



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *H. L. v Canada Employment Insurance Commission*, 2019 SST 49

Tribunal File Number: AD-18-842

BETWEEN:

H. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: January 23, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division.

OVERVIEW

[2] The Applicant, H. L. (Claimant), worked X for several years. She owns 24.5% of X's shares. In March 2018, she was laid off because of a shortage of work. She filed for Employment Insurance benefits. The Commission refused to pay the Claimant benefits because she was not considered to be in a week of unemployment. According to the Commission, the Claimant is engaged in the operation of her own business, and she is considered to have worked a full working week. According to the Claimant, she was a salaried employee and is entitled to Employment Insurance benefits. The Claimant asked the Commission to reconsider its decision, but it maintained its initial decision. The Claimant appealed to the General Division of the Tribunal.

[3] The General Division found that, even though the Claimant was a salaried employee and her employment was insurable, she must meet the criteria in the EI Act and the *Employment Insurance Regulations* (EI Regulations) to qualify for benefits. It found that the Claimant was not engaged in the operation of her business to such a minor extent that she would not normally rely on that employment or engagement as her principal means of livelihood.

[4] The Claimant now seeks leave from the Tribunal to appeal the General Division decision.

[5] The Tribunal must decide whether there is an arguable case that the General Division made a reviewable error that gives the appeal a reasonable chance of success.

[6] The Tribunal refuses leave to appeal because the appeal does not have a reasonable chance of success based on any of the grounds of appeal raised by the Claimant.

ISSUE

[7] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

ANALYSIS

[8] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) specifies the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or 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] An application for leave to appeal is a preliminary step to a hearing on the merits of the case. It is an initial hurdle for a claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, a claimant does not have to prove their case; they must instead establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, a claimant must show that there is arguably some reviewable error on which the appeal might succeed.

[10] The Tribunal will grant leave to appeal if it is satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

[11] This means that the Tribunal must be in a position to determine, in accordance with section 58(1) of the DESDA, whether there is an issue of natural justice, jurisdiction, law, or fact that may lead to the setting aside of the decision under review.

Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

Insurability versus entitlement

[12] In support of her application for leave to appeal, the Applicant argues that the General Division erred by finding that the Commission could apply section 30 of the EI Regulations and find that she was engaged in the operation of a business, when the Canada Revenue Agency (CRA) had previously decided that she was an employee and that her employment for X was insurable under section 5(1)(a) of the *Employment Insurance Act* (EI Act). It is the Claimant's position that, since she was an employee, this rules out the possibility that she was engaged in the operation of a business.

[13] The General Division had to follow the teachings of the Federal Court of Appeal, which has already specifically answered the question that the Claimant raised.¹

[14] In that case, the Federal Court of Appeal decided that the Commission must perform two consecutive operations when assessing a claimant's Employment Insurance claim. It must first determine whether the claimant was employed in insurable employment during their qualifying period, then establish a benefit period for the claimant during which their entitlement will be verified.

[15] Once the first operation concerning the claimant's insurability has been performed, as in this case with the CRA's decision, the Commission must establish a benefit period, and, once it is established, benefits are payable to the claimant for each week of unemployment that falls in the benefit period.² A week of unemployment for a claimant is a week in which the claimant does not work a full working week.³

[16] Section 30(1) of the EI Regulations provides that, during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the

¹ *Canada (Attorney General) v d'Astoli*, 1997 CanLII 5609 (FCA).

² EI Act, s 9.

³ EI Act, s 11.

claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[17] Section 30(2) of the EI Regulations provides that, where a claimant is employed or engaged in the operation of a business as described in section (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[18] Insurability and entitlement to benefits are two factors that the Commission must assess regarding two different periods. Parliament has determined that the analysis of these two factors would be subject to separate rules that must not be combined since the insurability process is separate from the entitlement process.

