



Citation: *CC v Canada Employment Insurance Commission*, 2022 SST 401

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: C. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 22, 2022
(GE-21-2467)

Tribunal member: Janet Lew

Decision date: May 19, 2022

File number: AD-22-108

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, C. C. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was not available for work from October 5, 2020 to April 9, 2021, while going to school. The General Division concluded that the Claimant was therefore disentitled from receiving Employment Insurance benefits. He had already received benefits, so the disentitlement created an overpayment of benefits.

[3] The Claimant argues that the General Division failed to follow rules of procedural fairness. He also argues that the General Division made several factual errors.

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

[5] 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 his appeal.

Issues

[6] The issues are:

- i. Is there an arguable case that the General Division failed to follow the rules of procedural fairness?

¹ 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."

² See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- ii. Is there an arguable case that the General Division made factual errors about his availability?

Analysis

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.³

[8] 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 failed to follow the rules of procedural fairness?

[9] The Claimant argues that the General Division failed to follow the rules of procedural fairness.

[10] However, the circumstances the Claimant describes took place before he filed his appeal with the General Division. The Claimant claims the Respondent, the Canada Employment Insurance Commission (Commission), reconsidered his claim without contacting or consulting him. The Claimant notes that he attempted to contact an agent with Service Canada, but no one ever returned his voicemail messages. In short, the Claimant states that he did not have an opportunity to explain his claim.

[11] The Claimant does not otherwise allege that the General Division failed to provide him with the opportunity to explain his appeal. Yet, one of the grounds of appeal under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) is that the General Division failed to observe a principle of natural justice. This ground of appeal does not extend to the Commission. In other words, if the

³ 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.

Claimant hopes to fall within section 58(1) of the DESD Act, his claim has to be made against the General Division.

[12] The Claimant's arguments lie only against the Commission. There is no allegation that the General Division did not provide the Claimant with a full and fair opportunity to present his case. There is no allegation either that the General Division failed to ensure that he had a fair hearing. There is no issue either that the General Division member was biased or had prejudged the appeal.

[13] For this reason, I am not satisfied that the appeal has a reasonable chance of success that the General Division failed to follow the rules of procedural fairness.

Is there an arguable case that the General Division made factual errors regarding his availability?

[14] The Claimant argues that the General Division made factual errors regarding his availability. (Throughout his arguments, the Claimant refers to the Commission. But, as he refers to specific paragraphs in the General Division decision in his arguments at points 5, 6, and 7, I understand that he is in fact referring to the General Division in these points.⁴)

– History of full-time employment and presumption of unavailability

[15] The Claimant argues that the General Division failed to consider his history of full-time employment while schooling. A history of full-time employment would have allowed the Claimant to rebut the presumption that he was not available for work while attending school on a full-time basis. The Claimant says that past records of employment show that he worked full-time hours while schooling.

[16] This issue is moot. In other words, it does not need to be addressed in light of the fact that the General Division found that the Claimant rebutted the presumption that he was unavailable for work from October 5, 2020 to February 10, 2021. The General

⁴ See Claimant's arguments dated March 14, 2022, at AD1B-2 to AD1B-4.

Division accepted that there were exceptional circumstances in the Claimant's case to rebut the presumption.⁵

[17] Besides, the General Division had to make its decision based on the evidence before it. Insofar as I can determine from the General Division file, there were no records of employment before the General Division member.

– **Master's program**

[18] The Claimant argues that the Commission made a factual error when it said that he enrolled in six courses for a Master's degree. He denies that he was in the Master's program. He had enrolled in six courses that would allow him or lead him to apply to the Master's program. He also dropped down to two courses.

[19] It is irrelevant whether the Commission made any factual errors because any grounds of appeal have to relate to any errors that the General Division made.

[20] That said, the General Division accepted the Claimant's evidence that he dropped four courses on February 10, 2021. The General Division did not make any findings about whether the Claimant was in the Masters program. However, I find that nothing turns on this point. Whether the Claimant was in a Masters program had no bearing on his availability.

– **Reasonable and customary efforts to obtain suitable employment and wanting to go back to work**

[21] The Claimant argues that the General Division failed to consider the pandemic when it concluded that (1) he had not made reasonable and customary efforts to obtain suitable employment and (2) he did not show that he wanted to go back to work as soon as a suitable job was available.

[22] The Claimant says it was meaningless to look for work with pandemic-related restrictions. Indeed, he says that general public messaging during the pandemic was

⁵ See General Division decision, at paras 34 and 35.

that there was little to no suitable employment available.⁶ He argues that the General Division should have considered the impact that the pandemic had on whether his efforts to obtain suitable employment were reasonable and customary.

