



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *B. B. v Canada Employment Insurance Commission*, 2019 SST 627

Tribunal File Number: AD-19-435

BETWEEN:

B. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: July 5, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, B. B. (Claimant), worked full-time as a bus driver starting September 15, 2018. He made a claim for benefits on December 23, 2018, because he was not working during the holiday season. The Claimant lost his permanent position as a bus driver in January 2019. He then worked as a substitute only. He filed an appeal with the Labour Court so that he could resume his position.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was not available for work from December 23, 2018, 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 for the period from December 23, 2018, to May 1, 2019, 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. 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 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

[10] 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.

[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, he must show that there is arguably a reviewable error based on which the appeal may 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 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 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?

[14] 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 December 23, 2018, to May 1, 2019, 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.

[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—and that the three factors must be considered in reaching a conclusion.¹

[16] 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

[17] 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 continue with his employment as a bus driver with his usual employer.

[18] In a statement made to the Commission on January 31, 2019, the Claimant indicated that he was not making any effort to find employment because he was satisfied with his work schedule. He said that he would look for alternative employment in the summer.³

¹ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

² *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

³ GD3-32.

[19] In a second statement made to the Commission on April 2, 2019, the Claimant indicated that he had not looked for alternative employment because he wanted to wait until April 25, 2019, when the Labour Court would give its decision.⁴

[20] In a third statement made to the Commission on April 30, 2019, the Claimant indicated that he was not looking for alternative employment because he wanted to remain available for his usual employer.⁵

[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] The Claimant admitted to making no effort to find employment because he was waiting for the proceedings before the Labour Court to be over. Furthermore, he did not want to resume full-time employment, and he wanted to continue working 25 hours per week. However, the Claimant has demonstrated that, as of May 1, 2019, following the Labour Court decision, he has made efforts to find suitable employment.

[23] 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 because he wanted to remain available for his usual employer.

[24] In support of his application for leave to appeal, the Claimant again states that he wanted to wait for the Labour Court decision at the end of April before making efforts to find employment.⁶

[25] Exercising a right to resume a position does not exempt a claimant, who wants to receive Employment Insurance benefits, from demonstrating that they are looking for employment and are available for work in the meantime. The same applies for work holiday periods.

⁴ GD3-43.

⁵ GD3-46.

⁶ AD1-3.

[26] 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.

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

[28] 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 for the period from December 23, 2018, to May 1, 2019.

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

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	B. B., self-represented
-----------------	-------------------------