[TRANSLATION]

Citation: *Canada Employment Insurance Commission v PN*, 2024 SST 108

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault
Respondent:	P. N.

Decision under appeal:	General Division decision dated September 12, 2023 (GE-23-1486)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	January 25, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	February 6, 2024
File number:	AD-23-898

Decision

[1] The appeal is allowed on the issue of availability. The Claimant has not proven that she was available for work while taking training full-time.

Overview

[2] The Respondent (Claimant) applied for Employment Insurance (EI) benefits. The Appellant (Commission) reviewed the Claimant's file. It decided that she voluntarily left (or chose to quit) her job without just cause. It also decided that the Claimant was not available for work while taking training full-time. So, the Commission was not able to pay her benefits.

[3] The Claimant argued that she did not leave her job. Her employer's human resources had assured her she would be transferred from Ottawa to Sudbury. She argued that she was available for work while in school. On reconsideration, the Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division decided that human resources in Ottawa had directed her to transfer and had started the process with X Sudbury in her favour. It found that the Claimant had never intended to leave her job, but to transfer to another X office with human resources' direction and encouragement. The General Division also found that the Claimant was available for work within the meaning of the law.

[5] The Commission was granted permission to appeal the General Division's decision. She argues that the General Division did not consider the evidence before it and that it made an error of law.

[6] I have to decide whether the General Division made its decision without regard for the material before it, and made an error in its interpretation of sections 18(1)(a) and 29(c) of the *Employment Insurance Act* (EI Act).

[7] I am allowing the Commission's appeal on the issue of availability.

Issues

[8] Did the General Division make its decision without regard for the material before it, and did it make an error in its interpretation of sections 18(1)(a) and 29(c) of the EI Act?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal 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*.[1]

[10] 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.

[11] 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, the Tribunal must dismiss the appeal.

Preliminary remarks

[12] I listened to the recording of the General Division hearing to decide this appeal.

[13] It is well established that I have to rely on the evidence that was before the General Division in deciding the Claimant's application for permission to appeal. A hearing before the Appeal Division is not a new opportunity to present evidence. The powers of the Appeal Division are limited by law.[2]

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

Did the General Division base its decision without regard for the material before it and did it make an error in its interpretation of sections 18(1)(a) and 29(c) of the EI Act?

– **Voluntary leaving**

[14] The Commission argues that the General Division made an error of law because it did not decide whether the Claimant had actually voluntarily left her job.

[15] It was the Commission's responsibility to prove before the General Division that the Claimant had voluntarily left her job.

[16] The Claimant said that she had decided, with her employer, to go to school to enhance her skills. She had been working as an orderly since July 2018 for X Ottawa. Wanting to take training in special education techniques in Sudbury, she asked for a transfer to the Sudbury office.

[17] The General Division found the Claimant's testimony credible.

[18] The General Division found that human resources in Ottawa had in fact directed the Claimant toward a transfer and had initiated the process with X Sudbury in the Claimant's favour.

[19] The General Division found that **the Claimant never intended to leave** her job, but to transfer to another X office with HR's direction and encouragement.

[20] The employer argued to the Commission that, because of the different districts, the employee had to leave her job and apply at the new location in the district, like any member of the public.

[21] Yet the Claimant's employment contract does not support that claim. It says that the Claimant is hired by the employer X. The Claimant is assigned **to the Ottawa branch**.[3] The employment contract lends weight to the Claimant's version of events that

[3] Branch definition: An establishment that reports to a head office.

the employer instead directed her toward a transfer and started taking steps to that end with the **Sudbury branch**.

[22] The General Division found that it was not unreasonable for the Claimant to accept what human resources in Ottawa said about her being transferred to another office.

[23] Case law has consistently held that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it. I can find no reason to intervene on the issue of the Claimant's credibility, as assessed by the General Division.

