no reasonable chance of success on appeal. The Claimant has not made out an arguable case that the General Division made an error of law or an important error of fact.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] To allow the appeal process to move forward, I must find that there is a "reasonable chance of success" on one or more of the "grounds of appeal" found in the law. A reasonable chance of success means that there is an arguable case. This would be some argument that the Commission could make and possibly win.[1]

[1] This is explained in a case called Canada (Minister of Human Resources Development) v Hogervorst, 2007, FCA 41; and in Ingram v Canada (Attorney General), 2017 FC 259.

[6] "Grounds of appeal" means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:[2]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[7] Is there an arguable case that the General Division made an error of law by,

a) finding that the Claimant was available after September 2, 2019, when there was no evidence that he was available after December 4, 2019?

b) failing to properly apply the presumption of unavailability for full-time students?

[8] Is there an arguable case that the General Division made an important error of fact by ignoring or misunderstanding evidence,

a) of the Claimant's full-time status as a student?

b) that the Claimant was not available for work in his home province?

[9] Is there an arguable case that the General Division made an error of fact or law when it found,

a) that the Claimant had not set personal conditions that unduly limited his chance of returning to the labour market?

b) that the Claimant had made reasonable and customary efforts to find employment?

[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

ANALYSIS

No evidence of applications for employment after December 4, 2019

[10] The Commission argues that there was no evidence that the Claimant applied for work after December 4, 2019.

[11] The original Commission decision was that he was not available at any time because of his studies. The General Division found that the Claimant was available for work from September 2, 2019, onward, because of his job search efforts and his ability and willingness to adapt his school schedule to allow for full-time work.

[12] The *Employment Insurance Act* (EI Act) states that a claimant is not entitled to benefits for each working day in a benefit period in which he cannot prove his availability for work. This means that a claimant may be able to prove his availability for work in some periods, but not others. The General Division would have made an error of law if it found the Claimant to be available for some period in which there was "no evidence" of the Claimant's availability.

[13] There is no arguable case that the General Division found the Claimant to be available after December 4, 2019, without any evidence of job search activities. For one thing, the Claimant testified that he was available. In addition, the General Division member led the Claimant through each of the activities that the *Employment Insurance Regulations*[3] describe as "reasonable and customary" and the Claimant confirmed that he had been doing, or was doing, almost all of them. He did not qualify his testimony by limiting the timeframe of his job search efforts to the period before December 4, 2019.

[14] As a practical matter, claimants are not normally required to corroborate their availability for each and every day of their benefit period with reference to specific job search activities on each of those days. In fact, a claimant's own assertion of availability will likely be the only evidence of his or her availability for at least some of the days within his or her benefit period. A claimant's availability on those days may be questioned and may be rejected depending on the surrounding circumstances, but that does not mean that even a claimant's bare assertion of

[3] Section 9.001 of the Regulations

availability is “no evidence”. Unless the Commission has reason to doubt a claimant’s declarations of availability in claim reports, such a declaration is considered sufficient. If a claimant’s assertion were “no evidence”, then the Commission would have no basis for paying out benefits in response to these declarations in innumerable claim reports.

[15] In any event, the Commission’s argument is focused on the absence of applications for employment after December 4, and not the absence of job search activities. The Claimant had provided evidence of his specific employer contacts and applications when he submitted his request for reconsideration on December 4, 2019. He did not forward information on any additional applications after he requested the reconsideration but neither did the Commission ask the Claimant to continue to document additional applications. At the General Division hearing, the Claimant could only recall having contacted one employer since December 4, 2918, which he named. This contact was just two weeks before the March 4, 2020, hearing.

[16] Claimants are required to prove their availability but this does not necessarily mean that they must always provide evidence of *applications*. The Commission may make a specific request under section 50(8) of the EI Act to require the Claimant to prove his availability according to reasonable and customary efforts, which may include applications. But there is no indication that the Commission made such a request at any time.

[17] I am certainly not saying that the Claimant was not required to prove that he was capable and available and unable to find suitable employment under section 18(1)(a) of the EI Act. However, it was not necessary that he prove it specifically through his applications for employment in any particular period. The manner in which the Claimant conducted his job search satisfied the General Division that he had expressed his desire to return to work through efforts to obtain a suitable employment. I am unwilling to second-guess that finding.

Misapplication of the presumption of unavailability

[18] The law is settled that a full-time student may be presumed to be unavailable for full-time employment. The General Division referenced this presumption and some of the applicable case law, but it found that the presumption does not apply in the Claimant’s case because the Claimant is not a full-time student. To reach this conclusion, the General Division relied on the

Claimant's evidence of how his classes were scheduled, and that he was attending classes for 17 hours a week.

