



Citation: *ET v Canada Employment Insurance Commission*, 2022 SST 431

**Social Security Tribunal of Canada  
Appeal Division**

**Leave to Appeal Decision**

**Applicant:** E. T.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 17, 2022  
(GE-21-1216)

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**Tribunal member:** Janet Lew

**Decision date:** May 27, 2022

**File number:** AD-22-190

## 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, E. T. (Claimant) is appealing the General Division decision. The General Division found that the evidence showed that the Claimant's focus from September 27, 2020 to April 10, 2021 was on her business as a realtor. The General Division concluded that the Claimant's self-employment was not minor in extent. Because of this, it considered her to have worked full working weeks.

[3] As a result, the Claimant was not entitled to receive Employment Insurance benefits. She was also required to repay benefits that she already received.

[4] The Claimant argues that the General Division made jurisdictional and legal errors when it assessed whether her self-employment was minor. The General Division considered six factors when it determined whether the Claimant's employment or engagement in the operation of her business was of a minor extent. The Claimant argues that the General Division should have, but failed to consider whether any exceptional circumstances existed.

[5] The Claimant says that, if the General Division had considered exceptional circumstances, it would have placed the six factors in the "appropriate light."<sup>1</sup> She suggests that the exceptional circumstances would have explained and could have excused the extent of her engagement in the operation of her business.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.<sup>2</sup> Having a reasonable chance of

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<sup>1</sup> Claimant's Application to the Appeal Division-Employment Insurance, at AD1-9.

<sup>2</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."

success is the same thing as having an arguable case.<sup>3</sup> If the appeal does not have a reasonable chance of success, this ends the matter.

[7] 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.

## Issue

[8] Is there an arguable case that the General Division made either a jurisdictional or a legal error when it assessed whether the Claimant's self-employment was minor?

## Analysis

[9] 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.<sup>4</sup>

[10] 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 either a jurisdictional or a legal error when it assessed whether the Claimant's self-employment was minor?**

[11] The Claimant argues that the General Division made a jurisdictional and legal error when it assessed whether her self-employment was minor. The Claimant argues that the General Division should have considered a "seventh factor", namely, exceptional circumstances.

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<sup>3</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>4</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.

[12] The General Division considered six factors when it determined whether the Claimant's employment or engagement in the operation of her business was of a minor extent. These factors included:

- the time the Claimant spent on her business;
- the nature and amount of the capital and resources that she invested;
- the financial success or failure of the employment or business;
- the continuity of the Claimant's employment or business;
- the nature of the employment or business; and
- the Claimant's intention and willingness to seek and immediately accept alternate employment.

[13] The Claimant argues that the pandemic represents an exceptional circumstance. Because of the pandemic, she lost her job. On top of that, she they were fewer employment opportunities. So, the Claimant says that she did not have any other options.

[14] The General Division agreed with the Claimant that the pandemic was unprecedented. But, it found that it did not have any authority to consider other factors, or to make exceptions, when assessing whether a claimant's self-employment was of a minor extent. The General Division wrote, "the six factors ... are based in law."

[15] The General Division referred to section 30(3) of the *Employment Insurance Regulations*. The section lists the circumstances that have to be considered in determining whether a claimant's employment or engagement in the operation of a business is of a minor extent, such that that person would not normally rely on that employment as a principal means of livelihood.

[16] The section does not give the Respondent, the Canada Employment Insurance Commission (Commission), or the General Division any opportunity to consider any other circumstances.

[17] The General Division correctly identified the scope of its authority under the section. The General Division considered the six factors. It also recognized that it was unable to consider any other factors.

[18] I am not satisfied therefore that there is an arguable case that the General Division misinterpreted the section, or that it failed to consider the Claimant's exceptional circumstances.

### **The Claimant's options**

[19] The Claimant also says that the Commission mishandled her application for benefits. She says that if the Commission had not made an error, she could have applied for alternative supports that are no longer available to her.

[20] I do not have any authority to give the Claimant the relief that she is seeking. I am unable to waive or reduce any of the overpayment. In terms of any potential relief, the Claimant has two options:

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

## **Conclusion**

[21] Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew  
Member, Appeal Division