Citation: *Canada Employment Insurance Commission v KJ*, 2021 SST 413

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Rachel Paquette
Respondent:	K. J.

Decision under appeal:	General Division decision dated June 24, 2021 GE-21-874

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	August 17, 2021
Hearing participants:	Appellant's representative Respondent
Decision date:	August 20, 2021
File number:	AD-21-236

Decision

[1] The Commission's appeal is allowed.

Overview

[2] The Appellant (Commission) determined that the Respondent (Claimant) had work limitations indicated in his study permit that limited his chances of returning to the labour market. It decided that the Claimant was disentitled from being paid EI benefits as of December 21, 2020, because he was not available for work.

[3] After an unsuccessful request for reconsideration, the Claimant appealed the Commission's decision to the General Division.

[4] The General Division found that the Claimant did not set personal conditions that would unduly limit his chances of returning to the labour market. It found that the 20 hours limit imposed on the Claimant by his study permit was not a personal condition but the application of a federal law.

[5] The General Division concluded that the Claimant was capable of and available for work and unable to find suitable employment pursuant to section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[6] The Appeal Division granted the Commission leave to appeal of the General Division's decision. The Commission submits that the General Division erred in law in its interpretation of section 18(1) (a) of the EI Act.

[7] I must decide whether the General Division made an error when it concluded that the Claimant was available for work pursuant to section 18(1) (a) of the EI Act.

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

Issue

[9] Did the General Division make an error when it concluded that the Claimant was available for work pursuant to section 18(1) (a) of the EI Act even though the Claimant could not work more than 20 hours per week due to the limitations imposed by his study permit?

Analysis

Appeal Division's mandate

[10] 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]

[11] 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]

[12] 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 when it concluded that the Claimant was available for work pursuant to section 18(1) (a) of the EI Act even though the Claimant could not work more than 20 hours per week due to the limitations imposed by his study permit?

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

[13] 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.[3]

[14] 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,

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[4]

[15] 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.[5]

[16] 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.[6]

[17] The undisputed evidence shows that the Claimant could not work more than 20 hours per week due to the limitations imposed by his study permit.

[18] When considering the three factors together, the General Division found that the Claimant did not set personal conditions that would unduly limit his chances of returning to the labour market. It found that the 20 hours limit imposed on the Claimant by his study permit was not a personal condition but the application of a federal law.

[19] The Commission submits that the General Division erred in law by misapplying jurisprudence, specifically, the third factor in the legal test confirmed

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[3] Section 18(1) (a) of the EI Act.
[4] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[6] *Bertrand*, A-613-81, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.

in the *Faucher* decision, on the basis that the condition limiting the Claimant to working 20 hours per week was not a voluntary restriction set by the Claimant.[7]

[20] When considering the third factor, the General Division found that the Claimant had not set personal conditions that would unduly limit his chances of returning to the labour market, based on the following reasons:

1. The third factor in the *Faucher* test speaks about a claimant setting personal conditions;
2. The limit of 20 hours of work imposed by the Government of Canada was not the Claimant's choice and was not a personal condition he imposed;
3. The situation of the Claimant is different than in *Leblanc* because he is capable of working within the 20 hours per week limitation imposed by the Government.[8]

[21] For the following reasons, and with great respect, I find that the General Division erred in law by setting aside the Federal Court of Appeal case law.

[22] In *Leblanc*, a Federal Court of Appeal decision subsequent to *Faucher*, the claimant was unable to work for two weeks because of a fire that destroyed his house and all of his possessions, including his work clothes and boots. Even though Mr. Leblanc wanted to go to work nonetheless, he was unable to do so because he did not have the proper clothing and could not get to his workplace, which was some distance from his house.

[23] The Court established that in order to decide whether an individual is available for work, one must determine whether that individual is struggling with obstacles that are undermining his or her willingness to work. The Court clarified that obstacle meant any constraint of a nature to deprive someone of his or her

[7] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[8] *Canada (Attorney General) v Leblanc*, 2010 FCA 60.

free choice. It also pointed out that payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability.[9]

[24] The Court found that notwithstanding his desire to get to work, Mr. Leblanc was not available within the meaning of the EI Act because of obstacles preventing him from coming in to work.

[25] I note that Mr. Leblanc wanted to go to work. The limitation was not his choice and was not a personal condition he imposed. He rather struggled with obstacles that undermined his willingness to work and deprived him of his free choice.

[26] In an interview dated April 14, 2021, the Claimant confirmed that he was willing to work full time but that he was not able to due to the conditions of his study permit.[10] The Claimant's permit restriction limiting him to working 20 hours per week was clearly an obstacle that undermined his willingness to work each working day and deprived him of his free choice.

[27] For these reasons, I am of the view that the General Division erred when it set aside jurisprudence and concluded that the Claimant was available for work pursuant to section 18(1) (a) of the EI Act.

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.[11]

[29] I find that the Claimant was not available and unable to obtain suitable employment on each working days of a benefit period because he was struggling with an obstacle depriving him of his free choice and undermining his willingness

[9] Canada (Attorney General) v Leblanc, 2010 FCA 60, I. K. v Canada Employment Insurance Commission, 2017 CanLII 77108 (SST)
[10] GD3-49.
[11] Pursuant to section 59(1) of the DESD Act.

to work. His study permit restrictions unduly limited his chances of returning to the labour market.

[30] During the appeal hearing, the Claimant put forward that he has contributed to the EI program during his entire period of employment and that it is unfair that the Commission is now trying to deny him benefits.

[31] Despite my sympathy for the Claimant, the EI program is an insurance plan and like other insurance plans, claimants must meet the conditions of the plan to obtain benefits. In this case, he does not meet those conditions and is therefore not entitled to benefits.

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

Conclusion

[33] The Commission's appeal is allowed.

Pierre Lafontaine
Member, Appeal Division