



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 589

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: S. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 24, 2022
(GE-22-409)

Tribunal member: Pierre Lafontaine

Decision date: July 6 2022

File number: AD-22-276

Decision

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

Overview

[2] The Respondent (Commission) decided that the Applicant (Claimant) was disentitled from receiving Employment Insurance regular benefits as of December 14, 2020, because she was not available for work while attending school full-time. 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 wanted to go back to work as soon as possible and that she had made enough efforts to find a suitable job. However, it found that the Claimant set personal conditions that might have 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. The Claimant submits that the General Division made an error when it concluded that she had unduly limited her chances of going back to work. She submits that she disagrees with the General Division decision. She would like the Appeal Division to reconsider her appeal.

[5] I wrote to the Claimant and asked that she filed her grounds of appeal in accordance with section 58(1) of the *Department of Employment and Social Development* (DESD Act). The Claimant did not reply within the allowed time.

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

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

Issue

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

Analysis

[9] Section 58(1) of the DESD 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.

[10] 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.

[11] 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?

[12] The Claimant submits that the General Division made an error when it concluded that she had unduly limited her chances of going back to work. She submits that she

disagrees with the General Division decision. She would like the Appeal Division to reconsider her appeal.

[13] 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

[14] 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

[15] 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

[16] The evidence shows that the Claimant was obligated to attend scheduled classes and that some of these classes took place during normal work hours. The Claimant stated that she would only accept a job as long as she could delay the start date to allow her to finish the program. She repeated this when she spoke with the Commission in December 2021. Both of those restricted her from obtaining full-time jobs during regular business hours, Monday to Friday.

[17] The *Employment Insurance Act* (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.

¹ Section 18(1) (a) of the *Employment Insurance Act*.

² *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

³ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[18] 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.⁴

[19] 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. I am satisfied that the General Division made no reviewable error. 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 under the law.

[20] I also find that the General Division made no reviewable error when it determined that the Temporary Measures to Facilitate Access to Benefits during the pandemic allows the Commission, at any point after benefits are paid to a claimant attending school, to verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.⁵

[21] 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

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

Pierre Lafontaine
Member, Appeal Division

⁴ *Duquet v Canada (Attorney General)*, 2008 FCA 313; *Canada (Attorney General) v Gauthier*, 2006 FCA 40; *Bertrand*, A-613-81; CUB 74252A; CUB 68818; CUB 37951; CUB 38251; CUB 25041.

⁵ See section 153.161 of the *Employment Insurance Act*.