

**Citation: *Canada Employment Insurance Commission v. S. H.*, 2015 SSTAD 746**

**Date: June 17, 2015**

**File number: AD-13-1165**

**APPEAL DIVISION**

**Between:**

**Canada Employment Insurance Commission**

**Applicant**

**and**

**S. H.**

**Respondent**

**Decision by: Shu-Tai Cheng, Member, Appeal Division**

## REASONS AND DECISION

### INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the Board of Referees (Board) issued on April 10, 2013. The Board allowed the claimant's appeal although the Commission had imposed a disentitlement pursuant to subsection 18(a) of the *Employment Insurance Act* (Act). The Commission had determined that the claimant had not proven that she was available for work, as she was only seeking part-time work and was not willing to change her course schedule.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on April 29, 2013.

### ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

### THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[6] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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.

[7] For our purposes, the decision of the Board is considered to be a decision of the General Division.

## **SUBMISSIONS**

[8] The Applicant submitted in support of the Application that:

- a) the Board erred in law, and in fact and law, in making its decision when it failed to apply the legal test to the issue of availability.

In particular,

- b) the claimant was only seeking part-time work on Fridays after 4pm, Saturdays and Sundays;
- c) she was not willing to change her course schedule in order to accept work and her intention was to finish her course rather than accept work;
- d) the Board allowed the appeal citing CUB decisions but did not consider the legal test for availability; and
- e) the claimant failed to show that she is available for and seeking work without restrictions.

## **ANALYSIS**

[9] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[10] The Applicant's submissions suggest an error of law and erroneous finding of facts.

[11] In *Faucher v. Attorney General of Canada* (A-56-96), the Federal Court of Appeal stated that an EI claimant must satisfy three criteria to be found available for work:

- a) A wish to return to the labour market as soon as suitable employment is offered;
- b) An indication of this wish by efforts to find suitable employment; and
- c) An absence of personal conditions that unduly limit their chances of returning to the labour market.

[12] The Board's decision does not refer to *Faucher* or state the criteria to be considered to be found available for work. Under the heading "Finding of Fact, Application of the Law", the Board found that the claimant had previously worked part-time and sought part-time work. Citing CUB decisions for the proposition that a claimant who is willing to work part-time and who has a history of working part-time must be allowed a reasonable amount of time to find work, the Board allowed the claimant's appeal.

[13] The Applicant's grounds of appeal are that the Board erred in law, and in fact and law, in making its decision when it failed to apply the correct legal test to the issue of availability. The Board did not refer to the legal test or the criteria noted in paragraph [11] above or any legal test or criteria on the issue of availability.

[14] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant referred to the legal test(s) on the issue of availability and provided an explanation on how the Board is said to have failed to apply the correct test.

[15] The Application has set out reasons which fall into the enumerated grounds of appeal, and I am satisfied that the appeal has a reasonable chance of success.

## **CONCLUSION**

[16] The Application is granted.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[18] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng  
Member, Appeal Division