



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. B. v Canada Employment Insurance Commission*, 2019 SST 841

Tribunal File Number: AD-19-600

BETWEEN:

T. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: September 6, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, T. B. (Claimant), upon reconsideration, was notified by the Canada Employment Insurance Commission (Commission) that it was unable to pay him benefits from September 9, 2015 through to December 17, 2015 because he was taking a training course on his own initiative and had not proven his availability for work. The Claimant appealed the reconsideration decision to the General Division of the Tribunal.

[3] The General Division found that a disentitlement was to be imposed because the Claimant had not proven his availability for work pursuant to sections 18 and 50 of the *Employment Insurance Act* and sections 9.001 and 9.002 of the *Employment Insurance Regulations*.

[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 puts forward that he disagrees with the General Division's conclusion on availability since he only spent nine hours in school. He submits that he did a job search and applied for several jobs in December, contrary to the conclusions of the General Division.

[6] The Tribunal must decide whether arguably, there is some reviewable error of the General Division upon which the appeal might succeed.

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

ISSUE

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

ANALYSIS

[9] 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; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[10] 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, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before leave can be granted, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

[12] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the DESD Act, whether there is a question of natural justice, jurisdiction, law, or fact, the answer to which may lead to the setting aside of the General Division decision under review.

Issue: Does the Claimant raise some reviewable error of the General Division upon which the appeal might arguably succeed?

[13] In support of his application for permission to appeal, the Claimant puts forward that he disagrees with the General Division's conclusion on availability since he only

spent nine hours in school. He submits that he did a job search and applied for several jobs in December, contrary to the conclusions of the General Division.

[14] The undisputed evidence before the General Division shows that the Claimant was in school from September 9, 2015 through to December 17, 2015. He took four on campus courses and one distance course. The distance course could be completed at his own pace, but the other four courses for which he had an obligation to attend had the following schedules:

Monday, Wednesday, Friday from 12:00 - 13:00

Monday from 14:00 - 17:00

Tuesday and Thursday from 12:00 - 13:00

Thursday from 17:00 - 18:00

[15] 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".¹

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

[17] The evidence before the General Division clearly demonstrates that the Claimant's primary goal during normal working hours was his studies, notwithstanding his repeated statement that he would leave his course if he found employment. He did not find any work at all, part time or full time, for his entire school period. The Claimant's employment history shows that he did not have a period of employment and school overlapping time. He had summer student or school break employment.

¹ *Landry v. Canada (Attorney General)*, A-719-91.

[18] Therefore, the General Division did not err when it concluded that there was not enough evidence to support a history of combining work and full time school to rebut the presumption of non-availability.

[19] As stated by the General Division, a mere statement of availability by the Claimant is not enough to discharge his burden of proof.

[20] For the above-mentioned reasons and after reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, The Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVES:	T. B., Self-represented
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