Federal Court of Appeal | Cour d'appel fédérale

**Date: 20221018**

**Docket: A-48-21**

**Citation: 2022 FCA 175**

**CORAM:** **PELLETIER J.A.**
**WOODS J.A.**
**ROUSSEL J.A.**

**BETWEEN:**

**GUIYEOMASSY OH**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard by online video conference hosted by the Registry on September 12, 2022.

Judgment delivered at Ottawa, Ontario, on October 18, 2022.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: PELLETIER J.A.
WOODS J.A.

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## REASONS FOR JUDGMENT

**ROUSSEL J.A.**

[1] Ms. Oh, who is self-represented, seeks judicial review of a decision rendered on November 9, 2020, by the Appeal Division of the Social Security Tribunal (2020 SST 969).

[2] Ms. Oh applied for employment insurance benefits in April 2019. Although she tried to log into her Service Canada account several times, technical problems prevented her from

submitting her online application to the Canada Employment Insurance Commission and from completing her bi-weekly reports. As the Commission had not yet approved her benefits in August 2019, Ms. Oh moved to another province where she enrolled in a full-time apprenticeship program.

[3] In early January 2020, Ms. Oh contacted the Commission indicating that she was unable to file the bi-weekly reports due to technical problems. She spoke again with the Commission on February 14, 2020, and disclosed her enrollment in the apprenticeship program.

[4] Following this disclosure, the Commission determined on February 21, 2020, that Ms. Oh was not entitled to benefits between April and December 2019, as she had not shown good cause for failing to complete her reports within the allotted time. It also held that she was not entitled to benefits after August 2019 because she had taken a training course on her own initiative and had failed to prove she was available for work.

[5] Ms. Oh sought reconsideration of this decision. On April 22, 2020, the Commission rescinded the disqualification relating to the delay in filing the required reports, but upheld its finding that she had not proven her availability for full-time work from August 25, 2019, onwards.

[6] Ms. Oh then filed an appeal to the General Division of the Social Security Tribunal. In a decision dated June 23, 2020, the General Division dismissed the appeal (2020 SST 970) on the basis that Ms. Oh did not prove that she was capable of and available for work while she was in

full-time training and because she did not demonstrate she had made reasonable and customary efforts to find suitable employment.

[7] Ms. Oh applied for leave to appeal this decision to the Appeal Division. The Appeal Division granted her application on August 13, 2020, but later dismissed her appeal.

[8] The Appeal Division found that the General Division erred in failing to provide adequate reasons. In particular, it found that it could not determine whether the General Division properly applied the presumption that a person enrolled in a course of full-time study is generally not available for work. The Appeal Division noted that if the General Division applied the presumption to the period after Ms. Oh stopped attending school, it would have done so in error.

[9] The Appeal Division, after finding that the appeal record was complete, proceeded to make the decision the General Division should have made. The Appeal Division confirmed that Ms. Oh was not entitled to benefits during the period she attended the apprenticeship program, as she had not demonstrated the existence of exceptional circumstances that might have rebutted the presumption of unavailability. Regarding the period after she stopped going to school, the Appeal Division determined that while Ms. Oh had a desire to return to work and had not set personal conditions that limited her employment prospects, her search efforts to find employment were inadequate.

[10] Ms. Oh submits that the Appeal Division erred in its application of the presumption of unavailability. She claims that she was always available for work and she would never have

enrolled in the apprenticeship program had she not experienced technical difficulties in completing her application.

[11] Ms. Oh has not persuaded me that this argument has merit.

[12] Pursuant to paragraph 18(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23, a claimant is not entitled to employment insurance benefits if the claimant fails to prove that they were capable of and available for work and unable to obtain suitable employment. In addition, subsection 50(8) provides that the Commission may require the claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.

[13] While availability is not defined in the statute, this Court wrote in *Faucher v. Canada (Employment and Immigration Commission)*, [1997] F.C.J. No. 215 (QL) at paragraph 3, that a claimant's availability is determined by examining 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.

