Federal Court Cour fédérale

Date: 20160218

Docket: T-1190-15

Citation: 2016 FC 220

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 18, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DANIELLE BERGERON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Appeal Division of the Social Security Tribunal (Appeal Division), dated June 22, 2015, denying an application for leave to appeal a decision by the General Division of the Social Security Tribunal (General Division).

[2] The facts of the case are not in dispute, although the parties disagree on how they should be interpreted.

[3] Toward the end of 2013, the Applicant submitted a benefit claim, which was approved by the Canada Employment Insurance Commission (the Commission). The Applicant was unemployed from November 2013 to July 1, 2014 when she accepted a full-time job as a mortgage broker with Multi-Prêts. In August 2014, the Commission conducted a telephone interview with the Applicant. She said she had started working full time at Multi-Prêts, but was paid on commission only. She also said that she spent an average of 30 hours per week on this job and wanted to make it her main source of income; and that she usually worked Monday to Friday, days and evenings, as well as the occasional weekend. The Applicant also said she wanted to find a part-time job while continuing to work at Multi-Prêts and was looking for 11 to 20 hours of work per week. Finally, she said the firm was looking for full-time brokers and that she could not work as a broker for another firm.

[4] On August 11, 2014, the Commission determined that the Applicant was not entitled to employment insurance benefits starting on July 1, 2014, because she was not considered available for work. The Commission therefore imposed an indefinite disentitlement effective July 1, 2014, as well as a $1904.00 overpayment amount. On September 8, 2014, the Applicant submitted a request for reconsideration. The Commission telephoned the Applicant to obtain additional information. The Applicant said she was available for work as a banking representative, that she could provide proof that she was looking for work, and that she was free

to set her brokerage schedule as she saw fit. Following this discussion, the Commission denied the request for reconsideration and maintained the disentitlement and the overpayment.

[5] On November 17, 2014, the Applicant filed a notice of appeal before the General Division of the Social Security Tribunal, but the notice was incomplete. On November 29, 2014, she filed a second notice of appeal. On January 15, 2015, a teleconference hearing was held. On April 14, 2015, the General Division dismissed the Applicant's appeal. The General Division determined that the Applicant had failed to prove she was available for work because she was working full-time. On May 14, 2015, the Applicant addressed the Appeal Division. On June 22, 2015, a member of the Appeal Division reviewed the case. Considering, on the one hand, that the General Division had correctly applied the relevant tests in assessing the Applicant's availability, and on the other hand, that the application for leave to appeal did not raise any question of fact or law or jurisdiction whose response might provide a basis for setting aside the General Division's decision, the member of the Appeal Division refused to grant leave to appeal, hence this application for judicial review.

[6] Reasonableness is the standard that applies to the judicial review of a decision by a member of the Appeal Division denying leave to appeal under the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (*DESDA*). In short, does the refusal here to grant leave to appeal fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law?

[7] From the standpoint of applicable law, under paragraph 18(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was "capable of and available for work and unable to obtain suitable employment." In *Faucher v. Canada (Employment and Immigration Commission)*, (1997) FCA No. 215 (*Faucher*), the Federal Court of Appeal indicated that a claimant's availability is a question of fact that must be determined by analyzing the following three factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; and

c) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[8] Also, under subsection 58(1) of *DESDA* the following errors or failures are the only grounds of appeal:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division 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.

[9] Furthermore, an appeal before the Appeal Division is not an appeal where a *de novo* hearing is held, i.e. where a party can resubmit its evidence and hope for a different decision. That said, the claimant must obtain leave to appeal. However, under subsection 58(2) of *DESDA*,

"Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[10] The Applicant is representing herself in these proceedings. Her factum is very brief and simply reasserts the grounds of appeal previously examined. The Applicant maintains that the Appeal Division did not comply with subsection 58(1) of *DESDA* by not considering the elements brought to its attention (specifically in terms of the Applicant's employment searches), whereas the Appeal Division compared her case to *Faucher*, which constitutes a reviewable error. In her oral submissions before the Court, the Applicant again relied on the facts and explanations previously considered and rejected both by the Commission and the Social Security Tribunal (General Division and Appeal Division).

[11] The Applicant had the burden of demonstrating to the member of the Appeal Division that her appeal was reasonably likely to succeed based on the evidence in the docket and the criteria set out in subsection 58(1) of *DESDA*. The member of the Appeal Division did in fact consider the grounds of appeal submitted by the Applicant and examined the General Division's decision. However, the Applicant was simply seeking a new assessment of the evidence, which is not the Appeal Division's role. The appeal arguments put forward by the Applicant in her application for leave to appeal did not undermine the reasonableness of the General Division's decision. The Applicant did not challenge the fact that she was employed full-time at Multi-Prêts. Rather, she alleged that she had not received any income during the period in dispute because she was paid on commission and did not expect to be paid until November 2014. Further, there was no serious basis for the Applicant's argument related to *Faucher*. Her "case"

was not compared to the case in *Faucher*. Rather, it was assessed in light of the criteria established in that decision. However, the Applicant did not explain how the *Faucher* ruling would have been incorrectly interpreted or why it would not apply in this case. Finally, claimants who impose unreasonable restrictions regarding the type of work they are looking for or the area in which they decide to work cannot prove they are available (*Canada (Attorney General) v. Whiffen*, (1994) FCA No. 252 at paragraph 3).

[12] The Applicant did not convince me in this case that the Appeal Division committed a reviewable error, whereas its refusal to grant leave to appeal is based on the evidence in the docket and the applicable law. The Appeal Division's finding that the Applicant's appeal had no reasonable chance of success falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

[13] The application for judicial review will therefore be dismissed by the Court. In this case, the Respondent does not ask for costs.

JUDGMENT

THE COURT'S JUDGMENT is that the application for judicial review be dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1190-15
STYLE OF CAUSE:	DANIELLE BERGERON v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
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