



Citation: *EC v Canada Employment Insurance Commission*, 2022 SST 509

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: E. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 25, 2022
(GE-22-463)

Tribunal member: Pierre Lafontaine

Decision date: June 13, 2022

File number: AD-22-310

Decision

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

Overview

[2] The Applicant (Claimant) established a claim for employment insurance benefits. The Respondent (Commission) decided that the Claimant was not available for work from January 11, 2021, because she was a full-time student. The Commission made this decision retroactively and asked the Claimant to repay benefits. 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 had a desire to return to work and made efforts to find a suitable job. However, it found that the Claimant set personal conditions that unduly limited her chances of going back to work. The General Division concluded that she was not available for work under the law.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division did not consider the evidence before it because she did work in the service industry from Monday to Friday and weekends. She does not believe that her school was limiting her in any way. The Claimant submits that the General Division made an error in law when it required that she be available for a regular 9 to 5 job considering her situation and work history.

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

[6] I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

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

Analysis

[8] 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.

[9] 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 her 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.

[10] 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?

[11] The Claimant submits that the General Division did not consider the evidence before it because she did work in the service industry from Monday to Friday and weekends. She does not believe that her school was limiting her in any way. The Claimant submits that the General Division made an error in law when it required that she be available for a regular 9 to 5 job considering her situation and work history.

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

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

[14] Furthermore, availability is determined for **each working day** in a benefit period for which a claimant can prove that on that day they were capable of and available for work, and unable to obtain suitable employment.³

[15] For the purposes of determining availability, a working day is any day of the week except Saturday and Sunday.⁴

[16] The General Division found that the Claimant had to attend her classes at set times on set days, and therefore her availability is restricted to certain times

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.

⁴ Section 32 of the *Employment Insurance Regulations*.

on certain days, which would unduly limit her chances of finding employment, as any job would have to work around that school schedule.

[17] I note that the Claimant initially declared to the Commission that she was available to work evenings and weekends and was not willing to accept any full time job due to the extensive workload of her course.⁵ She also indicated in her application for benefits that she would only accept a job that would allow her to finish the course.⁶

[18] The evidence shows that the Claimant was a full-time student in a full-time program. She was not willing to give up her course to take a full-time job. Both of those restricted her from obtaining full-time jobs during regular hours, Monday to Friday.

[19] 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. A claimant must establish their availability for work for each working day in a benefit period and this availability must not be unduly limited.

[20] Furthermore, availability must be demonstrated **for every working day** and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability.⁷

[21] The evidence shows that the Claimant's work pattern of part-time and summer employment is no different from that of any other student and her case is accordingly not an exception.⁸

⁵ See GD3-32.

⁶ See GD3-20.

⁷ *Bertrand*, A-613-81, *Canada Employment Insurance Commission v AP*, 2021 SST 295, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.

⁸ *Jean v Canada*, A-787-88.

[22] I am of the view that the evidence supports the General Division's conclusion that the Claimant did not demonstrate that she was available for work but unable to find a suitable job.

[23] I see no reviewable error made by the General Division. The Claimant does not meet the relevant factors to determine availability. Although the academic efforts of the Claimant deserve praise, this does not eliminate the requirement to show availability within the meaning of the EI Act.

[24] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability. I have no choice but to find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division