Citation: *EA v Canada Employment Insurance Commission*, 2022 SST 518

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 13, 2022 (GE-22-350)

Tribunal member:	Pierre Lafontaine
Decision date:	June 10, 2022
File number:	AD-22-282

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) imposed a retroactive disentitlement on his claim from July 12, 2021, to October 1, 2021, because he was taking a training course and had not proven his availability for work. This resulted in an overpayment of EI benefits on his claim. 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 only wanted to go back to work after his studies. It also found that he did not make sufficient efforts to find work. The General Division found that the Claimant had to attend classes at set times, and that his availability was restricted to certain times which would unduly limit his chances of finding employment. The General Division concluded that he 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. He submits that he did not have the opportunity to present his case and that the General Division did not consider the evidence before it.

[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 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.

[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 he did not have the opportunity to present his case and that the General Division did not consider the evidence before it.

[12] More precisely, he puts forward that the General Division did not take into consideration that his financial situation did not afford him the luxury of not accepting any job over dropping the course. He submits that the course was delayed and that he did not plan to go to school while receiving EI benefits. He puts forward that although the tuition fees were nearly $5000, he was still actively looking for a job.

[13] The undisputed evidence shows that the Claimant was attending full-time school while he was receiving EI benefits. The fact that the start of the course was delayed does not change the Claimant's obligation to demonstrate that he was available for work in order to receive EI benefits.

[14] 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]

[15] 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]

[1] Section 18(1) (a) of the *Employment Insurance Act*.
[2] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[16] 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]

[17] The General Division found that the Claimant was focusing on his school and was not actively looking for work. It found that he had not presented any verifiable evidence of a job search. The General Division also found that having to attend classes at set times, meant that his availability was restricted to certain times of the day which would unduly limit his chances of finding employment. It concluded that the Claimant was not available for work.

[18] I note that the General Division did consider the Claimant's position that he would drop school if offered a full-time job. However, it gave more weight to the Claimant's repeated initial statements to the Commission that he would not do so.

[19] The General Division based its decision on both of his Training Questionnaires in which the Claimant indicated that if he found full-time work that conflicted with his course, he would only accept the job if he could delay the start date to allow him to finish the course.[4]

[20] The General Division also based its decision on the reconsideration interview, where the Claimant stated that he had put a lot of money into the course and that he would ask to start a job after the course.[5]

[21] The General Division found that the Claimant's original statements were more credible than his testimony at the hearing that he would drop school notwithstanding the important tuition fees. It considered that the Claimant's original statements were made in response to simple, direct questions on forms that were personally completed by him, and because they were given spontaneously and before any negative decisions on his claim. It gave greatest

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[3] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[4] See the Training Questionnaires at GD3-21 and GD3-26.
[5] See GD3-33.

weight to his early, repeated statements that he would only accept a job if he could delay the start date to allow him to finish the course.

[22] The preponderant evidence shows that the Claimant was a full-time student in a full-time program. He was not willing to give up his course to take a full-time job. Both of those restricted him from obtaining full-time jobs during regular daytime business hours, Monday to Friday.

[23] 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. Furthermore, availability must be demonstrated during **regular hours for every working day** and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability.[6]

[24] The evidence supports the General Division's conclusion that the Claimant did not demonstrate that he was available for work but unable to find a suitable job. I see no reviewable error made by the General Division. The Claimant does not meet the relevant factors to determine availability.

[25] I am of the view that the Claimant had ample opportunity to present his case, in his appeal application and at the hearing, and that his position was fully considered by the General Division.[7]

[26] 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.

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[6] *Bertrand*, A-613-81, CUB 74252A, CUB 68818, CUB 37951, CUB 38251, CUB 25041.
[7] See GD2-9.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division