Federal Court  Cour fédérale

Date: 20230320

Docket: T-1392-22

Citation: 2023 FC 372

Ottawa, Ontario, March 20, 2023

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

AFSHAN NIKHAT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Nikhat asks the Court to set aside the decision of the Appeal Division of the Social Security Tribunal of Canada [Appeal Division] refusing her leave to appeal the decision of the Social Security Tribunal of Canada General Division [General Division] that she was disentitled to Employment Insurance [EI] benefits because she was not available for work.

[2] I find the decision of the Appeal Division to be reasonable, and therefore, as explained during the hearing, this application must be dismissed.

[3] Ms. Nikhat received Employment Insurance Emergency Response Benefits [EI ERB] from March 15, 2020 to September 26, 2020. Once the EI ERB entitlement period ended, her claim automatically converted to EI regular benefits from September 27, 2020 to August 21, 2021.

[4] She was required to complete claimant reports in order to prove her entitlement to benefits for each week she was claiming benefits. She completed these reports for the entire period indicating that she was available for work throughout.

[5] Ms. Nikhat contacted the Canada Employment Insurance Commission [Commission] on September 1, 2021 and based on her statements, the Commission determined that she was not available for work from September 27, 2020, as she was taking care of her son. She had already received benefits during this period and thus there was an overpayment of $23,500, which she was asked to repay.

[6] Pursuant to section 112 of the *Employment Insurance Act*, SC 1996 c 23, Ms. Nikhat submitted a request for reconsideration [reconsideration] of the Commission's decision. She submitted that she was unavailable for work because of the pandemic, caring for her children, and grieving her father's passing. In February 2022, the Commission rendered its decision, concluding that although she had unknowingly misrepresented her availability and no penalty ought to be imposed, she was unavailable for work. It upheld the initial decision.

[7] Ms. Nikhat appealed the reconsideration decision to the General Division. The General Division determined that she was not available for work because she was caring for her son.

[8] Ms. Nikhat then applied for leave to appeal to the Appeal Division. In June 2022, the Appeal Division refused leave to appeal finding that the appeal had no reasonable chance of success.

[9] The sole issue is whether the Appeal Division's decision is reasonable.

[10] Ms. Nikhat submits that she was unavailable for work from June 2020 to September 2021 because of the pandemic. She applied for jobs in person during the pandemic with no success. The Applicant also lost her father during the pandemic, which she submits prevented her from returning to work.

[11] Ms. Nikhat says that as a Registered Early Childhood Educator, she is required to work in-person, and because of the pandemic, she was unable to do so. She applied for EI because of closure to all workplaces.

[12] She submits that she switched her son from in-person to online school full time from September 2020 to June 2021 because of the high number of COVID-19 cases and that she was required to care for him at home.

[13] She did not accept a job offer from her previous employer in July because it did not allow her to have a regular work schedule like pre-COVID. She says that in September 2021, she applied for jobs but was not hired. She found employment in October 2021.

[14] The Appeal Division relied on *Faucher v Canada (Employment and Immigration Commission)*, [1997] FCJ No 215 (QL) [*Faucher*] to guide its availability assessment. The three *Faucher* factors are: (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: *Oh v Canada (Attorney General)*, 2022 FCA 175 [*Oh*] at para 13.

[15] The Appeal Division appropriately focused on the Applicant's admission that she chose to care for her child instead of looking for work.

[16] I agree with the Respondent that the Appeal Division reasonably dismissed the Applicant's COVID-19 argument when it found the pandemic did not excuse her from showing her availability for work. She did not have to show availability for work from March 15, 2020 to September 26, 2020 because she was receiving EI ERB. However, once her benefits were converted from EI ERB to EI on September 27, 2020, she then had to show she was available for and was actively searching for work: *Canada (Attorney General) v Leblanc*, 2010 FCA 60 at para 5; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311 at para 1. The COVID-19 pandemic is not factored into the availability test: *Canada Employment Insurance Commission v*

SL, 2022 SST 556 at paras 30-32. On the evidence before the Court, Ms. Nikhat only applied for jobs while receiving EI ERB and then after her EI benefits were discontinued.

[17] The analysis of the *Faucher* factors properly applied to the relevant facts demonstrates that the Appeal Division's decision was reasonable. First, Ms. Nikhat refused to return to work when offered part-time employment in June 2021 because of the pandemic, and later refused because her father passed away in July 2021. The first refusal shows that she did not have a desire to return to the labour market as soon as a suitable job became available, and there is no evidence that her view changed.

[18] Second, there is no evidence that Ms. Nikhat was actively seeking employment from September 27, 2020. She argues that she applied for jobs in-person but she did not provide evidence of submitted job applications, contacting prospective employers for job opportunities, or assessing employment opportunities. Based on the lack of evidence, the Appeal Division's determination that she did not make an effort to find suitable jobs is reasonable.

[19] Third, on multiple occasions Ms. Nikhat submitted that she was unable to return to work because she was caring for her child. She stated that she chose to homeschool her son from September 2020 to June 2021 because of the high cases of COVID-19 and therefore, had no choice but to stay home and care for her son. She submits that if it were not for the pandemic, she would have been available for work.

[20] While I sympathize with the situation of Ms. Nikhat, by choosing to homeschool and care for her son, she set personal conditions that limited her ability to return to the labour market.

[21] The Appeal Division reasonably assessed the *Faucher* factors and further reasonably stated that the pandemic "does not eliminate the requirement to show availability within the meaning of the law."

[22] The Appeal Division reasonably concluded that the evidence supported the General Division's finding that Ms. Nikhat "did not demonstrate that she was available for work but unable to find a suitable job." Accordingly, the finding that there was no reasonable chance of success on appeal is justified and the decision to refuse leave to appeal is reasonable.

[23] It became clear during the hearing that the remedy sought by Ms. Nikhat is to have the amount of overpayment owing written off, as she is unable to afford this repayment. Regrettably, the decision of the General Division suggested that her avenue was to seek this remedy in this application. That is incorrect. The Commission, not this Court or the Social Security Tribunal, has jurisdiction to write-off such an amount: *Employment Insurance Regulations*, SOR/96-332, s 56. Although the inability of the Applicant to repay the amount was raised during the hearing before the General Division, no application was brought by her. At the request of the Court, counsel for the Respondent on this application agreed to advise Ms. Nikhat in writing of the steps she ought to take to seek that remedy now.

[24] Accordingly, the application is dismissed without costs.

[25] At the request of the Respondent, the style of cause is amended with immediate effect to name as the sole respondent, the Attorney General of Canada.

JUDGMENT in T-1392-22

THIS COURT'S JUDGMENT is that the style of cause is amended with immediate effect to name as the sole respondent, the Attorney General of Canada and this application is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1392-22
STYLE OF CAUSE:	AFSHAN NIKHAT v THE CANADIAN EMPLOYMENT INSURANCE COMMISSION AND THE ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Afshan Nikhat	FOR THE APPLICANT (ON HER OWN BEHALF)
Joshua Toews	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT