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

Citation: *Canada Employment Insurance Commission v AP*, 2021 SST 295

Tribunal File Number: AD-21-107

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 24, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent (Claimant) applied for Employment insurance (EI) sickness benefits while on an authorized medical leave of absence from his employment. He declared that he was unable to work due to illness, but that he would be continuing with his full-time course of studies at York University while on medical leave. Once he recovered from his illness, his intention was to continue with his course and return to his employment to the same extent as he worked prior to his illness.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to sickness benefits because he was attending a full-time university program and he would not have been available for full-time employment if he were not sick. The Commission maintained its initial decision after reconsideration. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant had rebutted the presumption of non-availability while attending a full-time course. It determined that he had proven that, but for his illness, he was available for work between October 5, 2020 and December 9, 2020. The General Division concluded that the Claimant was entitled to sickness benefits.

[5] The Appeal Division granted the Commission leave to appeal. It submits that the General Division made errors of fact and law when it concluded that the Claimant was available for work had he not been sick.

[6] I must decide whether the General Division made an error in fact or in law when it concluded that the Claimant was available for work had he not been sick pursuant to section 18(1) (b) of the *Employment Insurance Act* (EI Act).

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

ISSUE

[8] Did the General Division make an error in fact or law when it concluded that the Claimant was available for work had he not been sick pursuant to section 18(1) (b) of the EI Act?

ANALYSIS

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

Did the General Division make an error in fact or law when it concluded that the Claimant was available for work had he not been sick pursuant to section 18(1) (b) of the EI Act?

[12] The General Division found that the Claimant had rebutted the presumption of non-availability while attending a full-time course. It determined that he had proven that, but for his illness, he was available for work between October 5, 2020 and December 9, 2020. The General Division concluded that the Claimant was entitled to sickness benefits.

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

[13] The Commission submits that the evidence shows that the Claimant is limiting his availability to part-time employment while attending his course. As such, it submits that the General Division erred in law when it found that the Claimant was not required to look for other employment because he already had a part-time job that was suitable. It also erred in law when it found that the Claimant had rebutted the presumption of non-availability that applies to full-time students.

[14] The undisputed evidence shows that the Claimant has been working for X since July 2019. He works part-time when attending school and fulltime during school breaks. The Claimant took a leave of absence due to stress on October 4, 2020 and returned to work part-time on December 12, 2020.

[15] The Claimant declared that he spends 33 to 38 hours per week on his studies. He told the Commission that if he were not sick, he would be capable of work in the same capacity as prior to his sickness, which was part time work. The Claimant declared that he always works 24 hours per week when school is in session; and 40 hours (or more) per week when school is on a break.

[16] To be eligible for sickness benefits, a claimant must establish that he is unable to work and if it were not for his illness, he would be available for work.[3] To be considered available for work, a claimant must show that he is capable of and available for work and unable to obtain suitable employment.[4]

[17] 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]

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[3] Section 18(1) (b) of the EI Act.
[4] Section 18(1) (a) of the EI Act.
[5] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[18] The General Division correctly indicated that returning to full-time studies creates a rebuttable presumption that the person pursuing the studies is not available for work. The presumption can be rebutted by evidence of "exceptional circumstances".

[19] The General Division found that the Claimant did not set personal conditions that might have unduly limited his chances of returning to the labour market as of October 5, 2019. It found that the Claimant remained available for work, given that he never severed the employment ties with his employer, that he remained part of the work force part-time during school time and that he began working full time during school breaks.

[20] The Federal Court of Appeal has established that maintaining the employment tie and remaining part of the work force does not necessarily make a person available for work. The courts have consistently held that, in addition, the person must not impose such restrictions on his or her availability as to unduly limit his or her chances of holding employment.[6]

[21] More recent case law than that cited by the General Division has established that availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability.[7]

[22] The Claimant is attending a four (4) year kinesiology and health science program at York University. He started in September 2018 and he will finish in April 2022. The Claimant stated that he spends 13 hours per week in classes and another 20-25 hours per week outside of classes. The class times are not flexible.

[23] Furthermore, the Claimant did not searched for another job. He declared that he was not available for full time work. He also indicated that he would not give up his school for full time work.

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[6] *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Canada (Attorney General) v Loder*, 2004 FCA 18; *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard* (2003), 2003 FCA 349 (CanLII), 317 N.R. 359 (F.C.A.); *Canada (Attorney General) v Bois*, 2001 FCA 175.
[7] *Bertrand*, A-613-81, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.

[24] The evidence does not support the General Division's conclusion that the Claimant rebutted the presumption of non-availability. The Claimant's work pattern of part-time and summer employment is no different from that of any other student and this case is accordingly not an exception.[8]

[25] Furthermore, the Claimant's school schedule is not flexible and requires the employer to tailor his working schedule to accommodate him. He has invested a substantial amount of money in the course and declared that he was not wiling to leave the course for full-time employment. He also did not look actively for another job.

[26] Therefore, the Claimant does not meet the relevant factors to establish his availability in accordance with recent case law. Although the academic efforts of the Claimant certainly deserve praise, this does not eliminate the requirement to show availability within the meaning of the EI Act.

[27] For these reasons, I am of the view that the General Division erred when it applied section 18(1) (b) of the EI Act and the *Faucher* test and concluded that had the Claimant not been sick, he would have been available for work.

REMEDY

[28] Considering that the evidence is undisputed and that both parties had the chance to present their case before the General Division, I will render the decision that should have been given by the General Division in accordance with section 59(1) of the DESD Act.

[29] Pursuant to section 18(1) (b) of the EI Act, and in applying the *Faucher* test, I find that had the Claimant not been sick, he would not have been available during the relevant period, because his availability was unduly restricted by the requirements of the program he is following at the York University.

[30] For the above-mentioned reasons, I am allowing the Commission's appeal.

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[8] *Jean v Canada*, A-787-88.

CONCLUSION

[31] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	June 17, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Angèle Fricker, Representative of the Appellant A. P., Respondent