



Citation: *ML v Canada Employment Insurance Commission*, 2021 SST 793

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 14, 2021
(GE-21-1383)

Tribunal member: Pierre Lafontaine

Decision date: December 29, 2021

File number: AD-21-402

Decision

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

Overview

[2] The Applicant (Claimant) was collecting EI sickness benefits. After his sickness benefits ended, he asked the Respondent (Commission) to pay him EI regular benefits. The Commission refused to pay EI regular benefits. The Commission decided that the Claimant had not proven that he was available for work starting February 7, 2021. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant did not show that he wanted to return to work and that he did not make enough efforts to find a suitable job. It concluded that the Claimant was not available for work from February 7, 2021, and that he was to be disentitled from receiving EI regular benefits.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that starting February 1, 2021, he was no longer sick and wanted to return to work. He tried to return to work for his employer but he had communication problems.

[5] A letter was sent to the Claimant requested that he explain in detail why he was appealing the General Division decision. He was advised that it was not sufficient to repeat his testimony before the General Division. The Claimant did not answer within the allowed time.

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

[7] I am refusing 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:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[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 but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before I can 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.

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

[12] The Claimant, in his application for leave to appeal, submits that starting February 1, 2021, he was no longer sick and wanted to return to work. He tried to return to work for his employer but he had communication problems.

[13] To be considered available for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.¹

[14] 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,
- (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.²

[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.³

[16] When considering the three factors together, the General Division concluded the Claimant did not show that he was capable of and available for work and unable to find suitable employment.

[17] The General Division found that the Claimant did not show the desire to return to the labour market and did not make enough efforts to find a suitable job. It determined that the Claimant had a job but refused to return to work. The General Division also determined that the job search record and the collection of business cards were not enough to prove that his job search efforts were sustained.

¹ Section 18(1) (a) of the *Employment Insurance Act* (EI Act).

² *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

³ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[18] The Claimant also provided contradictory statements regarding his capability of working. In his notice of appeal the Claimant states that he was able to work again as of February 1st, 2021. However, he stated to the Commission on March 26, 2021, that he was not sure if he was recovered as some days he was able to work and some days he was not.⁴

[19] The Claimant saw his doctor on March 30, 2021, at which time the doctor indicated that the Claimant could return to full-time work with no restrictions as of March 31, 2021. He returned to work on April 8, 2021, only to leave his job the next day.

[20] The EI Act clearly states that to be entitled to benefits, a claimant must establish their availability for work, and to do this, they must look for work. Availability must be assessed for each working day in a benefit period. A mere statement of availability by a claimant is not enough to discharge their burden of proof.⁵

[21] Therefore, the General Division did not make an error. It could not conclude that the Claimant was available for work under the law based on the evidence before it.

[22] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

Conclusion

[23] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

⁴ See GD3-60.

⁵ *Landry v Canada (Attorney General)*, A-719-91.