Citation: *WF v Canada Employment Insurance Commission*, 2022 SST 552

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	W. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 29, 2022 (GE-22-521)

Tribunal member:	Charlotte McQuade
Decision date:	June 22, 2022
File number:	AD-22-329

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] W. F. is the Claimant. She applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to EI regular benefits from June 21, 2021, to September 24, 2021, because she wasn't available for work.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division but the General Division dismissed her appeal.

[4] The Claimant is now asking to appeal the General Division decision to the Appeal Division. However, she needs permission for her appeal to move forward.

[5] The Claimant submits that the General Division made an important error of fact but she doesn't point to any specific factual error. Instead, she asks the Appeal Division to reconsider her case in light of a Family Member Attestation form for family caregiver EI benefits. She says her son was reluctant to sign the form before because he didn't think he was critically ill but now he has signed it.

[6] I am satisfied that the Claimant's appeal has no reasonable chance of success so I am refusing permission to appeal.

I can't consider the new evidence (Family Member Attestation form) the Claimant is asking to provide

[7] I can't consider the Family Member Attestation form for family caregiver benefits that the Claimant is now asking to provide.

[8] New evidence is evidence that the General Division did not have before it when it made its decision.

[9] The Appeal Division generally does not accept new evidence. This is because the Appeal Division isn't rehearing the case. Instead, the Appeal Division decides whether the General Division made certain errors, and if so, how to fix those errors.

[10] I can only accept new evidence that the General Division didn't have when it made its decision, if that new evidence provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly.[1]

[11] The Claimant didn't provide the Family Member Attestation form to the General Division before it made its decision, so it is new evidence.

[12] None of the exceptions that allow me to consider new evidence applies. So, I can't consider this form.

Issue

[13] The Claimant is raising one issue: Is it arguable that the General Division made an important error of fact?

Analysis

[14] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[1] See *Sharma v Canada (Attorney General),* 2018 FCA 48, which explains the test for accepting new evidence on judicial review. Given that the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.

[15] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[2] The law says that I can only consider certain types of errors.[3] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[4]

[16] The Claimant says the General Division based its decision on an important error of fact. I can consider this kind of error.

[17] Meeting the test for leave to be granted is a low bar and does not mean the appeal will necessarily succeed.

It is not arguable that the General Division based its decision that the Claimant was not available for work on an important error of fact

[18] The General Division decided that the Claimant was not available for work from June 21, 2021, to September 24, 2021. It is not arguable it based this decision on an important error of fact.

[19] The Appeal Division can intervene only if the General Division based its decision on the error of fact. In addition, the General Division must have made that error of fact in a perverse or capricious manner or without regard for the material before it.[5]

[20] The Claimant had been on vacation from her employer from June 21, 2021, to July 26, 2021. On July 22, 2021, the Claimant emailed her employer a request for four more weeks to care for her adult son, who had an injury and required surgery. The employer responded on July 26, 2021, refusing any further leave and advising that the employer will find someone to replace her shift. The Claimant did not return to her employer.

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[2] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), which says this is the test I have to apply.
[3] Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal. These errors are a breach of natural justice, an error of jurisdiction, an error of law or where the General Division based its decision on an important error of fact.
[4] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.
[5] See section 58(1)(c) of the DESD Act.

[21] The Commission suggested to the Claimant that she apply for compassionate care benefits but the Claimant's son did not want her to do so.[6] The Claimant applied for regular EI benefits on September 28, 2021. The Commission considered the Claimant's entitlement to regular benefits from June 21, 2021.

[22] The Commission decided the Claimant was not entitled to regular benefits from June 21, 2021, to September 24, 2021, because she wasn't available for work.

[23] The Claimant had to prove her availability for work to be entitled to regular benefits.[7]

[24] The law says availability for work has to be assessed having regard to three factors. These are whether a person had a sincere desire to return to the labour force as soon as a suitable job was available, whether the person expressed that desire through efforts to find a suitable job and whether the person had set any personal conditions that might unduly limit their chances of returning to the workforce.[8]

[25] The General Division considered those three factors and found that:

- the Claimant did not have a desire to return to the labour force as soon as a suitable job was available, as she could have returned to the job she had. The General Division concluded it was more likely than not that the Claimant continued to care for her son until the end of September 2021;[9]
- the Claimant had made some efforts to find a new job but they weren't enough to express her desire to return to the labour market as soon as a suitable job was available. The General Division decided the Claimant's efforts could have at least included asking her employer to return to her job, as scheduled, when her request for a further four-week leave was denied;[10]

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[6] See Claimant's reconsideration request at GD3-29.
[7] Section 18(1) of the *Employment Insurance Act* (EI Act) sets out this requirement.
[8] These factors come from a decision of the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.
[9] See paragraph 34 of the General Division decision.
[10] See paragraph 31 of the General Division decision.

- The Claimant had set a personal condition of caring for her son until the end of September 2021 that unduly limited her chances of returning to the labour market.[11]

[26] The General Division concluded, therefore, that the Claimant had not proven her availability for work from June 21, 2021, to September 24, 2021.

[27] The Claimant says in her Application to the Appeal Division that the General Division made an important error of fact but she does not point to any possible error of fact.

