



Citation: *DT v Canada Employment Insurance Commission*, 2022 SST 571

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: D. T.
Representative: S. T.
Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 28, 2022
(GE-22-393)

Tribunal member: Janet Lew
Decision date: June 28, 2022
File number: AD-22-252

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, D. T. (Claimant), is appealing the General Division decision. The General Division found that the Claimant failed to prove that she was available for work while attending high school full-time. The General Division concluded that she was therefore disentitled from receiving Employment Insurance benefits and that an overpayment remained on her claim.

[3] The Claimant argues that the General Division made procedural and factual errors when it found that she was not available for work. She argues that the General Division member did not treat her fairly. She also suggests that the General Division overlooked her evidence.

[4] Before the Claimant can move ahead with her 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 her appeal.

Issues

[6] The issues are as follows:

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.

- a) Is there an arguable case that the General Division treated the Claimant unfairly?
- b) Is there an arguable case that the General Division overlooked or misstated some of the evidence?

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] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

[9] 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 treated the Claimant unfairly?

[10] The Claimant argues that the General Division did not treat her fairly “because [she] was always honest about being a student.”⁴

– Allegations of bias

[11] From this, I understand that the Claimant is essentially arguing that the General Division member was biased against her because she was a student.

³ See section 58(1) of the DESD Act.

⁴ See Claimant’s Application to the Appeal Division--Employment Insurance, filed April 17, 2022, at AD1-4.

[12] The Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty v National Energy Board*:

[T]hat test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

[13] Merely alleging bias does not reach this standard.

[14] I have listened to the audio recording of the General Division hearing. The member made opening remarks. The member explained what the Claimant could expect at the hearing. She outlined the format that the hearing would take. The member outlined the case that the Claimant had to prove. She reviewed the documents and facts. She identified the issues and the legal test that the Claimant had to meet.

[15] Throughout the hearing, the member was respectful towards the Claimant. She treated the Claimant in a fair and even-handed manner.

[16] In her decision, the General Division member reviewed the evidence before her. This included the documentary evidence in the hearing file. This also included the Claimant's oral evidence. The General Division member considered the Claimant's evidence and arguments. The member weighed the evidence and applied the law to those facts that she considered relevant.

[17] The General Division member explained her reasons. She set out the issues and the factors that she had to assess. She identified the facts upon which she relied. The member's analysis was detailed and considered.

[18] In this case, it was unavoidable to consider the fact that the Claimant was a student. There is a general presumption in law that a full-time student is unavailable for work. The General Division could not overlook this. But, the General Division also examined whether any exceptions could have applied to rebut the general presumption.

[19] The General Division went one step further. It also assessed whether the Claimant was available for work. It did not have to do this, having found that the general presumption applied. But, it looked at whether the Claimant was available, in the event that it was wrong about whether the general presumption applied.

[20] The Claimant's school schedule was necessarily relevant to the Claimant's availability. The General Division had to consider it.

[21] In other words, there was nothing arbitrary about the General Division examining the Claimant's status as a student and her school schedule. They were relevant considerations to the availability issue.

[22] I do not see any indication—whether during the hearing or in the decision itself—that suggests that the member was in any biased against the Claimant, or treated the Claimant unfairly. The member gave the Claimant a full and fair opportunity to present her case and then issued a decision that was measured and justified on the facts and the law.

– **Allegations of procedural unfairness**

[23] Allegations of unfairness can also involve procedural missteps. This could mean any of the following, that a claimant:

- Did not receive adequate notice of the hearing,
- Did not know the case they have to meet,
- Did not get full disclosure of documents,
- Did not get a chance to present their case, or
- Did not get a fair hearing.

[24] The Claimant has not identified anything that the General Division member might have done that affected her rights to procedural fairness. I do not see anything in the

evidence that suggests that the process at the General Division was unfair towards the Claimant.

– **Allegations of unfairness by the Canada Employment Insurance Commission**

[25] I recognize that the Claimant says that it is unfair that she is facing a large overpayment when she relied on advice from the Respondent, Canada Employment Insurance Commission (Commission) through Service Canada. She accurately filled out the application form for benefits, as well as the weekly reports, so says she should have been able to rely on accurate information from the Commission.

[26] The Claimant continues to say that it is unfair that the Commission led her to believe that she was entitled to collect benefits when it was aware that she was a full-time student. And, she says that it is unfair that the Commission did not process her claim in a more timely manner. If it had processed her claim sooner, the overpayment would not have grown as large as it did.

[27] The Claimant's reliance on the Commission, and the delay in processing her application are both valid concerns. However, they are not matters that I can consider when I am deciding an application for leave. As I noted above, the issues I can look at are quite limited.⁵

– **Summary**

[28] The Claimant clearly disagrees with the General Division decision. But, that does not mean the General Division member did not treat her fairly or that something was unfair about the process at the General Division.

[29] I am not satisfied that there is an arguable case that the General Division member made a procedural error or that the member was biased against the Claimant.

⁵ See section 58(1) of the DESD Act.

Is there an arguable case that the General Division overlooked or misstated some of the evidence?

[30] The Claimant argues that the General Division overlooked or misstated some of the evidence. She writes:

I was available for a full-time work while I was a high school student. I started my first job [...], the day after my 15th birthday. I worked in 2 different companies, one of them is McDonald's which open 24 hours and the other one was [2nd employer]. Because of the lock down I got laid off form the [2nd employer] and lost most of my hours from McDonald's. I contacted EI and I was told that I am eligible to receive EI. I have checked my eligibility with the EI representative more than 8 times over the phone, and she assured me that I was eligible and she herself filled the application for me over the phone. While receiving EI, I have shown desire to work full time hours including overnight shifts at McDonald's, however, I wasn't granted enough hours because of the lock-down. In most days I would have to leave my online school early, so I can catch up with my work that started before the end of the school day. I was constantly looking for other jobs to make up for the loss of my hours at the [2nd employer], but no one was hiring during the pandemic. Now I have a large over-payment due to the retroactive dis-entitlement imposed on my claim. My whole family suffered during the lock-down, and the money I received was used for family expenses. I am a 16-year-old, and I cannot repay a \$14,600 debt.

[31] The General Division decision accurately reflects much of this evidence.⁶

[32] The only difference is when the General Division wrote that the Claimant's mother asked "6 or 7 times" if a high school student could get EI.⁷ The Claimant says that this is an error. She says that the evidence shows that she checked her eligibility with a representative for the Commission "more than 8 times over the phone."

[33] However, I find that nothing turns on how many times the Commission told the Claimant or her mother that the Claimant was eligible for benefits. It would not have changed the outcome because the number of times the Commission advised the Claimant did not have any impact on the Claimant's availability for work.

⁶ See, for instance, General Division decision, at paras 23, 33, and 48.

⁷ See General Division decision, at para 48.

[34] Apart from that, I see that the Claimant testified that the Commission gave them this advice “at least 6 to 7 times.” The Claimant said this three times.⁸ The General Division accurately described out the Claimant’s oral evidence.

[35] I am not satisfied that there is an arguable case that the General Division made the factual errors that the Claimant says it did. There was an evidentiary basis for the General Division’s findings.

[36] The Claimant is largely looking for a reassessment of the facts and seeking a different outcome. However, reassessments are not a ground of appeal.

Conclusion

[37] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal will not be going ahead.

[38] I note that the General Division listed options that the Claimant can look into to address her concerns about the overpayment. The Claimant can pursue these, if she has not already.

Janet Lew
Member, Appeal Division

⁸ At approximately 15:50 of the audio recording of the General Division hearing.