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

Citation: *JP v Canada Employment Insurance Commission*, 2021 SST 319

Tribunal File Number: AD-21-129

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: July 6, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant (Claimant) applied for Employment Insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant was not available for work because he was attending training full time and that he did not make efforts to find work. It decided that the Claimant was disentitled from receiving EI benefits as of September 28, 2020. The Claimant requested reconsideration but the Commission maintained its original decision. The Claimant appealed to the General Division.

[3] The General Division found that the Claimant wanted to go back to work but that he had not made enough efforts to find a job. It concluded that the Claimant did not show that he was available for work within the meaning of section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[4] The Appeal Division granted the Claimant leave to appeal of the General Division's decision. He puts forward that the General Division erred in 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 fact or in law when it concluded that the Claimant was not available pursuant to section 18(1) (a) of the EI Act.

[6] For the following reasons, I am dismissing the Claimant's appeal.

ISSUE

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

A**NALYSIS**

Appeal Division's mandate

[8] 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]

[9] 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]

[10] 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 not available for work pursuant to section 18(1) (a) of the EI Act?

[11] The Claimant puts forward that the General Division erred in its interpretation of section 18(1) (a) of the EI Act and in applying the *Faucher* test.[3]

[12] The Claimant submits that the General Division should have applied the Federal Court of Appeal decision in *MacDonald* in which a full-time university student also had an ongoing employment relationship with his employer and was on temporary layoff at the time of the claim. The Court upheld a decision that found a claimant was available even though the claimant was only willing to accept work from the employer with which the claimant had been employed on an "intermittent" basis for some time.[4]

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.
[3] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[4] *Canada (Attorney General) v MacDonald*, A-672-93.

[13] The Claimant submits that he considered his recall imminent. By the time he made his EI claim, he had already been recalled from the first lockdown. He puts forward that he made the decision to remain with his existing employer due to turmoil in the hospitality industry, which was resulting in many restaurants closing and staff being laid off permanently.

[14] To demonstrate availability for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.[5]

[15] 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:

> (1) the desire to return to the labour market as soon as a suitable job is offered,
>
> (2) the expression of that desire through efforts to find a suitable job, and
>
> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[6]

[16] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and unable to obtain suitable employment.[7]

[17] The General Division found that there was no evidence that the Claimant applied for any jobs or approached any other employers from September 28, 2020. It found that the Claimant was looking for work in some way, but that he did no show that he searched for work in a significant way.

[18] The General Division further found that the Claimant wanted to maintain his relationship with his usual employer with the understanding that he would return to his part-time work at some point.

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[5] Section 18(1) (a) of the EI Act.
[6] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[7] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[19] The General Division concluded that the Claimant had not demonstrated that he was capable of, and available for work but unable to find a suitable job, because he had not made sufficient efforts to find a suitable job.

[20] The case law submitted by the Claimant supports 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. 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 imminent recall.[8]

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

[22] 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. Furthermore, 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.[9]

[23] The Claimant initially declared to the Commission that he made no efforts to find employment because he already had a job. The Claimant further declared that even if there had been no pandemic, he would have not been available for full time work. In his application for benefits, the Claimant indicated that he did not look for work and that he

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[8] *Canada (Attorney General) v MacDonald*, A-672-93, in appeal of Umpire decision CUB 23283.
[9] *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311; CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.

would only accept a full time job if he could delay the start date to allow him to finish the course/program.[10]

[24] In these circumstances, was the Claimant available within the meaning of section 18(1) of the EI Act because he was waiting for an imminent recall from his usual employer? I do not believe so.

[25] The preponderant evidence before the General Division shows that the Claimant did not make sufficient efforts to find work because he wanted to return to work part time for his usual employer.

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

[27] I am of the view that a warning could be required when a claimant has shown that their efforts to find suitable employment were reasonable. In this case, it is certainly not necessary since the Claimant was not really looking for work because he was waiting to return to his usual employer and not actively looking for other work.[11]

[28] After reviewing the appeal file, the General Division's decision, and the Claimant's arguments, I find that the General Division properly applied the *Faucher* factors when assessing the Claimant's availability. I have no choice but to dismiss the Claimant's appeal.

CONCLUSION

[29] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

[10] See GD3-34, GD3-42, GD3-45, GD3-55.
[11] *Canada (Attorney General) v Stolniuk*, A-687-93.

HEARD ON:	June 29, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. P., Appellant Josée Lachance, Representative of the Respondent