[24] The evidence does not show, on a balance of probabilities, that the Claimant initiated the end of her job. The Commission did not meet its burden of proof.

[25] Once it was determined that the Claimant did not leave her job voluntarily, it was not necessary for the General Division to determine whether there were reasonable alternatives.

[26] This ground of appeal is dismissed.

– **Availability**

[27] The Commission argues that the General Division's finding, if there is one, is not supported by a concrete analysis of that availability under the factors established by case law and legislation, since the General Division makes no reference to section 18(1)(a) of the EI Act or to existing case law to support its argument that the Claimant was available for work.

[28] It is true that the General Division's decision is not an example of clarity. Nevertheless, there is evidence that it did consider the law and the *Faucher* test.[4]

[29] The General Division found that the Claimant's proposed schedules showed her availability and were suitable for an orderly's schedule. It noted that the Claimant

[4] *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).

testified at the hearing that she started working on October 18, 2022, for X Sudbury, which, in her view, removed the presumption that she could not work or was not available because she was studying special education techniques full-time.

[30] The General Division found that the type of work the Claimant did made it possible for her to take her course full-time. It considered that the Claimant had worked irregular hours for four years and had worked a lot of overtime.

[31] Relying on *Page*, the General Division found that the Claimant was available for work within the meaning of the EI Act even though she was taking training full-time.[5]

[32] But it is clear from the evidence that, unlike *Page*, the Claimant was willing to work only on weekends and a few hours per week while in school. She spent 42 hours per week on her studies.[6]

[33] The Claimant testified before the General Division that she had found a job at X that offered her few hours of work but made it possible for her to have some pocket money while in school.[7]

[34] The Claimant's testimony before the General Division is consistent with her many prior statements of only looking for part-time or casual work to focus on her studies.[8]

[35] I am of the view that the General Division made its decision without regard for the material before it and that it made an error of law. It could not find that the Claimant was available for work within the meaning of the law, given the evidence before it.

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

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[5] See *Page v Canada (Attorney General)*, 2023 FCA 169.
[6] General Division hearing recording: 42:16 to 43:12.
[7] General Division hearing recording: 33:08 to 33:35, and 43:42 to 44:16.
[8] See GD3-19, GD3-22, and GD3-31.

Remedy

[37] Considering that the parties had the opportunity to present their case before the General Division, I will give the decision that it should have given.

[38] To be considered available for work, a claimant must show that they are capable of and available for work and unable to obtain suitable employment.

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

(a) the desire to go back to work as soon as a suitable job is available

(b) the expression of 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

[40] Also, 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 a suitable job.

[41] To be entitled to benefits, a claimant must establish their availability for work and, to do so, they must **actively look** for work. A claimant must establish their availability for work for each working day in a benefit period. A mere statement of availability is not enough.[9]

[42] The evidence shows that the Claimant was willing to work only on weekends and a few hours per week while in school. She spent 42 hours per week on her studies. She repeatedly stated that she was only looking for part-time or casual work to focus on her studies.

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[9] See *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; and *Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[43] The Claimant testified before the General Division that she found a job at X that offered her few hours of work but made it possible for her to have some pocket money while in school.

[44] The Claimant's testimony before the General Division is consistent with her many prior statements where she says she is only looking for part-time or casual work to focus on her studies.

[45] The Federal Court of Appeal has issued several decisions where full-time students were not entitled to EI benefits when they restricted the type of work they were looking for or limited the hours they were willing to work to weekends or a few hours per week.[10]

[46] The evidence shows that the Claimant was not actively looking for work and that her availability was unduly limited by her studies.

[47] For these reasons, I find that the Claimant has not proven that she was available for work while in school pursuant to section 18(1)(a) of the EI Act.

Conclusion

[48] The Commission's appeal is allowed on the issue of availability. The Claimant has not proven that she was available for work while taking training full-time.

Pierre Lafontaine
Member, Appeal Division

[10] See *Page*, supra, at para 64.