



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. E. v Canada Employment Insurance Commission*, 2019 SST 296

Tribunal File Number: AD-19-26

BETWEEN:

A. E.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: March 20, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. E., applied for Employment Insurance (EI) benefits in order to supplement her earnings, from part-time employment, with EI benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied the request because the Applicant did not prove her availability for work. The Applicant requested a reconsideration and submitted that, in her field of work, it is common for people to work part-time and receive EI benefits. The Commission maintained its initial decision.

[3] The Applicant appealed to the General Division of the Social Security Tribunal of Canada. The General Division found that the Applicant had not shown a sincere desire to work apart from her part-time job, had not made reasonable and customary efforts to obtain work and had set personal conditions that unduly limited her chances of finding full-time employment. Therefore, the Applicant was not available for work.

[4] The Applicant filed an application for leave to appeal with the Appeal Division and submitted that she should receive EI benefits because she is available to work.

[5] I find that the appeal does not have a reasonable chance of success because the Applicant simply repeats arguments that she made to the General Division and does not raise any reviewable errors.

ISSUES

[6] For the application for leave to appeal to be considered, an extension of time to apply for leave to appeal must be granted.

[7] Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant did not prove her availability for work?

ANALYSIS

[8] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.¹

[9] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground on which the proposed appeal might succeed?²

[10] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success³ based on a reviewable error.⁴ The only reviewable errors are the following: 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] The Applicant submits that the General Division was wrong because she was ready, willing and capable of working. The application for leave to appeal does not specify what reviewable error the General Division allegedly made.

Late Application and Extension of Time

[12] The Applicant was late in filing her application for leave to appeal with the Appeal Division.

[13] The General Division decision was mailed to the Applicant on November 29, 2018.⁵ The Applicant is deemed to have received the decision 10 days after the date that it was mailed, namely on December 9, 2018.

¹ *Department of Employment and Social Development Act* (DESD Act), ss 56(1) and 58(3).

² *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208 at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363 at para 22.

³ DESD Act, s 58(2).

⁴ *Ibid.*, s 58(1).

⁵ General Division decision cover letter, dated November 29, 2018.

[14] The period within which the Applicant was required to file an application for leave to appeal was 30 days from December 9, 2018, that is by January 8, 2019.

[15] The Applicant filed an incomplete application for leave to appeal on January 10, 2019. She completed her application on March 12, 2019.

[16] The Applicant was late filing her application for leave to appeal. In order to move forward with the application, the Appeal Division would have to grant an extension of time.

[17] In *Canada (Attorney General) v Larkman*,⁶ the Federal Court of Appeal held that, when a decision-maker is determining whether to allow an extension of time, the overriding consideration is that the interests of justice be served.

[18] If the appeal has a reasonable chance of success, then it would serve the interests of justice to grant the extension of time. Therefore, I will consider whether the appeal has a reasonable chance of success.

Issue: Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant did not prove her availability for work?

[19] I find that there is no arguable case that the General Division erred in law 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.

[20] The General Division stated that the onus was on the Applicant to prove her availability.⁷ This was a correct statement of the standard of proof.

[21] The General Division referred to and applied the legal test in *Faucher v Canada (Attorney General)*,⁸ which is binding jurisprudence.

[22] The General Division correctly stated the binding jurisprudence and the applicable legal tests, and, as a result, did not err in law.

⁶ *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁷ General Division decision at paras 20 and 21.

⁸ *Faucher v Canada (Attorney General)*, 1997 CanLII 4856 (FCA).

[23] The General Division did not err in law. The appeal has no reasonable chance of success based on this ground.

[24] The General Division considered the evidence in the documentary record. It also considered the testimony that the Applicant gave during the teleconference hearing. The General Division considered the Applicant's assertion that she was ready, willing and capable of working.

[25] The General Division correctly noted, "by itself, a mere statement of availability is not enough to discharge the burden of proof".⁹ The Applicant must prove that she met the three *Faucher* factors¹⁰ and the General Division determined that she met none.

[26] In the Application, the Applicant argues that she was available. In its decision, the General Division noted the Applicant's submissions before it. Essentially, the Applicant seeks to reargue her case at the Appeal Division using arguments similar to those she made at the General Division. Simply repeating her arguments falls short of disclosing a ground of appeal that is based on a reviewable error.

[27] The appeal has no reasonable chance of success based on the ground of serious error in the findings of fact.

CONCLUSION

[28] I am satisfied that the appeal has no reasonable chance of success, so the extension of time and application for leave to appeal are refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	A. E., self-represented
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⁹ General Division decision at paras 21 and 21.

¹⁰ *Ibid.* at paras 5-19.