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

Citation: *MP v Canada Employment Insurance Commission*, 2021 SST 302

Tribunal File Number: AD-21-211

BETWEEN:

M. P.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: June 29, 2021

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant established a claim for employment insurance (EI) benefits effective November 4, 2018.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was disentitled from being paid EI benefits starting December 3, 2018, 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 available for employment and unable to obtain suitable employment. It concluded that the Claimant was to be disentitled from benefits per section 18(1) (a) of the *Employment Insurance Act* (EI Act) starting December 3, 2018.

[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 the General Division failed to observe a principle of natural justice.

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

[7] I refuse 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, in order to grant leave, I need 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.

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 would like to obtain the recordings of the interviews conducted by the Commission. He submits that the General Division based its decision on these interviews but that he did not have a chance to comment or request proof of the recordings.

[13] In view of the Claimant's grounds of appeal, I proceeded to listen to the General Division hearing. I note that the Claimant did not request an interpreter before or during the hearing. He also did not raise any language issue during the hearing.

[14] 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]

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

[16] The General Division found that the Claimant showed a desire to return to the labour market as soon as a suitable job was available. It determined that the Claimant was talking to family and friends so they could help him find a suitable job.

[17] However, the General Division found that the Claimant's job efforts to find a suitable job where not sufficient considering that his search was limited to talking to family and friends.

[18] The General Division further found that the Claimant set personal conditions on his job search by limiting his chances of returning to the job market because he had limited his availability to work.

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

[19] For these reasons, the General Division concluded that the Claimant had not proven his availability to work and was to be disentitled from benefits per section 18(1) (a) of the EI Act.

[20] During an interview held on April 4, 2019, the employer declared to the Commission that the Claimant only wanted to work 7 hours a week because he was satisfied with the hours worked combined with his employment insurance benefits.[3]

[21] During an interview held on April 4, 2019, the Claimant confirmed to the Commission the employer's declaration that he did not want to work more hours because he wanted to stay home during the winter after working hard in the summer.[4]

[22] Even after receiving a warning from the Commission agent, the Claimant repeated his statement that he was old, had enough of working 7 hours a week and that he needed time to rest at home.[5]

[23] During the reconsideration process held on April 27, 2021, and before the General Division, the Claimant denied having made these statements and declared that the employer did not have more hours to give him.[6]

[24] The General Division placed more weight on the Claimant's consistent, initial responses provided to the Commission that he did not want to work more hours because he wanted to stay home after working hard during the summer. It also found that the Claimant's initial declaration and the employer's declaration matched. This made it more probable than not that the Claimant did in fact tell the Commission he did not want to work more hours.

[3] GD3-24.
[4] GD3-27.
[5] GD3-27.
[6] GD3-35.

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

[26] The Claimant submits that he did not have a chance to comment the Commission interviews. However, during the General Division hearing, the member did request that he explain why he had declared to the Commission that he was not willing to work more than 7 hours per week.[7] The member also confronted the Claimant with the employer's declaration confirming his initial statement.[8] Therefore, the Claimant did have the opportunity to respond to the Commission interviews.

[27] In regards to the Commission interview recordings, subject to their existence, the Appeal Division would not accept such a late request considering that the Claimant's representative took a passive stance and did not request them before or during the General Division hearing.[9]

[28] To contradict the employer's prejudicial initial statement that the Claimant only wanted to work 7 hours a week, the Claimant's representative could have requested the opportunity to bring the employer as a witness at the hearing or requested permission to file a written statement from the employer, and yet the representative did not.

[29] Unfortunately, for the Claimant, an appeal to the Appeal Division is not a new hearing where he can represent evidence and hope for a different outcome.

[30] 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.

[7] 31:13 and 33:25 of the General Division hearing.
[8] 32:10 of the General Division hearing.
[9] *Y. L. v Canada Employment Insurance Commission*, 2016 CanLII 59140, par. 30.

[31] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability. I cannot find any failure by the General Division to observe a principle of natural justice.

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

CONCLUSION

[33] Leave to appeal is refused.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	Rebecca Leclerc, Representative for the Applicant