Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *O. S. v Canada Employment Insurance Commission*, 2019 SST 80

Tribunal File Number: AD-18-840

BETWEEN:

O. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 1, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, O. S. (Claimant), applied for Employment Insurance benefits after working as a warehouse clerk for the employer, X, from August 25, 2014, to September 18, 2017, inclusive. He stated that he began courses for an X certificate program at the Université du Québec en Outaouais (UQO) on September 5, 2017.

[3] The Respondent, the Canada Employment Insurance Commission, determined that the Claimant was not available for work on October 17, 2017, because he was writing an exam that day at the university. It determined the same for December 3, 2017, onward because he had not shown that he was available for work and looking for employment from that date onward. The Claimant requested a reconsideration of the decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division determined that the Claimant was not available for work on October 17, 2017, as well as from December 3, 2017, onward under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

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

[6] In support of his application for leave to appeal, the Claimant disputes the General Division's finding that he was not available for work. He argues that the General Division erred because it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner and without regard for the material before it.

[7] 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.

[8] 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

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

ANALYSIS

[10] Section 58(1) of the DESD Act sets out 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.

[11] 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 the Claimant to meet, but it is lower than the one that must be met at the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case; he must instead establish that the appeal has a reasonable chance of success. In other words, the Claimant must show that there is arguably some reviewable error based on which the appeal might succeed.

[12] 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.

[13] This means that the Tribunal must be in a position to determine, in accordance with section 58(1) of the DESD Act, 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?

[14] In support of his application for leave to appeal, the Claimant submits that he was available for work for each working day of the benefit period from December 3, 2017, onward, in accordance with section 18(1) of the EI Act. He argues that the General Division erred because it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner and without regard for the material before it.

[15] The Claimant also argues that the General Division has no credibility and that it does not have the necessary expertise to make Employment Insurance decisions.

[16] There being no precise definition in the EI Act, the Federal Court of Appeal has held on many occasions that availability must be determined by analyzing three factors—the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market—and that the three factors must be considered in reaching a conclusion.[1]

[17] Furthermore, availability is assessed for each working day in a benefit period in which the claimant can prove that they were capable of and available for work on that day and unable to obtain suitable employment.[2]

[18] The General Division found that the Claimant had not demonstrated a desire to return to the labour market as soon as he was offered a suitable job, but that he had instead chosen to not do this by prioritizing his training course and refusing to attend training sessions provided by the Commission to help him find a new job.

[19] The General Division also found that the Claimant's search for suitable employment was insufficient and that the jobs that he had applied for were mostly

[1] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[2] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

part-time or short-term or required a specialized qualification and work experience that he did not have.

[20] In the end, the General Division found that the Claimant had set conditions that unduly limited his chances of returning to the labour market by prioritizing his training course and refusing to attend the Commission's information sessions.

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

[22] The Tribunal notes that, in his application for leave to appeal, the Applicant does not raise any question of law, fact, or jurisdiction that may lead to the setting aside of the decision under review.

[23] After reviewing the appeal file, the General Division decision, and the Applicant's arguments, the Tribunal finds that the General Division considered the evidence before it and properly applied the *Faucher* factors in assessing the Applicant's availability.

[24] The Tribunal has no choice but to find that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	O. S., self-represented