[28] Rather, the Claimant explains that she stopped working because she needed to take care of her son who had torn his Achilles tendon. She says, at that time, her son was reluctant to sign the Family Member Attestation form for family caregiver benefits because he didn't think he was critically ill. She says, now he has signed the attestation form. She asks that her case be reconsidered. She includes the signed Family Member Attestation form with her Application to the Appeal Division.[12]

[29] It is not arguable that the General Division made an error of fact by not considering the Family Member Attestation form. The General Division can only make findings of fact based on the evidence before it and it did not have this form.

[30] The Claimant appears to be asking that I make a decision about her entitlement to family caregiver benefits. However, I cannot do that. The Appeal Division's role is not to make initial entitlement decisions about benefits but instead to look for possible reviewable errors made by the General Division.

[31] Aside from the Claimant's submission, I have reviewed the General Division decision, the record and the audio tape from the General Division hearing to see if the General Division may have ignored or misinterpreted any evidence that was before it.[13]

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[11] See paragraph 44 of the General Division decision.
[12] AD1-3.
[13] The case of *Karadeolian v Canada (Attorney General)*, 2016 FC 615 recommends doing such a review.

[32] The law says that I can assume that the General Division considered all the evidence, even if it didn't specifically mention every piece of if.[14] However, the General Division does need to address important pieces of evidence, especially ones that contradict its conclusion, and it must explain how it is weighing the evidence.

[33] I did not find key evidence that the General Division might have ignored or misinterpreted. The General Division also addressed contradictory evidence and explained how it weighed the evidence.

[34] The General Division made a finding of fact that the Claimant was caring for her son until the end of September 2021. This finding impacted its decision on all three factors it considered about the Claimant's availability for work.

[35] This finding of fact was supported by evidence on file. The General Division referred to evidence of the Commission's notes of August 30, 2021, September 10, 2021, and September 28, 2021, which reflected discussions between the Claimant and the Commission about family caregiver benefits. The General Division also referred to the email from the Claimant to her employer requesting an extended leave to care for her son.[15]

[36] The Claimant had provided evidence contradicting the General Division's finding that she was caring for her son until the end of September 2021. Specifically, she had testified that she began looking for work and was available for work at the end of July, once her employer refused her request for additional time off to care for her son.[16] She had also told the Commission this.[17]

[37] I am satisfied the General Division was aware of and considered this contradictory evidence.

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[14] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[15] See paragraphs 28 to 31 of the General Division decision.
[16] I heard this on the audio recording from the General Division hearing at approximately 00:25:54.
[17] See GD3-18, GD3-24, GD3-29 and GD3-31.

[38] The General Division acknowledged the Claimant's testimony and information in the record that she had stopped caring for her son at the end of July.[18] It also acknowledged her testimony that she was looking for a job and when her employer told denied her request for further leave, she didn't think to ask the employer to take her back. She said this was because the employer said that they would hire a replacement and she was upset at the time.[19]

[39] The General Division explained why it preferred the evidence of the Commission's notes and the Claimant's email requesting additional time off to care for her son.[20] The General Division explained the Claimant had not reasonably explained why she would ask her employer for four weeks' leave to care for her son, if she weren't caring for him and that if the Claimant had a desire to return to work at the end of July 2021, she could have returned to the job she had.[21]

[40] The General Division has the authority to weigh the evidence before it and to decide which evidence it will prefer. I cannot reweigh the evidence in a different way and come to a different conclusion.

[41] I see no arguable case that the General Division based its decision that the Claimant had not proven her availability for work on an important error of fact.

It is not arguable that the General Division made any other reviewable errors

[42] Aside from the Claimant's arguments, I have also considered other grounds of appeal.

[18] See paragraph 20 and paragraph 44 of the General Division decision.
[19] See paragraphs 32 to 33 of the General Division decision.
[20] See paragraph 34 of the General Division decision.
[21] See paragraphs 32 to 34 of the General Division decision.

[43] I have not identified any errors of law. The General Division stated and applied settled law regarding the factors that have to be considered to decide whether the Claimant was available for work.[22]

[44] The General Division did not make an error of jurisdiction. The General Division could not make a decision about the Claimant's possible entitlement to family caregiver benefits. This is because the General Division's authority was restricted to reviewing the reconsideration decision made by the Commission that had been appealed to it.[23]

[45] The reconsideration decision before the General Division only dealt with the Commission's decision that the Claimant was not available for work during the period of June 21, 2021, to September 24, 2021.[24] There is no evidence on file that the Commission made a reconsideration decision about the Claimant's entitlement to family caregiver benefits.

[46] It is unclear from the information on file whether the Claimant completed an application for family caregiver benefits. If the Claimant wishes to pursue her application for family caregiver benefits, she will have to contact the Commission directly to make or complete such an application.

[47] The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness.

[48] It is not arguable that the General Division based its decision on an important error of fact or made an error of law, an error of jurisdiction or breached procedural fairness. As a result, there is no reasonable chance of success and I must refuse permission to appeal.

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[22] The General Division applied the test from *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.
[23] See sections 112 and 113 of the EI Act.
[24] See the reconsideration decision at GD3-32.

Conclusion

[49] I am refusing permission to appeal. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division