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

[TRANSLATION]

Citation: *DG v Canada Employment Insurance Commission*, 2021 SST 130

Tribunal File Number: AD-21-98

BETWEEN:

D. G.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: April 1, 2021

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant (Claimant) applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was not available for work from March 1 to August 9, 2019. It disentitled him from receiving benefits for that period.

[3] The Claimant requested a reconsideration of the decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that, during the period in question, the Claimant had an incapacity that unduly limited his chances of returning to the labour market. It found that the Claimant was not available for work from March 1 to August 9, 2019, under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[5] The Claimant now seeks leave from the Tribunal to appeal the General Division decision. He submits that the General Division made an error of fact by finding that he was unable to work during the period in question.

[6] I have to 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] I am refusing 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 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 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 at 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] I will grant leave to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

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

[12] The Claimant argues that the General Division made an error of fact by finding that he was unable to work from March to July 2019. He submitted a medical certificate in support of his position that he was capable of work during that period.[1]

[1] AD1-2.

[13] 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.

[14] 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. I will therefore decide on this application for leave to appeal based on the evidence that was before the General Division.

[15] There being no precise definition in the EI Act, the Federal Court of Appeal has established that availability must be determined by analyzing three factors:

(1) the desire to return to the labour market as soon as a suitable job is offered;

(2) the expression of that desire through efforts to find a suitable job; and

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[2]

[16] Furthermore, availability is assessed for each working day in a benefit period in which the claimant must prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.[3]

[17] The Claimant initially filed into evidence a medical certificate from his family doctor indicating that he became unable to work on March 1, 2019.[4] He then filed with the General Division another medical certificate, from his specialist, indicating that he was able to work on February 23, 2021.[5] He also argued before the General Division that he considered himself capable of work during the period in question.[6]

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[2] *Faucher v Canada (CEIC)*, A-56-96.
[3] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[4] GD3-33.
[5] GD5-2.
[6] The medical certificate submitted in support of leave to appeal also indicates that the Claimant considers himself able to work.

[18] As the General Division pointed out, while availability implies that a person is motivated by a sincere desire to work, willingness to work is not necessarily synonymous with availability within the meaning of the EI Act.

[19] To decide whether an individual is available for work, it is necessary to determine whether that individual is struggling with obstacles that are undermining their willingness to work. Obstacle signifies any constraint of a nature to deprive someone of their free choice, such as a lessening of the individual's physical strength.[7]

[20] Based on the material before it, the General Division found that, given his medical situation during the period in question, the Claimant was in a situation that prevented him from being available within the meaning of section 18(1)(a) of the EI Act.

[21] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the material before it and properly applied the *Faucher* factors in assessing the Claimant's availability.

[22] I have no choice but to find that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	D. G., self-represented

[7] *Canada (Attorney General) v Leblanc*, 2010 FCA 60.