[19] The Commission argues that a claimant's status as either full-time or part-time student should be determined by the number of courses or credits in which the claimant is registered. It also states that the Claimant's university considered him a full-time student. In support of its position, the Commission refers to the Federal Court of Appeal decision of *Canada (Attorney General) v. Gagnon.*[4]

[20] There is no arguable case that the General Division made an error of law when it found that the presumption did not apply in his circumstances.

[21] *Gagnon* acknowledged the principle that a claimant who is engaged in full-time studies may be presumed to be unavailable for work. However, it did not define who should be considered a full-time student. *Gagnon* did rely on *Landry v Canada (Attorney General)*,[5] and *Landry* stated that a person enrolled in a course of full-time study is generally not available.

[22] However, *Landry* does not explain how it defines a "course of full-time study" and this is not even *Landry*'s "*ratio decendi"* (the legal principle on which the decision was based). Essentially, *Landry* dismissed the appeal that was before it because the Umpire's decision[6] had been based on the Umpire's assessment of the claimant's credibility. The Umpire had not believed the claimant's evidence that he was available for employment. *Landry* is also cited for the error of law that it identified incidentally, but which was not sufficient for it to disturb the Umpire's decision. The error of law was that the Umpire had taken too narrow a view of what constituted the "exceptional circumstances" under which a full-time student may challenge the presumption of unavailability.

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[4] *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.
[5] *Landry v Canada (Attorney General),* A-719-91.
[6] The Umpire was the decision maker in the second level of appeal within the former Unemployment Insurance appeal mechanism.

[23] Like *Gagnon*, *Landry* is not authority for the notion that a full-time student is necessarily one who has a certain number of courses or credits or who may be considered full-time by the educational institution.

[24] I note that the *Landry* decision relied on the earlier decision in *Canada (Attorney General) v Mercier*.[7] When the Court in *Mercier* determined that a claimant was not available, it did so with reference to the claimant's time commitment to his program; not to the number of courses, credits, or status according to the school. The Court held that, "taking five hours of courses a day, five days a week, is not available…"

[25] The case law does not explain what "full-time" is supposed to mean precisely or in a definitive manner. Without guidance from the higher courts, the question of whether the Claimant is a full-time student is not a question of law, but of fact, or perhaps mixed fact and law.

Evidence that the Claimant had the status of a full-time student

[26] The Commission also submits that the General Division made an important error of fact in how it assessed the Claimant's student status. It argues that the General Division should have considered how many courses or credits the Claimant was taking, and that the university considered him a full-time student.

[27] If this is a question of fact, then I may only intervene under certain circumstances. The General Division's would need to have based its decision on its finding that the Claimant was not full-time. If that finding ignored evidence, there would need to be an arguable case that the evidence factored significantly into the finding.[8]

[28] There is no arguable case that the General Division made an error of fact, when it found that the presumption did not apply in his circumstances. I appreciate that the General Division decision did not refer to the number of courses in the Claimant's program or his credits. However, in my view, the General Division was not required to have acknowledged this evidence or factored it in to its decision explicitly. For the purpose of assessing claimant's

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[7] *Canada (Attorney General) v Mercier,* A-690-75.
[8] *Canada v. Bernier (Attorney General), 2017 120 FC.*

availability, the importance of a claimant's status as a "full-time" student relates to the presumption that a claimant's time commitment to his studies will exclude full-time employment. The number of courses or credits is just one proxy, like hours of class, for the time the Claimant invested in his program. In this case, the General Division chose to classify the Claimant as part-time based on his classroom hours

[29] The General Division it is not required to refer to each and every piece of evidence. Instead, it may be presumed to have considered all the evidence before it.[9] The General Division is not presumed to have ignored evidence because it does not refer to it. The audio record of the General Division hearing does not reveal that the General Division ignored or misunderstood the Claimant's courses or credits, or the manner in which the university classified him.

[30] I acknowledge that the Commission disagrees with the General Division's finding that the Claimant was not "full-time", and I would agree that the General Division's finding of fact that the Claimant was not a full-time student might be debatable. However, the case law says that mere disagreement or a debatable finding does not meet the high bar for an error of fact under the grounds of appeal.[10]

[31] Furthermore, the General Division's finding that the Claimant is not a full-time student for the purpose of applying the presumption may be more properly characterized as a question of mixed fact or law than a finding of fact. In such a case, the Federal Court of Appeal has said that the Appeal Division cannot intervene at all.[11]

Important evidence claimant not available to work in home province

[32] The Claimant was enrolled in university in one province while his hometown was in an adjacent province. The General Division relied in part on a list of employers that the Claimant had contacted which included some in the province of his university and some in his home province.

