



Citation: *AF v Canada Employment Insurance Commission*, 2022 SST 686

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: A. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 18, 2022
(GE-22-945)

Tribunal member: Pierre Lafontaine

Decision date: August 1, 2022

File number: AD-22-387

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 October 19, 2020 through to April 30, 2021, and from September 7, 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 full-time and that she 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.

[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 did not give her an opportunity to present her case. She puts forward that during the period of October 2020 through April 2021, her school hours reduced drastically to 8-10 hours of mandatory class time. She was therefore more than capable of finding work and accepting full-time work, even if it meant leaving her training program.

[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 the General Division did not give her an opportunity to present her case. She puts forward that during the period of October 2020 through April 2021, her school hours reduced drastically to 8-10 hours of mandatory class time. She was therefore more than capable of finding work and accepting full-time work, even if it meant leaving her training program. However, the pandemic made things very complicated to find work.

[12] The Claimant established a claim for employment insurance benefits effective October 28, 2020.

[13] The law says that the Commission may, at any point after benefits are paid to a claimant attending 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, acknowledges implicitly 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 note that the provision was in force when the Claimant applied for benefits.²

[16] On November 16, 2020, in her training questionnaire submitted two months after the start of the school year, the Claimant indicated that she was attending school at X from 14/09/2020 until 30/04/2021. The Claimant declared that she spent about 25 hours or more per week in her studies. She went to school Mondays to Fridays and was obligated to attend any scheduled classes.³

¹ In force from September 27 2020 to September 25, 2021: See section 153.15 and following of the *Employment Insurance Act*.

² See section 153.196 of the *Employment Insurance Act*.

³ See GD3-15 to GD3-19.

[17] On October 8, 2021, in her second training questionnaire, the Claimant indicated that she was attending school at X from 07/09/2021 until 01/01/2022. The Claimant declared that she spent about 25 hours or more per week in her studies. She went to school Mondays to Fridays and was obligated to attend any scheduled classes.

[18] On December 17, 2021, when interviewed by the Commission, the Claimant declared that she was not available to work full-time when she was in school. She stated that she would look for full-time work after her graduation.⁴

[19] In the Claimant's application for reconsideration, she stated that she was looking for part-time work while in school but that most employers were not willing to work around her school schedule.⁵

[20] During the reconsideration interview, the Claimant reiterated that she was looking for part-time work while in school but that the employers could not accommodate her school schedule.⁶ The Claimant stated that she had mandatory classes for approximately 8-10 hours/week - on every other Tuesday (2-3 hours) and every week on Wednesdays and Fridays (4 hours/week). She also spent time in labs, which varied.⁷

[21] 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.⁸

[22] 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,

⁴ See GD3-26.

⁵ See GD3-37.

⁶ See GD3-39.

⁷ See GD3-39.

⁸ Section 18(1) (a) of the *Employment Insurance Act*.

- (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.⁹

[23] 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.¹⁰

[24] The evidence shows that the Claimant was attending school at X from 14/09/2020 until 30/04/2021. The Claimant initially indicated that she devoted 25 hours or more per week on her studies. She later declared that she had mandatory classes for approximately 8-10 hours/week on every other Tuesday (2-3 hours) and every week on Wednesdays and Fridays (4 hours/week). She also spent time in labs, which varied.

[25] The evidence also shows that the Claimant indicated that she was attending school at X from 07/09/2021 until 01/01/2022. The Claimant declared that she spent about 25 hours per week in her studies. She went to school Mondays to Fridays and was obligated to attend any scheduled classes.

[26] The Claimant stated that she would look for full-time work only after her graduation. She also stated on several occasions that she was only looking for part-time work but that no jobs could accommodate her school schedule.

[27] The Claimant's school schedule, even reduced, and her limitation to part-time work around her school schedule clearly restricted her from obtaining full-time jobs during regular business hours, Monday to Friday.

[28] The *Employment Insurance Act* (EI Act) indicates that to be entitled to benefits, a claimant must establish their availability for work, and to do this, they

⁹ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

¹⁰ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

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.

[29] 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.¹¹

[30] 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.

[31] 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.

[32] 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 find that the Claimant had the opportunity to present her case, in writing, and before the General Division. I have no choice but to find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

¹¹ *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.