[23] Despite the pandemic, the Claimant says that he managed to secure a job in late December 2020. The job was to have started in January 2021, but the pandemic delayed his start to March 2021.

[24] The General Division did in fact accept that the pandemic reduced potential opportunities. Even so, the General Division found the Claimant's job search efforts "very passive".⁷ The General Division determined that, if the Claimant had been intent on returning to the labour market as soon as a suitable job was available, he would have engaged in a more sustained job search.

[25] The General Division also acknowledged that the Claimant had secured a job in December 2020 and that there was a delay as to when it would start. The General Division found that the Claimant did not make any further applications after that. It also found that he did not show an intent to return "as soon as"⁸ a suitable job was available because he did not do anything further to attempt to return to work, other than to wait for his employer to call him to work.

[26] It is clear that the General Division considered how the pandemic affected the Claimant. I am not satisfied that there is an arguable case that the General Division failed to consider the pandemic when it assessed the Claimant's availability and his job search efforts.

– **Making efforts to find a suitable job**

[27] The Claimant argues that the General Division overlooked his efforts to find a suitable job. He claims that there was evidence that he had prepared a resume and cover letter, had searched online job banks, networked with prospective employers,

⁶ See Claimant's arguments dated March 14, 2022, at AD1B-2.

⁷ See General Division decision at para 46.

⁸ See General Division decision at para 47.

submitted job applications, attended an interview, underwent testing, and secured employment with a suitable employer.

[28] The General Division recognized the Claimant's efforts. The General Division concluded that these efforts however were insufficient. The General Division found that the Claimant made two job applications between October 2020 and April 2021. The General Division found that the Claimant could have done more to look for work during this timeframe. For instance, he could have applied for more jobs.

[29] Essentially, the Claimant is asking me to reassess the evidence and come to a different conclusion from the General Division. However, a reassessment is not a ground of appeal under section 58(1) of the DESD Act. For that reason, I am not satisfied that the appeal has a reasonable chance of success on this point.

– **Setting personal restrictions**

[30] The Claimant argues that the General Division made a factual error when it said that he set personal conditions that limited his chance of going back to work. The General Division found that the Claimant “set the personal restriction of only working part-time ...”⁹ The Claimant says that the evidence actually showed that he gave “open availability to allow for as many hours”¹⁰ as the employer was able to offer him.

[31] The General Division noted the Claimant's evidence in this regard. The General Division wrote that the Claimant said he could have worked as much as he wanted as he provided his availability to the employer. The General Division also wrote that the Claimant explained that he was only working part-time as he was in school. But, if this employer had asked him to work full-time, he would have. The General Division noted that the Claimant “did not ask for full-time work because he was fine with working part-time and just having a job and it worked with his schedule.”¹¹

⁹ See General Division at para 60.

¹⁰ See Claimant's arguments dated March 14, 2022, at AD1B-2 to AD1B-3.

¹¹ See General Division decision, at paras 43 and 48.

[32] I note also that, when the Claimant spoke with the Commission on May 18, 2021, he reportedly stated, “as a student you can’t work full-time”.¹² Then, in a phone call on May 27, 2021, the Claimant reportedly stated that he had applied for the part-time position with his employer.¹³

[33] The Claimant does not challenge the General Division’s findings that he had testified that he did not specifically ask for full-time work because he was fine with working part-time as it fit his schedule.

[34] In the Claimant’s mind, he may not have specifically restricted himself to part-time work because he gave “open availability” to the employer. But, by failing to let his employer know that he was prepared to work full-time, and as he was fine with working part-time, the General Division was entitled to conclude that the Claimant was, for all practical purposes, setting personal restrictions that unduly limited his chances of going back to work.

[35] I am not satisfied that the Claimant has an arguable case on this point because the evidence also shows that the Claimant did not seek full-time work as he was fine with working part-time and because a part-time job fit his schedule.

The Claimant’s options

[36] The Claimant was disentitled from receiving Employment Insurance benefits. As he received benefits to which he was not entitled, this leaves him with an overpayment.

[37] The Claimant suggests that he is facing financial hardship. I do not have any authority to provide him any relief from the overpayment.

[38] In terms of any potential relief, the Claimant has two options:

¹² See Supplementary Record of Claimant dated May 18, 2021, at GD3-26.

¹³ See Supplementary Record of Claimant dated May 27, 2021, at GD3-27.

1. He can ask the Commission to consider writing off the debt because of undue hardship. If the Claimant does not like the Commission's response, his option then is to appeal to the Federal Court, or
2. He can phone Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823. He can ask them to consider writing off any debt or about accepting a repayment schedule.

[39] Often, the Commission refers claimants to the Debt Management Centre to help determine whether they are facing financial hardship.

Conclusion

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

Janet Lew
Member, Appeal Division