Citation: *KT v Canada Employment Insurance Commission*, 2022 SST 580

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 22, 2022 (GE-22-50)

Tribunal member:	Melanie Petrunia
Decision date:	July 3, 2022
File number:	AD-22-196

Decision

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

Overview

[2] The Applicant, K. T., is the Claimant. She applied for and received EI Emergency Response Benefits (EI-ERB). She was automatically transitioned to EI regular benefits as of October 3, 2020.

[3] The Canada Employment Insurance Commission (Commission) later decided that the Claimant was not available for work from October 5, 2020 to June 30, 2021 and was disentitled from receiving EI benefits. The Commission maintained its decision on reconsideration. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[4] The General Division dismissed the Claimant's appeal. It found that the Claimant did not show that she was available for work while studying full time. The General Division found that the Claimant wanted to go back to work and made sufficient efforts to find a job. However, the General Division found that the Claimant set personal conditions that limited her chances of finding a job.

[5] The Claimant now seeks leave to appeal the General Division's decision to the Appeal Division. She argues that the General Division made important errors of fact in finding that she set personal restrictions and did not provide proof of availability.

[6] I must decide if there is some reviewable error of the General Division upon which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[7] Is there an arguable case that the General Division made an important error of fact?

Analysis

[8] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?[1]

[9] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed under section 58(1) the *Department of Employment and Social Development Act* (DESD Act). Briefly, the relevant errors are about whether the General Division:

> a) provided a fair process;
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> b) decided all the questions that it had to decide, without deciding questions that were beyond its powers to decide;
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> c) misinterpreted or misapplied the law; and
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> d) based its decision on an important error about the facts of the case.[2]

[10] 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.

[11] 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.

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[1] This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[2] This paraphrases the relevant errors, formally known as “grounds of appeal,” which are listed under section 58(1) of the DESDA.

Is there an arguable case that the General Division made an important error of fact?

[12] The Claimant argues that the General Division made important errors of fact by finding that she had set personal restrictions that limited her ability to find jobs. She also says that the General Division made important errors of fact when it determined that she did not provide proof of availability for the period under appeal.

[13] The Claimant states that her personal circumstances did not further limit her job search because the market was so scarce that there were no jobs. She says that this was the case without any filters on her job search.

[14] The Claimant says that she did search for jobs during the day and within her commuting area. This was because she was concerned with the number of Covid-19 cases in her area and wanted to protect her high-risk parents.

[15] The Claimant argues that her job search often returned with nil results. She states that the pandemic changed the job market and that these were circumstances beyond her control, not conditions that she personally set.

[16] 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.[3]

[17] The General Division found that the Claimant had rebutted the presumption that she was not available for work while studying full time.[4] After finding that the presumption did not apply, it considered whether the Claimant had proven her availability for work.[5]

[18] 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

[3] See section 58(1)(c) of the DESD Act.
[4] General Division decision at para 18.
[5] General Division decision at para 19.

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.[6]

[19] The General Division considered these three factors. It found that the Claimant did have a desire to return to work as soon as a suitable job was available.[7] It also found that the Claimant made efforts to find a suitable job.[8]

[20] The General Division found that the Claimant set personal conditions that might have unduly limited her chances of finding a job.[9] It found that only being available after school ended each working day was a personal condition that would have limited the Claimant's chances of finding work.[10] The Claimant was in school full-time with classes from 8am to 2pm each day.

[21] The General Division also found that the Claimant limited her job search to a specific area close to her home because she did not have a car and was unwilling to use public transportation.[11] It considered the Claimant's reasons for these restrictions, including that she was concerned about her parents' health.[12]

[22] The General Division determined that the limited area of her job search and the fact that she was only available outside of school hours were personal conditions that would have unduly limited her chances of returning to work.[13]

[23] Because she set these personal conditions, the General Division found that the Claimant had not proven her availability for work from October 5, 2020 to June 30, 2021.

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[6] These factors come from a decision of the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.
[7] General Division decision at para 24.
[8] General Division decision at para 26.
[9] General Division decision at para 32.
[10] General Division decision at para 38.
[11] General Division decision at para 40.
[12] General Division decision at para 41.
[13] General Division decision at para 45.

[24] The Claimant says that the General Division made important errors of fact. However, the General Division considered the facts she outlines in her Application for Leave to Appeal.

[25] The General Division considered that there were few jobs to apply for because of Covid-19. It acknowledged that the job market was very challenging.[14] It discussed these factors when determining that the Claimant made efforts to find work. With respect to that factor, the General Division also considered that the Claimant didn't qualify for some of the jobs that could be done from home.[15]

[26] The General Division also took into consideration the Claimant's reasons for limiting her job search to the area close to her home.[16] It noted the Claimant's concerns and found that there was no evidence that people were told not to use public transportation or that her parents' doctor had advised this.[17]

[27] The General Division took into consideration all of the facts that the Claimant points to in her Application for Leave to Appeal. The General Division finding that the Claimant set personal conditions by only being available outside school hours, and limiting her job search area, is supported by the evidence.

[28] 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.

[29] There is 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.

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[14] General Division decision at para 31.
[15] General Division decision at para 28.
[16] General Division decision at para 40.
[17] General Division decision at para 43.

There is no arguable case that the General Division made any other reviewable errors

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

[31] 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.[18]

[32] The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction.

[33] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[34] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

[18] The General Division applied the test from *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.