



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. S. v Canada Employment Insurance Commission*, 2019 SST 994

Tribunal File Number: AD-19-598

BETWEEN:

J. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: October 9, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. S. (Claimant), has a valid work permit authorizing him to work in Canada, which restricts the type of work, the employer, and the location where he can work. The Claimant lost his job with that employer due to a shortage of work on November 13, 2018. He applied for Employment Insurance benefits on March 9, 2019. The Commission decided the Claimant was not entitled to benefits because he is restricting his job search to his previous employer. The Claimant disputed this decision and argued that his colleagues were paid benefits and they have the same work permit, with the same restrictions. The Commission maintained its initial decision. The Claimant appealed to the General Division.

[3] The General Division found that the Claimant did not prove that he was available for employment and unable to obtain suitable employment. Therefore the Claimant was disentitled from benefits under section 18 (1) (a) of the *Employment Insurance Act* (EI Act).

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. In support of his application for permission to appeal, the Claimant submits that his employment status states that he is able to receive benefits if he is laid off work. He did not receive anything while his co-workers received benefits.

[5] On September 6, 2019, a letter was sent to the Claimant asking that he explain in detail his grounds of appeal. He was advised that it was insufficient to simply repeat what he had said to the General Division.

[6] On September 9, 2019, the Claimant replied to the Tribunal's request. He essentially added facts to his previous testimony before the General Division.

[7] On September 18, 2019, the Claimant sent another correspondence to the Tribunal stating that he could change his work permit if he found another job. He attached an interim driver's licence delivered after the General Division decision, proof of an occupational first aid level 2, payslips and work permits for a previous employer and his spouse.

[8] On September 29, 2019, the Tribunal informed the Claimant that he could make an application to rescind or amend a General Division decision based on the alleged new evidence he presented in support of his application for leave to appeal. The Tribunal asked the Claimant to indicate how he would like to proceed. The Claimant did not reply to the Tribunal within the allowed period.

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

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

ISSUE

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

ANALYSIS

[12] 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.

[13] 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.

[14] 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.

[15] 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 succeed?

[16] The Appeal Division will only consider the evidence submitted to the General Division to decide the present application for permission to appeal. As stated on numerous occasions by the Appeal Division, its powers are limited by section 58 (1) of the DESD Act.

[17] In support of his application for permission to appeal, the Claimant submits that his employment status states that he is able to receive benefits if laid off work. He did not receive anything while his co-workers received benefits. He also submits that he could change his work permit if he found another job.

[18] 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

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

[20] Based on the evidence before it, the General Division found that the Claimant was waiting to be recalled by his former employer, who did not have work for him, and was seeking employment as a truck driver without having the required licence, or was waiting for a job offer from a company that was not hiring. It found that the Claimant was not actively seeking suitable employment.

[21] The General Division also found that the Claimant was initially restricting his availability to his former employer. Since April 2019, he had been waiting for his licence approval, while assisting his family in preparing for their move to another province, and had contacted only three employers who were not hiring. The General Division found that the Claimant was restricting his availability to becoming a truck driver, for which he did not yet have the required licence, therefore unduly limiting his chances of returning to the labour market.

[22] Therefore, the General Division concluded that the Claimant did not meet the availability requirements of section 18 (1) (a) of the EI Act

[23] The Claimant, in his leave to appeal application, would essentially like to represent his case. Unfortunately for the Claimant, an appeal to the Appeal Division of the Tribunal is not a new hearing, where a party can represent its evidence and hope for a new favorable outcome.

[24] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any

¹ *Faucher v Canada (CEIC)*, A-56-96.

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

erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[25] 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

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	J. S., Self-represented
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