[TRANSLATION]

Citation: *Canada Employment Insurance Commission v RT*, 2023 SST 223

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Julie Meilleur
Respondent:	R. T.
Representative:	S. L.

Decision under appeal:	General Division decision dated October 20, 2022 (GE-22-2106)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	February 2, 2023
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	March 1, 2023
File number:	AD-22-827

Decision

[1] The appeal is allowed.

Overview

[1] The Respondent (Claimant) made an initial claim for Employment Insurance (EI) benefits on January 10, 2022, effective January 9, 2022.[1]

[2] On April 7, 2022, the Appellant (Commission) told the Claimant that it could not pay him benefits as of January 10, 2022. The Commission decided that the Claimant was not available for work. The Claimant asked the Commission to reconsider the initial decision, but it maintained its decision. The Claimant appealed the decision to the Tribunal's General Division.

[3] The General Division found that the Claimant had a desire to go back to work, that he had made sufficient efforts to find a job, and that he had not limited his chances of finding a job. The General Division found that the Claimant had shown that he was available for work within the meaning of section 18(1)(a) of *the Employment Insurance Act* (EI Act).

[4] The Commission is now asking the Appeal Division for permission to appeal the General Division decision. It argues that the General Division made an error of law in its interpretation of section 18(1)(a) of the EI Act.

[5] I must decide whether the General Division made an error when it found that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act.

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

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[1] The General Division decided that the application could be treated as though it was made on October 31, 2021.

Issue

[7] Did the General Division make an error in finding that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal (FCA) has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of *the Department of Employment and Social Development Act*.[2]

[9] 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.

[10] So, 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, I must dismiss the appeal.

Did the General Division make an error when it found that the Claimant was available for work within the meaning of section 18(1)(a) of the EI Act?

[11] The Commission says that the Claimant was working on call, had a job that was suitable for him, and was not looking for other work. It says that a claimant must be actively looking for work to be entitled to benefits and cannot just wait to be called back to work.

[12] The Commission argues that the evidence does not allow the Claimant to meet the second *Faucher* factor required by the Federal Court of Appeal.[3]

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

[13] The Claimant says that the General Division assessed his availability on the basis that he was working and that he always showed his desire to work all the hours that his employer could offer him. In addition, the General Division found that the Claimant's other job search efforts were sufficient based on the documents provided at the hearing before the General Division.

[14] Availability must be determined by analyzing three factors:

a) wanting to go back to work as soon as a suitable job is available

b) expressing that desire through efforts to find a suitable job

c) not setting personal conditions that might unduly limit the chances of going back to work

[15] In addition, 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 find a suitable job.[4]

[16] The General Division found that the Claimant showed a desire to work since he worked between 7.5 and 43 hours per week for his employer.

[17] But, the issue has more to do with whether the Claimant's job search efforts were enough within the meaning of the law.

[18] The General Division found that the Claimant had shown that he had made reasonable and customary efforts to find a suitable job since he was under contract with his employer until May 2022.

[4] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[19] On February 2, 2022, the Claimant said that his employer offered him a contract of at least two days per week. He indicated that he was not looking for another job. He said that he worked for his employer part-time from July to November 2021. Since November, he had been on call for the same employer.[5]

[20] On April 4, 2022, the Claimant said that he was not limiting himself to part-time work. He added that he would have accepted a contract of five days a week if his employer had offered it to him.[6]

[21] In support of his reconsideration request dated April 20, 2022, the Claimant said that he was open to opportunities that could appear.[7]

[22] On May 20, 2022, the Claimant said that he had not been actively looking for work since April 5, 2022. He said that he wanted to do things right and wait to see what his employer would offer him. If that did not work out, he would look elsewhere to find something else.[8]

[23] I note that the Claimant told three different agents that he was waiting for work from his regular employer. This was not a simple misunderstanding. It is clear from the Claimant's many initial statements that he wanted to prioritize his employer.

[24] The evidence shows, on a balance of probabilities, that the Claimant's availability for work did not result in concrete and sustained job search efforts to find a job. He chose to prioritize the employer who gave him on-call work, rather than continuously look for another job that would be full-time.

[25] Even if the Claimant was considered to have made efforts to find another job, they were clearly limited and insufficient. The Claimant wanted to prioritize his employer before [translation] "looking elsewhere for something else."

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[5] See GD3-26.
[6] See GD3-29.
[7] See GD3-46.
[8] See GD3-54.

[26] I am of the view that the General Division made an error by not considering the material before it. In addition, the General Division made an error in its interpretation of the second *Faucher* factor.

[27] This means that I am justified in intervening.

Remedy

[28] I am of the view that the parties had the opportunity to present their case before the General Division. So, I will give the decision that the General Division should have given.[9]

[29] I am of the view that the Claimant does not meet the second *Faucher* factor.

[30] The evidence shows, on a balance of probabilities, that during the period in question, the Claimant was waiting for his regular employer to offer him work. However, a claimant cannot just wait to be called back to work and must actively look for work to be entitled to benefits.

[31] To get EI benefits, the Claimant had to actively look for a suitable job even though it seemed more reasonable to him to be content with his work from his regular employer.

[32] Did the Commission have an obligation to notify the Claimant to expand his job search?

[33] I am of the view that notifying a claimant may be required when they have properly shown that their efforts to get a suitable job were reasonable. When notifying them would be useless, like in this case, it is certainly not necessary, since the Claimant has said several times that he was not actively looking for another job so that he would be available for his employer.[10]

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[9] In accordance with the powers given to the Appeal Division under section 59(1) of *the Department of Employment and Social Development Act*.
[10] *Canada (Attorney General) v Stolniuk*, A-687-93.

[34] For these reasons, I am allowing the Commission’s appeal.

Conclusion

[35] The appeal is allowed.

Pierre Lafontaine

Member, Appeal Division