Citation: *Canada Employment Insurance Commission v. AM*, 2021 SST 751

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Rachel Paquette
Respondent:	A. M.
Representative:	Nicole Fowlie

Decision under appeal:	General Division decision dated August 27, 2021 (GE-21-1295)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	December 2, 2021
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	December 13, 2021
File number:	AD-21-311

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant (Commission) decided that the Respondent (Claimant) was disentitled from receiving EI regular benefits from January 10, 2021, because she was attending university on her own initiative and had not proven her 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 expressed a desire to work in remaining available for recall with her existing employer. It found that the Claimant's efforts in awaiting recall and her two job applications in May 2021 were enough to prove she had made efforts to find a suitable job. The General Division found that the Claimant did not place any personal restrictions that unduly limited her return to the workforce. It concluded that the Claimant had shown that she was available for work within the meaning of the law.

[4] The Appeal Division granted the Commission leave to appeal. It submits that the General Division made errors of fact and law when it concluded that the Claimant was available for work while attending full-time university.

[5] I must decide whether the General Division made an error in fact or in law when it concluded that the Claimant was available for work while attending full-time university on her own initiative.

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

Issue

[7] Did the General Division make an error in fact or in law when it concluded that the Claimant was available for work while attending full-time university on her own initiative?

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 in fact or in law when it concluded that the Claimant was available for work while attending full-time university on her own initiative?

[11] The Commission submits that the General Division erred in law by misapplying the legal test for availability, as the claimant admitted she was only available for part-time work and that she was not looking for other employment while going full-time to university.

[12] The Commission also submits that the General Division ignored that the Claimant confirmed that she was not looking for other employment while going to school and that she was available full time work only after her course ended.

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

[13] The evidence shows that the Claimant had been working 30 to 34 hours biweekly while attending school full-time, prior to being laid off in January 2021. She declared that she would not have quit her program to work a full-time job but she could have worked full-time if the work hours were in the morning and evening. She said her flexible school schedule allowed her to work for her existing employer. She was waiting for her employer to call her back to work and applied for other jobs in May 2021. The Claimant stated that in the summer, she was available any day, any time.

[14] The General Division found that the Claimant expressed a desire to work in remaining available for recall with her existing employer. It found that the Claimant's efforts in awaiting recall and her two job applications in May 2021 were enough to prove she had made efforts to find a suitable job. The General Division found that the Claimant did not place any personal restrictions that unduly limited her return to the workforce. It concluded that the Claimant had shown that she was available for work within the meaning of the law.

[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 *Employment Insurance Act* (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 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. She was not willing to give up her course to take a full-time job. Both of those restricted her from obtaining full-time jobs during regular business hours, Monday to Friday. She also was not actively looking for a full-time job but rather waiting to return to her regular employer who had flexible hours permitting her to work around her school schedule.

[20] I note that the case law followed by the General Division 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.[7]

[21] However, there is more recent case law than that followed by the General Division that establishes that a claimant cannot merely wait to be called back to work and must look for employment to be entitled to benefits. It follows the reasonning that the employment insurance program is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits.[8]

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[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[6] Section 32 of the *Employment Insurance Regulations*.
[7] *Canada (Attorney General) v MacDonald*, A-672-93, in appeal of Umpire decision CUB 23283.
[8] *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.

[22] The evidence before the General Division clearly shows that the Claimant was waiting to return to work part time for her usual employer during her studies because the employer offered flexible hours to work around her school schedule. Even if one had to consider that she was looking for work apart from waiting for her regular employer, her search was very limited, which goes against her availability.

[23] 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.

[24] 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.[9] The Claimant admitted that she only wanted part-time work because she needed flexible hours due to school.[10]

[25] 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.

REMEDY

[26] 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.[11]

[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 university from January 10, 2021.

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[9] *Bertrand*, A-613-81, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.
[10] See GD3-31.
[11] Pursuant to section 59(1) of the DESD Act.

Conclusion

[28] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division