[14] This Court has also held that a claimant attending a course of full-time studies is presumed to be unavailable for work. The claimant may nevertheless rebut the presumption through proof of exceptional circumstances. One such circumstance is where the claimant has a history of holding full-time employment while attending school (*Canada (Attorney General) v. Cyrenne*, 2010 FCA 349 at para. 2; *Canada (Attorney General) v. Gagnon*, 2005 FCA 321 at

para. 6; *Canada (Attorney General) v. Rideout*, 2004 FCA 304 at para. 3; *Landry v. Canada (Deputy Attorney General)*, [1992] F.C.J. No. 965 (QL)).

[15] Paragraph 25(1)(*a*) of the *Employment Insurance Act* provided at the relevant time that a claimant is unemployed and capable of and available for work during a period when the claimant is attending a program of training to which the Commission, or an authority the Commission designates, has referred the claimant.

[16] In the case at hand, the Appeal Division noted the acknowledgement in Ms. Oh's leave application submissions that the Commission had not referred her to the apprenticeship program. It also noted that Ms. Oh had indicated at the hearing that she was still relying on her leave application submissions despite the fact that the counsel who had prepared them was no longer representing her. Given Ms. Oh was engaged in a full-time program and her admission that she was not referred to that program by the Commission, the Appeal Division's conclusion that the presumption of unavailability applied is reasonable.

[17] The Appeal Division then considered whether Ms. Oh had rebutted the presumption of unavailability despite the explicit statement in her leave application submissions that she was not appealing the decision to disentitle her for the period she was in school. It noted that Ms. Oh did not claim to have ever worked full-time while going to school. It also found that while the circumstances of Ms. Oh's enrollment in the apprenticeship program were sympathetic, they did not support a finding of exceptional circumstances.

[18] Under the framework enunciated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the burden of demonstrating that the decision is unreasonable lies with Ms. Oh (*Vavilov* at para. 100). While I accept that Ms. Oh might not have enrolled in the apprenticeship program had she not experienced technical difficulties in completing her application and that she might not have understood the referral requirement, she has not persuaded me that the Appeal Division's conclusion is unreasonable. The Appeal Division's reasoning regarding her disentitlement to benefits while in the apprenticeship program is both rational and logical and the decision is justified in relation to the facts and the law relevant to it (*Vavilov* at para. 85).

[19] Ms. Oh also disputes the Appeal Division's finding that her employment search efforts were inadequate after she stopped going to school. She further claims that the Appeal Division should have considered there were limited opportunities of employment in a time of pandemic.

[20] The Appeal Division properly applied the *Faucher* factors to determine Ms. Oh's availability. It agreed that Ms. Oh had a desire to return to work and that she did not set personal conditions that unduly limited her chances of entering the labour market by focusing on finding the kind of work with which she was most familiar. However, the Appeal Division was not satisfied that Ms. Oh's job search efforts were adequate. The Appeal Division noted that, with the exception of updating her resume and visiting "Indeed" and the federal government's jobs site, Ms. Oh did not describe any jobs she reviewed or to which she applied, nor did she offer any evidence of any other job search efforts. It also noted that despite the General Division

giving Ms. Oh additional time to supply evidence of jobs to which she applied or even the kinds of jobs she considered, she had failed to do so.

[21] The Appeal Division considered Ms. Oh's argument regarding the Commission's obligation to tell her exactly what she had to do to show her availability. However, it reminded Ms. Oh that the form she completed when she applied for benefits described the kind of job search efforts the Commission required of claimants and it instructed them to keep records.

[22] Upon review of the reasons and the record, I am satisfied that the Appeal Division's conclusion is reasonable. Ms. Oh had the burden of demonstrating that she made reasonable efforts to find suitable employment. During the hearing before the General Division, the member gave Ms. Oh many opportunities to particularize her efforts to seek employment. Similarly, she was given the opportunity following the hearing to respond in writing to specific questions, one of which asked her to state what she did to try to find a job and, if she applied for any job, to provide the company or department name, the job title, the date she applied and whether she had an interview. Ms. Oh did not provide any more detail or evidence in her response to the General Division's questions. Given the evidence on the record, the Appeal Division could reasonably find that her efforts were inadequate, both before and after the start of the pandemic.

[23] Ms. Oh further complains that the Appeal Division erred in failing to acknowledge the breach of procedural fairness that occurred before the General Division when she was denied her request for an interpreter.

[24] Ms. Oh has not persuaded me that the Appeal Division erred.

