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

[TRANSLATION]

Citation: *G. L. v Canada Employment Insurance Commission*, 2019 SST 625

Tribunal File Number: AD-19-433

BETWEEN:

G. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: July 4, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. L. (Claimant), worked as a dump truck driver for X from May 7 to November 16, 2018, inclusively. He stopped working for that employer because of a shortage of work. On November 21, 2018, the Claimant made a claim for Employment Insurance benefits after which he was paid benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was not available for work from February 18, 2019, onward and imposed a disentitlement from benefits on him effective that date. The Claimant requested a reconsideration, but the Commission upheld its initial decision.

[4] The Claimant appealed the reconsideration decision to the General Division.

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

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

[7] 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 or without regard for the material before it.

[8] 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.

[9] 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

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

ANALYSIS

[11] Section 58(1) of the 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 made in a perverse or capricious manner or without regard for the material before it.

[12] 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, he must show that there is arguably a reviewable error based on which the appeal may succeed.

[13] 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.

[14] 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 could 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?

[15] In support of his application for leave to appeal, the Claimant submits that he was available for work for each working day in his benefit period from February 18, 2019, 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 or without regard for the material before it.

[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 must prove that they were capable of and available for work on that day and unable to obtain suitable job.[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 because he wanted to resume the employment he held with X whenever he could do so.

[19] In a statement made to the Commission on February 26, 2019, the Claimant indicated that he was not making any active effort to find employment because he did not want to jeopardize his seasonal employment.[3]

[20] In a second statement made to the Commission on April 8, 2019, the Claimant indicated that he was available for work but that he wanted to resume his seasonal

---

[1] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[2] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[3] GD3-20.

employment with X. He then stated that he had not given his name to work as a truck driver with potential employers.[4]

[21] The General Division also found that the Claimant's availability for work has not led to concrete and sustained searches with the aim of finding employment.

[22] In his testimony before the General Division and in his statements to the Commission, the Claimant stated that he had not applied to potential employers who could have enabled him to do work similar to what he did with his usual employer.

[23] The Claimant argued before the General Division that he was having back problems (herniated disc), which meant that he could not work year-round driving trucks. However, the evidence the Claimant submitted before the General Division does not show that the Claimant had any functional limitations related to back pain that would have prevented him from finding employment.

[24] In the end, the General Division found that the Claimant set personal conditions that had unduly limited his chances of returning to the labour market by prioritizing his usual seasonal employer.

[25] 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.

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

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

---

[4] GD3-23.

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

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	G. L., self-represented