



Citation: *AW v Canada Employment Insurance Commission*, 2022 SST 680

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: A. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 18, 2022
(GE-22-560)

Tribunal member: Pierre Lafontaine

Decision date: July 28, 2022

File number: AD-22-385

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 (EI) regular benefits from January 7, 2021 through to March 17, 2021 and from September 8, 2021, 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 did not demonstrate a sincere desire to go back to work and did not make enough efforts to find a suitable job. 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 from January 7, 2021 through to March 17, 2021 and from September 8, 2021.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that she was never asked to provide evidence of her job search and the General Division held it against her in dismissing her appeal. She puts forward that on December 3, 2020, a representative told her that she could still qualify for benefits if she was returning to school. She submits that there is no confirmation in the General Division decision that she was a full-time student from January 7, 2021 to March 17, 2021.

[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 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.

[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 she was never asked to provide evidence of her job search and the General Division held it against her in dismissing her appeal. She puts

forward that on December 3, 2020, a representative told her that she could still qualify for benefits if she was returning to school. She submits that there is no confirmation in the General Division decision that she was a full-time student from January 7, 2021 to March 17, 2021.

[12] The Claimant established a claim for employment insurance benefits effective September 27, 2020.

[13] The law says that the Commission may, **at any point after benefits are paid** to a claimant who attends a course, program of instruction or training, 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.¹

[14] This provision, which is part of the Temporary Measures to Facilitate Access to Benefits during the pandemic, implicitly acknowledges that during the pandemic, verification of entitlement may not have been possible at the time benefits are initially paid, and to allow for subsequent verification even after benefits have been paid.

[15] I notice that the provision was in force when the Claimant applied for benefits.²

[16] The evidence before the General Division shows that the Claimant was a full-time student attending Dartmouth College and was enrolled in the Graphic Design program since 2016. In her application for benefits, the Claimant indicated that her course was considered full-time by the educational institution.³

[17] During an initial interview by the Commission, the Claimant stated that during the winter semester, she was enrolled in six courses and was devoting 35 to 40 hours a week on her education. The Claimant was off for the summer, and returned to school on September 8, 2021. The Claimant stated that she was enrolled in two courses but was still considered full-time because she had a lot of project work. She was in class for 15

¹ See section 153.161 of the *Employment Insurance Act*.

² In force between September 27, 2020 and September 25, 2021: See sections 153.15 and following of the *Employment Insurance Act*.

³ See GD3-13.

hours a week, but devoted on average an additional 20 hours a week studying. She also stated that she was looking for full-time work only during summer months because she was employed to her fullest-extent during school.⁴

[18] In her training course form, the Claimant indicated that she was attending full-time school from January 4, 2021, to April 16, 2021, and that she had worked part-time during school.⁵

[19] I find that the preponderant evidence shows that the Claimant was attending full-time school from January 7, 2021 to March 17, 2021, and that she was not looking for full-time work during school.

[20] 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.⁶

[21] 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.⁷

[22] 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.⁸

[23] The evidence shows that the Claimant was a full-time student attending X and was enrolled in the Graphic Design program since 2016. The Claimant stated on

⁴ See GD3-23.

⁵ See GD2-10.

⁶ Section 18(1) (a) of the *Employment Insurance Act*.

⁷ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

⁸ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

numerous occasions that she was not willing to give up her courses to take a full-time job. Both of those restricted him from obtaining full-time jobs during regular business hours, Monday to Friday.⁹

[24] 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.

[25] 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.¹⁰

[26] 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.

[27] I see no reviewable error made by the General Division. 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 within the meaning of the EI Act.

[28] 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

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

Pierre Lafontaine
Member, Appeal Division

⁹ See GD2-10 and GD3-19.

¹⁰ *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.