[19] There is no question that insurability must be decided by the CRA according to the terms of section 90 of the EI Act and by the Tax Court of Canada, if there is an appeal, and that insurability refers to the qualifying period. At the same time, entitlement must be decided by the Commission and by the General Division, if there is an appeal, and entitlement refers to the benefit period.

[20] The General Division did not err by finding that the CRA's insurability decision was not binding on the Commission and the General Division for the question of entitlement to benefits. It also did not err by finding that the Commission could apply section 30 of the EI Regulations and assert that the Claimant was engaged in the operation of a business during her benefit period.

Unemployment status

[21] In support of her application for leave to appeal, the Claimant argues that section 30(3) of the EI Regulations leads to a very arbitrary interpretation because the interpretation is based on the Commission's summary of her responses. She presents the facts that support her position and argues that section 30(3) of the EI Regulations should not apply in her case.

[22] The Tribunal accepts that the Claimant, who attended the hearing, received the appeal file before the General Division hearing. She had sufficient opportunity to prepare her file and to clarify or supplement before the General Division the responses given to the Commission that she regarded as incomplete or arbitrary. Therefore, the General Division did not fail to observe a principle of natural justice.

[23] The evidence before the General Division clearly shows that the Claimant was engaged in the operation of a business through a partnership or co-adventure in accordance with the provisions of section 30(1) of the EI Regulations. Regardless of the legal forms, she has an interest in the business with other people.⁴

[24] The General Division assessed the evidence and, in light of the six factors set out in section 30(3) of the *Employment Insurance Regulations* (EI Regulations), found that the Claimant had not shown that her level of engagement in her business was to such a minor extent that she could not rely on it as a principal means of livelihood.

[25] The General Division found from the evidence that, during her benefit period, even though the operations slowed down, the Claimant dedicated herself to the business's activities.

[26] The evidence before the General Division shows that the Claimant is a co-owner of the business and has been engaged in its operations since it was founded. She holds the position of director of marketing/client services, and she oversees some employees as well as sales. She usually works 30 hour or more per week. The evidence also shows that the Claimant was the only employee out of the 18 employees, including part-time employees she manages, to be short of work in the business in March 2018. Nevertheless, she confirmed that she should be replaced if she left her sales and marketing position.

[27] The General Division also found that the business, which the Claimant is a shareholder of, had made investments of [\$]1.5 million. It noted that the Claimant was

⁴ *Canada (Attorney General) v Tremblay*, A-674-85.

significantly involved in the business because she had personally guaranteed the business with two business partners, her spouse and her daughter.

[28] The General Division found that the business was a success given the scale of its growth and the size of its investments. It considered that the Claimant had worked there since it was founded and that she was a shareholder in the business, which are factors that attest to the continuity of the employment or business. The General Division also found that the Claimant held a job with the business that was connected to her academic training.

[29] The General Division noted that the Claimant made only one real attempt to work somewhere other than for the business—namely with the electoral officer. It found that, during the periods in question, the Claimant's primary intention was to work for her business and keep it operating, and not to look for and immediately accept a new job.

[30] The Tribunal notes that the General Division based its decision on the evidence brought before it. The General Division did not err in finding that, based on the facts, more than four (4) criteria from section 30(3) of the EI Regulations lead to the conclusion that the Claimant was not engaged in operating her business to such a minor extent.

[31] The Claimant therefore did not demonstrate to the General Division that her level of involvement in her business was to such a minor extent that she could not rely on it as her principal means of livelihood.

[32] Unfortunately for the Claimant, an appeal to the Appeal Division is not an appeal in which there is a new hearing where a party can present their evidence again and hope for a favourable decision.

[33] The Tribunal finds that, despite the Tribunal's specific request, the Claimant has not raised any issue of law, fact, or jurisdiction that might lead to the setting aside the decision under review.

[34] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, the Tribunal has no choice but to find that the appeal has no reasonable chance of success.

CONCLUSION

[35] The Tribunal refuses leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	H. L., self-represented
-----------------	-------------------------