[25] An allegation of a breach of procedural fairness must be raised at the earliest opportunity. Ms. Oh did not raise the issue of interpretation in her leave application to the Appeal Division. While this Court did not have the benefit of the recording before the Appeal Division, it is unlikely that Ms. Oh raised it during the hearing since she indicated that she was relying on the counsel's written leave application submissions. The Appeal Division did not address the issue in its reasons, nor did Ms. Oh raise it in her post-hearing submissions either.

[26] I am nonetheless satisfied, based on the record before me, that Ms. Oh received a full and fair opportunity to put forward her case throughout the General Division's process.

[27] When Ms. Oh appealed the reconsideration decision to the General Division, she did not request an interpreter in her notice of appeal. She also indicated that she did not have a preferred type of hearing. She later wrote to the General Division requesting a hearing by way of written questions and answers. The member of the General Division was not convinced that Ms. Oh understood the legal test she had to meet to be successful in her claim. She also felt, after reviewing Ms. Oh's submissions, that a hearing over the phone would allow her to clarify the issues with Ms. Oh and better understand her arguments. As a result, and following an exchange of correspondence, the member wrote to Ms. Oh to confirm that the hearing would proceed by teleconference. The member informed Ms. Oh that if she felt she had not been able to communicate properly, she could provide written comments within five days of the hearing. In addition, the member welcomed any written arguments before the hearing and advised Ms. Oh

that the tribunal could provide the services of an interpreter. The member also informed Ms. Oh that she could be accompanied on the phone by a supporter.

[28] At the beginning of the teleconference, Ms. Oh informed the member that she would like to have the assistance of an interpreter. The member advised Ms. Oh that if she felt she still wanted an interpreter after they spoke for a while, she would adjourn the hearing. The member also indicated that if they proceeded, she would provide Ms. Oh the opportunity to respond to specific questions and provide any additional submissions in the event she felt misunderstood. Ms. Oh agreed to proceed. Following the teleconference, the member wrote to Ms. Oh with specific questions and asked her to provide more details about her job search. Ms. Oh provided a written response to the letter. She did not directly address the questions, saying that she had already addressed them during the hearing. Considering these circumstances, I fail to see how the lack of an interpreter resulted in a breach of procedural fairness. Ms. Oh was given many opportunities to present her case and she has not demonstrated how the outcome would have been different.

[29] Ms. Oh claims that the Appeal Division should have recognized that the member of the General Division "focused on nothing but [the] Faucher test to a point of harassment and mental torture." However, the record does not show that Ms. Oh made any arguments before the Appeal Division pertaining to harassment or discrimination by the General Division. The only issues that appear to have been raised were the allegations that the Commission, through one of its agents, had harassed her and discriminated against her and that Service Canada's poor service violated her human rights. The Appeal Division found that there was no evidence that the Commission

discriminated against Ms. Oh. It also found that if the Commission gave poor service or its agent had bad telephone manners, there was no evidence that this was based on a ground of discrimination recognized under the relevant human rights legislation. Ms. Oh has not demonstrated that this conclusion is unreasonable. As for the General Division's focus on the *Faucher* test during the hearing, I am of the view that the member was only trying to ensure that Ms. Oh addressed the relevant factors to prove that she was available for work.

[30] Ms. Oh also alleges in her memorandum of fact and law that the Appeal Division erred by failing to observe the principles of natural justice and procedural fairness. However, she has not clearly articulated nor demonstrated how she was denied procedural fairness and therefore I will not address this argument.

[31] While Ms. Oh's circumstances are unfortunate, she has failed to persuade me that there are grounds for this Court to intervene.

[32] For these reasons, I would dismiss the application for judicial review without costs.

"Sylvie E. Roussel"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Judith Woods J.A. "

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-48-21 |
| **STYLE OF CAUSE:** | GUIYEOMASSY OH v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEO CONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 12, 2022 |
| **REASONS FOR JUDGMENT BY:** | ROUSSEL J.A. |
| **CONCURRED IN BY:** | PELLETIER J.A.<br>WOODS J.A. |
| **DATED:** | OCTOBER 18, 2022 |

**APPEARANCES:**

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|---|---|
| Guiyeomassy Oh | FOR THE APPLICANT<br>(on her own behalf) |
| Maria Oswald | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| A. François Daigle<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |