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

[TRANSLATION]

Citation: *M. D. v Canada Employment Insurance Commission*, 2019 SST 176

Tribunal File Number: AD-19-87

BETWEEN:

M. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 11, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, Marcel Dubuc (Claimant), worked a X for X. He was on unpaid leave as of June 6, 2018. He was to return to work on August 29, 2018. According to the Commission, the Claimant was not available for work because he was not looking for work. As a result, he was not entitled to Employment Insurance benefits as of June 4, 2018. The Claimant requested a reconsideration of this decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant had not been available for work, under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

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

[5] In support of his application for leave to appeal, the Claimant disputes the General Division's finding that he had not been available for work. He argues that he has worked as a X for six years and that he was always entitled to his Employment Insurance. He submits that no one wanted to hire him because of his age and because he was returning to his employment as a X at the end of the summer. He argues that he always mentioned his return date on his application for benefits.

[6] On February 6, 2019, a letter was sent to the Applicant asking him to explain in detail why he was appealing. It also stated that it was not enough to simply repeat the testimony he gave to the General Division. The Tribunal received no response from the Applicant.

[7] The Tribunal must decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[8] The Tribunal refuses leave to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

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

Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal for 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.

[10] 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 on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case; instead, he must establish that his 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.

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

[12] 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?

[13] In support of his application for leave to appeal, the Claimant disputes the General Division's finding that he had not been available for work. He argues that he has worked as a X for six years and that he has always been entitled to his Employment Insurance. He submits that no one wanted to hire him given his age and because he was returning to his employment as a X at the end of the summer. He argues that he always mentioned his return date on his applications for benefits.

[14] 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 when reaching a conclusion.[1]

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

[16] The General Division found that the Claimant had not shown his desire to return to the labour market as soon as he was offered suitable employment but that he had instead chosen not to do so by giving priority to his employment as a X.

[17] The General Division also noted that the Applicant admitted that he had not looked for work.

[18] Finally, the General Division found that the Claimant had set conditions that unduly limited his chances of returning to the labour market by claiming that he could work only as a X.

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

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.

[19] The Tribunal finds that, in his application for leave to appeal and despite the Tribunal's express request, the Applicant has not raised any issue of law, fact, or jurisdiction that may lead to the setting aside of the decision under review.

[20] 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 applied the *Faucher* criteria properly in its evaluation of the Applicant's availability.

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

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	M. D., self-represented