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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v GS*, 2020 SST 1076

Tribunal File Number: AD-20-809

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

G. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: December 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal allows the Commission's appeal.

OVERVIEW

[2] At the age of 60, the Respondent (Claimant) accepted the employer's offer to work four days a week. He then stopped working because of a shortage of work. He filed a claim for Employment Insurance benefits with the Appellant, the Canada Employment Insurance Commission (Commission). The Claimant returned to work a few weeks later. The Commission refused to pay him benefits because he is not available for full-time work. The Claimant requested a reconsideration of the initial decision, but the Commission upheld its decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[3] The General Division determined that the Claimant had the desire to return to the labour market, had made efforts to find a job, and had not limited his chances of finding a job, since he already had suitable employment and knew his return-to-work date. The General Division found that the Claimant had shown his availability for work under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[4] The Commission now seeks leave from the Tribunal's Appeal Division to appeal the General Division decision. It argues that the General Division made an error of law in its interpretation of section 18(1)(a) of the EI Act.

[5] I must decide whether the General Division made an error in finding that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act.

[6] I am allowing the Commission's appeal.

ISSUE

[7] Did the General Division make an error in finding that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act?

ANALYSIS

Appeal Division's Mandate

[8] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[10] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, the Appeal Division must dismiss the appeal.

Did the General Division make an error in finding that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act?

[11] The facts on file are not really disputed. At the age of 60, the Claimant accepted his employer's offer to work four days a week. This is a privilege that the employer granted him under the collective agreement given his seniority. He then stopped working because of a shortage of work. He filed a claim with the Commission to receive Employment Insurance benefits during his time off work. The Claimant returned to work a few weeks later.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[12] The Commission argues that the Claimant has a job that suits him and that he is not searching for another. It submits that, under section 18(1)(a) of the EI Act, to be entitled to benefits, the Claimant must prove that he is not only capable of and available for work but also unable to find suitable employment. The Commission submits that the Claimant is not available within the meaning of section 18(1)(a) of the EI Act.

[13] The Claimant submits that he must remain available for his usual employer under the agreement between the parties. He argues that he already has a suitable job. He submits that the General Division did not make an error in finding that he was available for work.

[14] The General Division determined that the Claimant had the desire to return to the labour market, had made efforts to find a job, and had not limited his chances of finding a job. It based its decision on the evidence that the Claimant already had a suitable job and knew his return-to-work date.

[15] A claimant's availability is assessed for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.[2]

[16] The General Division decision rests on the position that a claimant who is waiting to be called back by their employer is exempt, at least for a reasonable period, from having to show an active job search.[3] The claimant would be justified, for a reasonable period, to consider the promise of being called back to work the most likely way of obtaining a new employment and to act accordingly. Therefore, it would not be appropriate to automatically require a job search given the known date of recall.[4]

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[2] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[3] CUB 1804, 14685, 14685 [*sic*], 23283, *Charpentier*, A-474-97.
[4] CUB 14708, 15389, 16823, and 18846.

[17] There is, however, more recent case law that establishes that a claimant cannot merely wait to be called back to work and must look for employment to be entitled to benefits.

[18] According to that case law, the EI Act clearly states that, to be entitled to benefits, a claimant must establish their availability for work, and to do this, they must look for work. Availability must be assessed for each working day in a benefit period. This requirement does not go away if the unemployment period is short-term. No matter how little chance of success the claimant may believe a job search would have, the EI Act is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits. A claimant must establish their availability for work, and this availability must not be unduly limited.[5]

[19] On two occasions, the Claimant told the Commission that he had made no effort to find employment.[6]

[20] In these circumstances, was the Claimant available within the meaning of section 18(1) of the EI Act because he had a job with his usual employer and knew his return-to-work date? I do not believe so.

[21] The evidence before the General Division shows that the Claimant expected to return to work for his usual employer after a few weeks. He was not actively looking for work.

[22] Did the Commission have the obligation to warn the Claimant that he had to expand the scope of his job search?

[23] In my view, a warning might be necessary when a claimant has adequately demonstrated that their efforts to find suitable employment were reasonable. It is

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[5] *YV v Canada Employment Insurance Commission*, 2020 SST 197; *YG v Canada Employment Insurance Commission*, 2019 SST 1278; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (EIC)*, A-56-96; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311; *Canada (Attorney General) v Stolniuk*, A-686-93; CUB 76450; CUB 69221; CUB 64656; CUB 52936.
[6] GD3-14, GD3-22.

certainly not necessary when the warning would serve no purpose, as in this case, where the Claimant was not looking for work because he was returning to his usual employer after a few weeks.[7]

[24] After reviewing the appeal file, the General Division's decision, and the parties' submissions, I am of the view that the General Division made an error in its interpretation of section 18(1)(a) of the EI Act and in its assessment of the Claimant's availability. I have no choice but to allow the Commission's appeal.

CONCLUSION

[25] The Tribunal allows the Commission's appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	December 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Anick Dumoulin, Representative for the Appellant Nelson Flamand, Representative for the Respondent

[7] *Canada (Attorney General) v Stolniuk*, A-687-93.