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

[TRANSLATION]

Citation: *L. L. v Canada Employment Insurance Commission*, 2019 SST 1342

Tribunal File Number: AD-19-764

BETWEEN:

L. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: November 12, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, L. L. (Claimant), worked for X from August 30, 2017, to June 30, 2018, inclusive, and stopped working for that employer because of a shortage of work. She also worked as an X for the X school board from September 1, 2017, to June 19, 2018, inclusive, and stopped working for that employer because of a shortage of work. On July 10, 2018, the Claimant applied for Employment Insurance benefits, which she later received.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was not available for work as of April 17, 2019, and disqualified her from receiving benefits as of 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 determined 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 to appeal the General Division decision. She would like to file new medical evidence showing that employment as an X suits her completely and takes her functional limitations into account.

[7] The Tribunal wrote to the Claimant informing her of the possibility of applying to rescind or amend the General Division decision under section 66 of the *Department of Employment and Social Development Act* (DESD Act) based on new evidence. However, the Claimant did not respond to the Tribunal. The Tribunal will therefore give its decision on the application for leave to appeal based on the evidence before the General Division.

[8] The Tribunal must decide whether it is arguable that the General Division made a reviewable error based on which the appeal could succeed.

[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. 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 her case; rather, she must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[13] The Tribunal will grant leave to appeal if it is satisfied that at least one of the grounds of appeal raised by the Claimant 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 may 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 her application for leave to appeal, the Claimant would like submit new medical evidence that shows that her employment as an X suits her and takes her functional limitations into account.

[16] The Appeal Division has decided numerous times that, with a few exceptions, new evidence is not admissible on appeal because the Appeal Division's powers are limited by section 58(1) of the DESD Act. An application to rescind or amend a General Division decision under section 66 of the DESD Act is the appropriate process for trying to introduce new evidence. The Tribunal will therefore decide on this application for leave to appeal based on the evidence before the General Division.

[17] 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]

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

[19] The General Division determined that the Claimant had not expressed her desire to return to the labour market as soon as a suitable job was offered because she wanted to resume her employment with her usual employer.

[20] The General Division also determined that the Claimant's availability for work did not lead to concrete and sustained job searches with the goal of finding employment. It determined that the Claimant chose to give priority to the employer that had given her

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

part-time work for 25 years instead of looking, in a sustained manner, for other full-time employment.

[21] The General Division finally determined that the Claimant had set conditions that unduly limited her chances of returning to the labour market by giving priority to her usual employer.

[22] Unfortunately for the Claimant, an appeal to the Appeal Division is not a new hearing where a party can present its evidence again and hope for a favorable outcome.

[23] The Tribunal notes that, in her application for leave to appeal, the Claimant has not raised an issue of law, fact, or jurisdiction that may lead to the setting aside of the decision under review.

[24] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, the Tribunal finds that the General Division considered the material before it and applied the *Faucher* criteria properly when assessing the Claimant's availability.

[25] The Tribunal has no choice but to find 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:	L. L., self-represented