



Citation: H. M. v Canada Employment Insurance Commission, 2022 SST 52

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** H. M.  
**Representative:** M. M.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated January 3, 2022  
(GE-21-2425)

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**Tribunal member:** Janet Lew  
**Decision date:** February 7, 2022  
**File number:** AD-22-28

## Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

## Overview

[2] The Applicant, H. M. (Claimant), is appealing the General Division decision. The General Division found that the Claimant did not prove that she was available for work from January 4, 2021 to June 11, 2021. The General Division concluded that she was therefore disentitled from receiving Employment Insurance benefits for this period. This created an overpayment of benefits, as she had already received benefits for this period.

[3] The Claimant argues that the General Division made an important error of fact. She says that she was available for work but “due to my school schedule and COVID-19, I was unable to find work.” She maintains that she conducted an extensive job search.

[4] The Claimant also argues that she should not be responsible for any overpayment because she relied on the Respondent, the Canada Employment Insurance Commission (Commission) to properly assess her application and determine her entitlement. She says the Commission should never have paid her in the first place if she was ineligible for benefits.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.<sup>1</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>2</sup> If the appeal does not have a reasonable chance of success, this ends the matter.

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<sup>1</sup> Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, “that the appeal has no reasonable chance of success.”

<sup>2</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

## Issues

[7] Is there an arguable case that the General Division made an important error of fact?

## Analysis

[8] The Appeal Division must grant permission to appeal unless it does not have a reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.<sup>3</sup>

[9] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

### **Is there an arguable case that the General Division made an error when it found that the Claimant was not available?**

[10] The Claimant argues that the General Division made an important error of fact regarding her availability for work. She insists that she was available for work and had been earnestly looking for work. However, she was unable to find work “due to [her] school schedule and COVID-19.”<sup>4</sup>

[11] I do not have to examine whether the General Division made any errors about whether she tried looking for suitable employment. As long as the Claimant set personal

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<sup>3</sup> See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

<sup>4</sup> See Claimant’s Application to the Appeal Division – Employment Insurance, at AD1-3.

conditions that unduly limited her chances of returning to the job market, then she was not available for work.<sup>5</sup>

[12] As the General Division pointed out, there are three criteria that a claimant has to meet to prove availability:<sup>6</sup>

- a) A claimant must demonstrate their desire to return to the labour market as soon as a suitable job is offered;
- b) Their desire must be expressed through efforts to find a suitable job; **and**
- c) They must not set personal conditions that might unduly limit their chance of returning to the labour market.

[13] The Claimant states in her application to the Appeal Division that she was unable to find work, in part, because of her school schedule.

[14] The Claimant says that she was available for work. But, she was available for work only to the extent that it did not conflict with her school schedule. This represented a personal condition that could have unduly limited her chance of returning to the job market. Under the *Employment Insurance Act*, this meant the Claimant was not available for work.

[15] I am not satisfied that there is an arguable case that the General Division made a factual error about the Claimant's availability. There was an evidentiary basis for the General Division to conclude that the Claimant was not available for work.

### **The Claimant's option**

[16] The Claimant argues that she should not bear any fault for the overpayment. She claims that the Commission should not have paid her if she was not eligible for benefits.

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<sup>5</sup> See, for instance, *Canada (Attorney General) v Boland*, 2004 FCA 251. The respondent Boland set personal conditions that might unduly limit his chance of returning to the labour market. He did not make himself available for work during regular hours.

<sup>6</sup> See General Division decision at para 17, citing *Faucher v Canada (Employment and Immigration Commission)*, [1997] F.C.J. No. 215 (FCA).

However, the Appeal Division does not have any authority to provide any relief to the Claimant.

[17] In terms of any potential relief, the Claimant can contact Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 about a repayment schedule or for other relief.

## **Conclusion**

[18] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal will not be going ahead.

Janet Lew  
Member, Appeal Division