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

Citation: *A. H. v Canada Employment Insurance Commission*, 2020 SST 448

Tribunal File Number: AD-20-638

BETWEEN:

A. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: May 27, 2020

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, A. H. (Claimant), left his job because issues with back pain from a previous injury made working painful. He applied for Employment Insurance (EI) sickness benefits and received the full amount of benefits he was entitled to. He then applied for regular EI benefits and asked for his sickness benefits to be converted to regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was disentitled from being paid EI benefits as of December 3, 2019, because he was not available for work. The Claimant asked for reconsideration of the decision and the Commission again refused on the same grounds.

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

[5] 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 he provided a medical note stating that he was available for work past December 12, 2019. He puts forward that the General Division ignored his evidence that he made several efforts applying for work since December 12, 2019.

[6] The Tribunal must decide whether 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 succeed?

ANALYSIS

[9] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

a) the General Division: failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) the General Division 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. The Claimant must meet this initial hurdle, but it is lower than the one of 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.

[11] In other words, 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 in appeal, in order to grant leave.

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

[12] In support of his application for permission to appeal, the Claimant submits that he provided a medical note stating that he was available for work past December 12,

2019. He puts forward that the General Division ignored his evidence that he made several efforts applying for work since December 12, 2019.

[13] 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 reviewing 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
- the non-setting of personal conditions that might unduly limit the chances of returning to the labour market.[1]

[14] Furthermore, availability is determined 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]

[15] The General Division found that the Claimant did not show a desire to return to the labour market as soon as a suitable job was available. It determined that the Claimant was doing a limited job search while he was waiting for his benefits.

[16] The General Division also found that the Claimant's job efforts to find a suitable job where not sufficient considering that there were many jobs available at the time.

[17] The General Division finally found that the Claimant set personal conditions on his job search by limiting his chances of returning to the job market because he had decided to wait for his benefits.

[18] The Claimant submits that the General Division ignored his evidence at the hearing that he made several efforts applying for work since December 12, 2019, after he received clearance from his doctor.

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

[19] During an interview held on December 3, 2019, the Claimant was asked by the Commission whether he had looked for a job. He answered he did not. The Commission informed him of his obligation to do so and advised him to start looking for a job.[3]

[20] During a second interview held on December 19, 2019, the Claimant confirmed that he did not really look for a job after December 3, 2019, and that he was not sure what he was going to be able to do.[4]

[21] During the reconsideration process held on February 24, 2020, the Claimant confirmed his statement of December 19, 2019, that he had not looked for a job. He also confirmed that he had received instruction on December 3, 2019, to look for a job. He stated that he had applied for two jobs, had not passed out any resumes and had not talked to any employers about work.[5]

[22] In its decision, the General Division placed more weight on the Claimant's consistent, initial responses provided to the Commission that he had done a limited job search, than on his testimony provided at the hearing.

[23] Availability is a prerequisite for entitlement to benefits. The claimant bares the burden of proving availability. A mere statement of availability is not enough for a claimant to discharge the burden of proof.

[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 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.

[3] Exhibit GD3-19.
[4] Exhibit GD3-24.
[5] Exhibit GD3-30.

[25] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, the Tribunal finds that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability.

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

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	A. H., Self-represented