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[9] *Simpson v Canada (Attorney General), 212 FCA 82.*
[10] *Grosvenor v. Canada (Attorney General),* 2018 36 FC; *Rouleau v Canada (Attorney General),* 2017 534 FC.
[11] *Quadir v Canada (Attorney General),* 2018 FCA 21.

[33] The Commission argues that the General Division ignored important evidence that the claimant was not actually available to work in his home province. It notes that a significant number of the job search contacts that the Claimant documented were to employers in his home province.

[34] There is no arguable case that the General Division ignored evidence of the Claimant's unwillingness to work in his home province. The General Division considered how the Claimant's studies would have affected his ability to work in a manner that did not depend on the employer's location. When the General Division member questioned the Claimant about his prior statement that he would not have left his studies to accept employment, the Claimant testified that he would have returned to his hometown province for full-time employment.

[35] The Claimant explained that he might have misunderstood the Commission agent's earlier questions about his job search intentions and his willingness to leave his program to take a job. He testified that could remain in his program and work full-time because his program offered online course. He also testified that he had the flexibility to rearrange his course load and was able to take courses during the summer months. He stated that his program permitted him to write his exams when time allowed. This was consistent with his answers in the "work search" section of his training questionnaire,[12] which he completed prior to the Commission's initial decision. It is also consistent with his statement attached to his reconsideration request[13] and with his statement to the Commission during the Commission's reconsideration process.[14] The very fact that the Claimant contacted a number of employers in his hometown could support an inference that he was willing to accept work there.

[36] The General Division accepted the Claimant's explanation for the inconsistency and preferred his testimony to any contrary statement to the Commission. It is the General Division's prerogative to assess credibility and to weigh the evidence accordingly.

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[12] GD3-21.
[13] GD3-27
[14] GD3-30.

Personal conditions

[37] The Commission argues that the General Division could not reasonably conclude that the Claimant had proven his availability because he set personal conditions that unduly limited his chances of returning to the labour market.

[38] There is no arguable case that the General Division made an error by unreasonably finding that the Claimant did not unduly limited his chances of returning to the labour market. I am not required or authorized to determine whether the General Division decision is reasonable. I must decide if the General Division made an error under one of the grounds of appeal.

- Clearly, the Claimant placed some limitations on when and how much he could work. However, the General Division had to decide whether the Claimant had **unduly** limited his prospects. In support of its decision, the General Division accepted that the Claimant would alter or drop courses as necessary for suitable employment;
- that he looked for jobs in his university town and in his hometown, and;
- that his testimony supports that he would have accepted suitable employment in either location.

[39] Other than those arguments that I have addressed above, and which I did not accept as having established an arguable case, the Commission has not pointed to any error or fact or law in the General Division's finding that the Claimant did not unduly limit his employment prospects by setting personal conditions.

Reasonable and customary efforts

[40] Again, the Commission has not pointed to any error of fact or law that relates to the General Division's finding that the Claimant made reasonable and customary efforts.

[41] There is no arguable case that the General Division made an error of fact or law by finding that the Claimant satisfied a requirement to make "reasonable and customary efforts". This is because the General Division's finding on the Claimant's "reasonable and customary efforts" was unnecessary to its decision that the Claimant should not be disentitled to benefits under section 18(1) of the EI Act.

[42] The Commission did not exercise its discretion under section 50(8) to request the Claimant to prove his availability in accordance with the "reasonable and customary efforts" described in Regulation 9.001. Nor did it disentitle the Claimant under section 50(1) for having failed to prove reasonable and customary efforts. The only test that the General Division needed to apply was the test for availability under section 18(1)(a) which was set out in the Federal Court of Appeal decision in *Faucher v Canada (Attorney General)*.[15] The General Division properly applied *Faucher* to determine availability, and its decision that the Claimant should not be disentitled was dependent on its analysis of the *Faucher* factors.

[43] The Commission has no reasonable chance of success on appeal.

CONCLUSION

[44] The application for leave to appeal is refused

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	unknown, for the Applicant, the Canada Employment Insurance Commission

[15] *Faucher v Canada (Attorney General)*, A-57-96.