



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. G. v Canada Employment Insurance Commission*, 2019 SST 298

Tribunal File Number: AD-19-150

BETWEEN:

**A. G.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 21, 2019

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, G. A. (Claimant), received Employment Insurance (EI) sickness benefits from January 14, 2018, to April 28, 2018. The Claimant requested that his claim be converted to regular EI benefits. After contacting the Claimant regarding his availability and capability the Canada Employment Insurance Commission (Commission), disentitled the Claimant from benefits from April 30, 2018, as he had not proven he was capable of and available for work and unable to find suitable employment. The Claimant requested a reconsideration of this decision, and the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division of the Tribunal.

[3] The General Division found that the Claimant did not prove that he was capable of and available for employment and unable to obtain suitable employment as he did not rebut the presumption that he was unavailable for work while attending a full-time course of instruction and he failed to prove that he was capable of work. Therefore the Claimant was disentitled from benefits under section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division.

[5] In support of his application for permission to appeal, the Claimant explains in detail the financial stress the General Division decision has put on him and his family. He submits that his life is torn apart because of a disagreement with his spouse on how they will meet their financial needs. He wants the Appeal Division to render a decision in his favor.

[6] The Claimant was sent a letter asking that he explain in detail his grounds of appeal. In his reply to the Tribunal, the Claimant essentially reiterated the arguments he made in his initial application for leave to appeal.

[7] The Tribunal must decide whether the Claimant raised some reviewable error of the General Division on which the appeal might succeed.

[8] The Tribunal refuses leave to appeal because the Claimant's appeal has no reasonable chance of success.

### **ISSUE**

[9] Does the Claimant raise some reviewable error of the General Division upon which the appeal might arguably succeed?

### **ANALYSIS**

[10] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) 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 had 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. 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 but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, the Claimant must prove that there is arguably some reviewable error on which the appeal might succeed.

[12] Therefore, before it can grant leave, the Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal mentioned above and that at least one of the reasons has 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 General Division decision under review.

**Does the Claimant raise some reviewable error of the General Division on which the appeal might succeed?**

[14] In support of his application for permission to appeal, the Claimant explains in detail the financial stress the General Division decision has put on him and his family. He submits that his life is torn apart because of a disagreement with his spouse on how they will meet their financial needs. He wants the Appeal Division to render a decision in his favor.

[15] 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. The three factors must be considered in reaching a conclusion.<sup>1</sup>

[16] Furthermore, availability is assessed for each working day in a benefit period for which the claimant can prove that on that day he or she was capable of and available for work, and unable to obtain suitable employment.<sup>2</sup>

[17] The undisputed evidence before the General Division shows that the Claimant was in training from April 20, 2018 to May 18, 2018. The training hours were from 8h30 am to 3h30 pm, Monday to Friday each week.

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<sup>1</sup> *Faucher v Canada (CEIC)*, A-56-96.

<sup>2</sup> *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[18] Attending full-time studies creates a rebuttable presumption that the person pursuing the studies is not available for work. That presumption may be rebutted by evidence of "exceptional circumstances."<sup>3</sup>

[19] The Claimant has the burden of proving the "exceptional circumstances." The General Division concluded that there was not enough evidence provided by the Claimant to meet his burden.

[20] The uncontested evidence before the General Division also shows that the Claimant is incapable of working full time for medical reasons. The Claimant declared that he could not work full time since he is on a surgery waiting list and that he had to remain on stand-by.<sup>4</sup> The Claimant testified before the General Division that his ankle injury has placed limitations on him since 2013 and that it had an impact on his ability to acquire work since that time. He also testified that he thought he could work while attending the course, but his doctor said that if he worked with his ankle injury it would deteriorate even more.

[21] Notwithstanding the Claimant's desire to work full-time, the evidence clearly shows that he was not capable of doing so.

[22] In order to decide whether an individual is available for work, one must determine whether that individual is struggling with obstacles that are undermining his willingness to work. Obstacle signifies any constraint of a nature to deprive someone of his free choice, such as family obligations or a lessening of the individual's physical strength.<sup>5</sup>

[23] The General Division found from the evidence that the Claimant, given his medical situation, is in a situation that prevents him from being available as defined in section 18(1)(a) of the EI Act.

[24] The Claimant, in his leave to appeal application, would essentially like to represent his case. Unfortunately, for the Claimant, an appeal to the Appeal Division of

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<sup>3</sup> *Landry v Canada (CEIC)*, A-719-91.

<sup>4</sup> GD3-25.

<sup>5</sup> *Canada (Attorney General) v Leblanc*, 2010 FCA 60.

the Tribunal is not a new hearing, where a party can represent its evidence and hope for a new favorable outcome.

[25] In his application for leave to appeal, the Claimant has not identified any reviewable errors, such as a jurisdictional error, or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law or any erroneous findings of fact that the General Division may have made in a perverse or capricious manner or without regard for the material before it in coming to its decision.

[26] For the reasons mentioned above and after reviewing the appeal file and the General Division decision and after considering the Claimant's arguments in support of his application for leave to appeal, The Tribunal finds that the appeal has no reasonable chance of success.

**CONCLUSION**

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

Pierre Lafontaine  
Member, Appeal Division

REPRESENTATIVE:	A. G., Self-represented
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