



Citation: *Canada Employment Insurance Commission v RK*, 2021 SST 759

## Social Security Tribunal of Canada Appeal Division

# Leave to Appeal Decision

**Applicant:** Canada Employment Insurance Commission

**Respondent:** R. K.

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**Decision under appeal:** General Division decision dated October 29, 2021  
(GE-21-1798)

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**Tribunal member:** Jude Samson

**Decision date:** December 13, 2021

**File number:** AD-21-389

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] R. K. is the Claimant in this case. She applied for and received Employment Insurance (EI) regular benefits. Later, the Canada Employment Insurance Commission (Commission) decided that the Claimant didn't qualify for the benefits she had received. It said that she wasn't available for work while she was receiving EI benefits.<sup>1</sup> So, the Commission asked the Claimant to repay nearly \$6,000 in benefits.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. It decided that the Claimant was available for work during some of the relevant times.

[4] The Commission now wants to appeal the General Division decision. It argues that the General Division based its decision on an important error about the facts of the case. It also argues that the General Division made an error of law.

[5] The Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal.

## Issue

[6] This decision focuses on one issue: Does the Commission's appeal have a reasonable chance of success?

## Analysis

[7] Most Appeal Division files follow a two-step process. This appeal is at step one: permission to appeal.

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<sup>1</sup> The Commission's letters are from Service Canada. It delivers the EI program for the Commission.

[8] The legal test that the Commission needs to meet at this step is a low one: Is there any arguable ground on which the appeal might succeed?<sup>2</sup> If the appeal has no reasonable chance of success, then I must refuse permission to appeal.<sup>3</sup>

[9] To decide this question, I considered whether the General Division could have

- based its decision on an important error about the facts of the case, or
- made an error of law.

[10] Both are relevant errors that I can consider.<sup>4</sup>

### **The appeal has no reasonable chance of success**

[11] To qualify for regular EI benefits, the Claimant had to be available for work.<sup>5</sup> Availability is assessed using three main factors.<sup>6</sup> In addition, the Claimant was a student. And students are presumed to be unavailable for work.<sup>7</sup> However, that presumption can be overcome in exceptional circumstances.

[12] Although the Claimant was a student, the General Division noted that she had worked for the same employer over several years. The Claimant's employer was very flexible, allowing her to modify her hours as needed. So, the Claimant returned to the same employer whenever she was looking for work.

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<sup>2</sup> This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.

<sup>3</sup> This is the legal test described in section 58(2) of the *Department of Employment and Social Development Act* (DESDA).

<sup>4</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESDA.

<sup>5</sup> This requirement comes from section 18(1)(a) of the *Employment Insurance Act* (EI Act).

<sup>6</sup> These factors were described by the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.

<sup>7</sup> This presumption is described in several cases, including *Canada (Attorney General) v Cyrenne*, 2010 FCA 349 at paragraph 2.

[13] In all the circumstances, the General Division found that the Claimant was **available** for work from

- January 14 to February 28, 2021, and
- April 25 to June 30, 2021.

[14] During these times, the Claimant was either working full time or asking for full-time work.

[15] At other times, the Claimant either stopped working or restricted her hours of work. During these times, the General Division found that the Claimant was **not available** for work.

– **The General Division did not base its decision on an important mistake about the facts of the case**

[16] The Commission argues that the General Division based its decision on an important mistake about the facts of the case. But the Commission's arguments do not point to particular facts that the General Division supposedly got wrong.

[17] As a result, this argument has no reasonable chance of success.

– **The General Division did not make an error of law**

[18] The Commission also argues that the General Division misapplied the sections of the law about availability for work.<sup>8</sup>

[19] Again, however, the Commission's arguments are unclear. The Commission has not pointed to specific legal errors in the General Division decision.

[20] Importantly, the General Division

- referred to the relevant sections of the law;

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<sup>8</sup> See footnote 5.

- identified the three main factors used to assess availability;
- recognized the presumption of unavailability that applies to students; and
- acknowledged the Claimant's job search efforts and relied on court decisions in support of its conclusion that the Claimant was available for work.<sup>9</sup>

[21] So, the Commission's argument has no reasonable chance of success.

[22] Instead of identifying a specific error of fact or law, the Commission seems to disagree with the result in this case. So, it is asking me to reweigh the evidence. Or the Commission is challenging the application of settled legal principles to the facts of this case. But I cannot consider these errors.<sup>10</sup>

[23] Aside from the Commission's arguments, I have reviewed the file and examined the General Division decision.<sup>11</sup>

[24] The evidence supports the General Division's decision. I did not find evidence that the General Division might have ignored or misinterpreted. Finally, the Commission has not argued that the General Division acted unfairly in any way.

## Conclusion

[25] I have concluded that the Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal. This means that the appeal will not proceed.

Jude Samson  
Member, Appeal Division

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<sup>9</sup> See paragraphs 39 to 42 of the General Division decision and the Federal Court of Appeal's decisions in *Carpentier v Canada (Attorney General)*, A-474-97, and *Canada (Attorney General) v MacDonald*, A-672-93.

<sup>10</sup> See paragraphs 7 to 11 of the Federal Court of Appeal's decision in *Garvey v Canada (Attorney General)*, 2018 FCA 118.

<sup>11</sup> The Federal Court has said that I must do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.