



Citation: *Canada Employment Insurance Commission v HM*, 2022 SST 934

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Rachel Paquette

Respondent: H. M.

Decision under appeal: General Division decision dated April 18, 2022
(GE-22-853)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: September 21, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: September 23, 2022

File number: AD-22-289

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was disentitled from receiving EI regular benefits for the periods from October 13, 2021 to October 14, 2021, and from October 18, 2021, to March 4, 2022, because he was attending a training program on his own initiative and had not proven his availability for work. The Commission maintained its initial decision after reconsideration. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant had shown that he was capable of and available for work but unable to find a suitable job until he started a new job on January 24, 2022. Further, for the period from October 13, 2021, to December 17, 2021, the General Division determined that the Claimant did not set personal conditions that would have unduly limited his chances of going back to work while attending a fulltime training program because his classes were online and he could work afternoons, evenings and weekends.

[4] The Appeal Division granted the Commission leave to appeal of the General Division's decision. The Commission does not dispute the General Division's decision to allow the Claimant's appeal for the period from December 18, 2021, to March 4, 2022. The Commission submits that the General Division made an error in law when it concluded that the Claimant was available for work from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021.

[5] I must decide whether the General Division made an error in law when it concluded that the Claimant was available for work from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021.

[6] I am allowing the appeal.

Issue

[7] Did the General Division make an error in law when it concluded that the Claimant was available for work from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021?

Analysis

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 of law when it concluded that the Claimant was available for work from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021?

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

² *Idem*.

[11] The Commission does not dispute the General Division's decision to allow the Claimant's appeal for the period from December 18, 2021, to March 4, 2022.

[12] The Commission submits that the General Division made an error in law when it concluded that the Claimant was available for work from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021.

[13] The Claimant submits that he was approved to take this course or program as part of a government-sponsored Employment or Skills Development program. He submits that two other students attending the same program received EI benefits.

[14] The General Division found that the Claimant had shown that he was capable of and available for work but unable to find a suitable job until he started a new job on January 24, 2022. Further, for the period from October 13, 2021, to December 17, 2021, the General Division determined that the Claimant did not set personal conditions that would have unduly limited his chances of going back to work while attending a fulltime training program because his classes were online and he could work afternoons, evenings and weekends.

[15] 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

[16] 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.⁴

³ Section 18(1) (a) of the EI Act.

⁴ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[17] Furthermore, availability is determined 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**.⁵

[18] For the purposes of sections 18 of the *Employment Insurance Act* (EI Act), a working day is any day of the week except Saturday and Sunday.⁶

[19] The evidence shows that the Claimant was a full-time student in a full-time program from October 13, 2021, to December 17, 2021. He declared that he had to log in during the mornings from Monday to Friday to do workshops on various topics, and in the afternoons, he had projects to complete on his own. The Claimant confirmed that he was officially in training 30 hours each week.⁷ He also testified before the General Division that he was available to work afternoons (after 3:00 pm) and evenings while he was in school from October 13, 2021, to December 17, 2021.

[20] 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. A claimant must establish their availability for work for each working day in a benefit period and this availability **must not be unduly limited**.

[21] Furthermore, it is well-established case law 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.⁸

⁵ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

⁶ Section 32 of the *Employment Insurance Regulations*.

⁷ See GD3-18.

⁸ *Vézina v Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40; *Duquet v Canada (Attorney General)*, 2008 FCA 313; *Bertrand*, A-613-81, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.

[22] For these reasons, I find that the General Division erred in law in its interpretation of section 18(1) (a) of the EI Act and ignored the Federal Court of Appeal case law regarding a claimant's availability for work while attending full-time school.

[23] I am therefore justified to intervene.

Remedy

[24] Considering that both parties had the opportunity to present their case before the General Division, I will render the decision that should have been given by the General Division.⁹

[25] The evidence shows that the Claimant had to log in during the mornings from Monday to Friday to do workshops on various topics, and in the afternoons, he had projects to complete on his own. The Claimant confirmed that he was officially in training 30 hours each week. He testified that he was available to work afternoons (after 3:00 p.m.) and evenings while attending school from October 13, 2021, to December 17, 2021.

[26] I find that the evidence supports a conclusion that the Claimant's availability for every working day was unduly limited and restricted to irregular hours resulting from his training schedule.

[27] Pursuant to section 18(1) (a) of the EI Act, and in applying the *Faucher* test, I find that the Claimant was not available and unable to obtain suitable employment while attending full-time training from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021.

[28] In regards to the Claimant's position that his training was approved, there is no evidence before the General Division to support that conclusion.

⁹ Pursuant to section 59(1) of the DESD Act.

[29] During the reconsideration process, the Commission advised the Claimant that he was attending a full-time non-referred training.¹⁰ The Claimant did not provide any evidence to the contrary before the General Division.

[30] Unfortunately, for the Claimant, the fact that some other students in the same course as him received benefits does not make him eligible to receive benefits.¹¹

Conclusion

[31] The appeal is allowed.

[32] The Claimant was not available for work and unable to obtain suitable employment while attending full-time training from October 13, 2021, to October 14, 2021, and from October 18, 2021, to December 17, 2021.

Pierre Lafontaine
Member, Appeal Division

¹⁰ See GD3-26.

¹¹ See CUB 56268.