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

[TRANSLATION]

Citation: *MB v Canada Employment Insurance Commission*, 2021 SST 284

Tribunal File Numbers: AD-20-802
AD-20-803
AD-21-156
AD-21-159

BETWEEN:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 21, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant (Claimant) worked for the employer as a support worker. She works 32 hours per week. She was laid off during the summer because of a shortage of work. She applied for Employment Insurance benefits every summer. A benefit period was established, and she received Employment Insurance benefits.

[3] When she returned to work, she continued to complete her claims for Employment Insurance benefits and to receive benefits. After investigating, the Canada Employment Insurance Commission (Commission) found that the Claimant was working [full] working weeks and that she was not entitled to Employment Insurance benefits. The Commission also found that the Claimant was not available for work from December 4, 2019, to December 19, 2019, and that she had not properly declared all her earnings. It allocated the earnings to the weeks of unemployment.

[4] The Claimant requested a reconsideration of the decisions. The Commission upheld its initial decisions, except it changed its decision on availability in terms of the period. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[5] The General Division found that it was a full working week when the Claimant worked 32 hours in a week. It found that the Claimant's earnings were wages and that the Commission had allocated them correctly. The General Division found that the Claimant was not available for work between December 4, 2019, and December 19, 2019.

[6] The Claimant was granted leave to appeal the General Division's initial September 11, 2020, decision.

[7] In the meantime, the Claimant filed an application to rescind or amend the General Division's initial decision. On January 18, 2021, the General Division dismissed the Claimant's application.

[8] The Claimant was granted leave to appeal the General Division's January 18, 2021, decision on the application to rescind or amend a decision.

[9] The appeals were heard by videoconference on June 15, 2021.

[10] I have to decide whether the General Division made an error in its interpretation of section 31(1) of the *Employment Insurance Regulations* (EI Regulations). I also have to decide whether the General Division made an error in its interpretation of section 66 of the *Department of Employment and Social Development Act* (DESD Act). Lastly, I have to decide whether the General Division made an error of law in its interpretation of section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[11] I am dismissing the Claimant's appeal.

ISSUES

[12] Did the General Division make an error in its interpretation of section 31(1) of the EI Regulations?

[13] Did the General Division make an error in its interpretation of section 66 of the DESD Act?

[14] Did the General Division make an error in its interpretation of section 18(1)(a) of the EI Act?

ANALYSIS

Appeal Division's Mandate

[15] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the DESD Act.[1]

[16] 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.

[17] 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 Tribunal must dismiss the appeal.

Issue 1: Did the General Division make an error in its interpretation of section 31(1) of the EI Regulations?

[18] The facts of this case are not really disputed. The Claimant worked for the employer as a support worker. She worked 32 hours per week. She was laid off during the summer because of a shortage of work. She applied for Employment Insurance benefits every summer. A benefit period was established, and she received Employment Insurance benefits.

[19] When she returned to work, she continued to complete her claims for Employment Insurance benefits and to receive benefits, since she considered herself a part-time employee. The Claimant was looking for a job of eight hours per week to round out the working week.

[20] The General Division found that it was a full working week under section 31(1) of the EI Regulations when the Claimant worked 32 hours in a week.

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

[21] The Claimant argues that the General Division made an error of law by ignoring her evidence showing that a position like hers in the same grade or class is considered a full-time position when the employee works 35 hours per week.

[22] In my view, the General Division did not ignore the Claimant's evidence. Instead, it determined that the Claimant's evidence did not support the finding that she was not working full working weeks. In making its determination, it accepted that employees in the same grade or class as those hired by her employer worked between 28 and 32 hours per week, and the employer considered them full-time employees.

[23] The Claimant also alleges that the General Division made an error of law by limiting the comparison to other employees working for the same employer. She argues that section 31(1) of the EI Regulations does not limit the comparison to only her employer.

[24] In addition, the Claimant argues that she cannot be compared to the employer's other employees, since she is part of a pilot project with budgetary constraints limiting employees' hours.

