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

[TRANSLATION]

Citation: *J. A. v Canada Employment Insurance Commission*, 2019 SST 977

Tribunal File Number: AD-19-513

BETWEEN:

J. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: September 11, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. A. (Claimant), stopped working for X (X) due to a shortage of work. The Canada Employment Insurance Commission (Commission) found that it could not pay benefits to the Claimant as of April 30, 2019, because he had failed to show that he was actively seeking employment. The Claimant requested a reconsideration, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant was not available for work under sections 18 and 50 of the *Employment Insurance Act* (EI Act) and section 9.001 of the *Employment Insurance Regulations* because he had failed to prove his availability through reasonable and customary efforts to obtain suitable employment.

[4] The Claimant now seeks leave to appeal the General Division decision. In support of his application for leave to appeal, the Claimant argues that he is eligible for Employment Insurance benefits because he did indeed seek other employment.

[5] On August 6, 2019, the Tribunal sent the Claimant a letter requesting a detailed explanation of his grounds of appeal under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). The Claimant did not respond to the Tribunal's request.

[6] 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.

[7] 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

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

ANALYSIS

[9] 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.

[10] 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 on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case; instead, he must establish that his 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.

[11] 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.

[12] 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 justify setting aside 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?

[13] In support of his application for leave to appeal, the Claimant argues that he is eligible for Employment Insurance benefits because he did seek other employment.

[14] 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 assessing 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 when reaching a conclusion.[1]

[15] Furthermore, availability is assessed for each working day in a benefit period in which the claimant can prove that they were capable of and available for work on that day and unable to obtain suitable employment.[2]

[16] The General Division found that the Claimant had not demonstrated a desire to return to the labour market as soon as he was offered suitable employment because he wanted to resume the seasonal employment he had had for several years.

[17] In a statement made to the Commission on April 30, 2019, the Claimant indicated that he had not actively sought employment because he did not want to jeopardize his seasonal employment and he did not want to work 12 months of the year.[3]

[18] In a second statement made to the Commission on June 7, 2019, the Claimant indicated that he did not see the point of looking for another job because his employment resumed in August. During his unemployment period, he could rest before going back to work.[4]

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[1] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[2] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[3] GD3-22.
[4] GD3-23.

[19] The General Division also found that the Claimant's availability for work did not result in a concrete and sustained job search. Instead, his testimony demonstrated that he wanted to keep his seasonal employment because it suited him.

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

[21] 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.

[22] The Tribunal finds that, despite the Tribunal's specific request, the Claimant has not raised any issue of law, fact, or jurisdiction that could justify setting aside the decision under review.

[23] After reviewing the appeal file, the General Division decision, and the Applicant's arguments, the Tribunal finds that the General Division considered the evidence before it and properly applied the *Faucher* criteria in its assessment of the Claimant's availability.

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

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	J. A., self-represented