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

[TRANSLATION]

Citation: *E. D. v Canada Employment Insurance Commission*, 2019 SST 1353

Tribunal File Number: AD-19-687

BETWEEN:

E. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: November 22, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, É. D. (Claimant), works 30 to 31 hours a week as an X for his employer. He is claiming Employment Insurance benefits because he does not work full-time. The Commission determined that the Claimant was not available for work from March 18, 2019, to June 21, 2019, because he worked only 31.25 hours a week and he was not looking for other employment to make up for his shortfall. The Claimant requested a reconsideration, but the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division determined that the Claimant was not available for work from March 18, 2019, to June 21, 2019, under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[4] The Claimant now seeks leave to appeal the General Division decision. He argues that his physical condition limits him in terms of the jobs he can perform. He argues that his employment as an X is the ideal employment for his physical condition because he can take frequent breaks during his work day. He argues that other Xs who work less than 35 hours a week are entitled to claim a shortfall, but he is not. He claims to be a victim of discrimination.

[5] The Tribunal sent the Claimant a letter asking him to explain his grounds of appeal in detail. However, he did not respond to the Tribunal’s request.

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

[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 *Department of Employment and Social Development Act* (DESD Act) specifies the only grounds of appeal of a General Division decision. These reviewable errors are the following:

- 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 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; 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 might succeed.

[11] 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.

[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 may lead to the setting aside of the General Division decision under review.

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

[13] The Claimant argues that his physical condition limits him in terms of his job search. He argues that his employment as an X is the ideal employment for his physical condition because he can take frequent breaks during his work day. He argues that other Xs who work less than 35 hours a week are entitled to claim a shortfall, but he is not. He claims to be a victim of discrimination.

[14] The General Division's role was to assess the Claimant's file on an individual basis and on its own merit to determine his availability. The General Division had no jurisdiction to decide other Xs' files that were not 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. In addition, the three factors must be considered in reaching a conclusion.[1]

[16] 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]

[17] The General Division determined that the Claimant had shown his desire to return to the labour market as soon as he was offered suitable employment because he works 30 or 31 hours a week for his employer and agrees to work more hours for that same employer when it can offer them.

[18] However, the General Division determined that the Claimant's availability for work did not translate into concrete and sustained job searches because he chose to give

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

priority to the employer offering him part-time work instead of looking, in a sustained manner, for other full-time employment.

[19] The General Division found that the Claimant had not shown that the job search was his priority.

[20] The General Division also determined that the Claimant had set conditions that unduly limit his chances of returning to the labour market by limiting his availability to his usual employer.

[21] As the General Division stated, the purpose of the Employment Insurance benefits is not to make up some of a claimant's income when they voluntarily accept part-time employment and do not actively look for full-time employment.

[22] To obtain Employment Insurance benefits, the Claimant had to actively look for suitable employment even if it seemed more reasonable to be content with his part-time work.

[23] The Tribunal notes that the Claimant has not raised in his application for leave to appeal 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 properly applied the *Faucher* criteria 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:	É. D., self-represented