[25] Section 31(1) of the EI Regulations says that a full working week is the number of hours, days, or shifts normally worked by persons in the claimant's grade, class, or shift at the factory, workshop, or other premises at which the claimant is or was employed.

[26] As the General Division pointed out, the evidence shows that the Claimant has a contract of employment with the employer. In a week, she works the same number of hours for her employer as other full-time employees in her grade or class. Therefore, the General Division did not make an error by comparing the Claimant to co-workers in her grade or class at her workplace despite the specifics of her job.

[27] Umpire decisions have held that, in some circumstances, where a claimant cannot be compared to persons in the claimant's grade, class, or shift, they can be compared to

another person in the same grade working a similar job for another employer.[2] That is not this case here.

[28] It is true that Umpire decisions are not mandatory or binding for the Tribunal, but they have real persuasive value.[3]

[29] In a recent case, the Tribunal's General Division seems to have adopted this interpretation by Umpires of section 31(1) of the EI Regulations, pointing out the lack of comparison between the claimants and other employees of the same company when it was possible to make one.[4]

[30] The Claimant has not convinced me that it is appropriate to depart from this interpretation of section 31(1) of the EI Regulations. To me, it seems unreasonable to compare a claimant's situation to employees of another employer when it can be compared to co-workers in the same grade or class working a similar job for the same employer.

[31] For the reasons above, I am of the view that the General Division made its decision about full working weeks based on the evidence before it. The decision is consistent with the legislative provisions and case law.

Issue 2: Did the General Division make an error in its interpretation of section 66 of the DESD Act?

[32] In the case of a decision relating to the EI Act, section 66(1)(a) of the DESD Act says that the Tribunal may rescind or amend a decision given by it if new facts are presented to the Tribunal or if the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.

[33] The General Division dismissed the Claimant's application because the evidence presented did not make any comparison to co-workers in her grade or class hired by the same employer when it was possible to do so.

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[2] CUB 14781, CUB 14061, CUB 13938.
[3] *YS v Canada Employment Insurance Commission*, 2015 SSTAD 1199.
[4] *GD et al v Canada Employment Insurance Commission*, 2014 at para 103.

[34] For the reasons above, I am of the view that the General Division did not make an error by dismissing the Claimant's application to rescind or amend.

[35] This ground of appeal is dismissed.

Issue 3: Did the General Division make an error in its interpretation of section 18(1)(a) of the EI Act?

[36] The Commission found that the Claimant was not available for work from December 4 to 19, 2019, because, during that period, she was still working 32 hours per week for her usual employer and was looking only for another part-time job, of eight hours per week.

[37] There being no precise definition in the EI Act, the Federal Court of Appeal has held on many occasions that availability must be determined by analyzing three factors—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—and that the three factors must be considered in reaching a conclusion.[5]

[38] Furthermore, availability is assessed for each working day in a benefit period in which the claimant must prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.[6]

[39] The General Division accepted that the Claimant was working 32 hours per week for her employer. She was looking for another job to supplement her hours.

[40] The Claimant also told the Commission that her employer's four-day schedule suited her well given her family obligations.

[41] The General Division found that the Claimant had set personal conditions that might have unduly limited her chances of returning to the labour market. Her searching

[5] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[6] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

only for a job of eight hours per week did not show availability to look for a full-time job for each working day in a benefit period.

[42] To receive Employment Insurance benefits, the Claimant had to be actively looking for suitable employment, even if it appeared more reasonable for her to stay with her usual employer, with whom she has a flexible schedule that allows her to work four days per week.

[43] For these reasons, I am of the view that the General Division considered the material before it and properly applied the *Faucher* factors in assessing the Claimant's availability.

[44] There is nothing to warrant my intervention.

CONCLUSION

[45] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 15, 2021
METHOD OF PROCEEDING :	Videoconference
APPEARANCES:	M. B., Appellant Alexis Deschênes (counsel), Representative for the Appellant