



Citation: *LH v Canada Employment Insurance Commission*, 2022 SST 678

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: L. H.
Representative: D. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 27, 2022
(GE-22-791)

Tribunal member: Pierre Lafontaine

Decision date: August 12, 2022
File number: AD-22-421

Decision

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

Overview

[2] The Applicant (Claimant) applied for regular Employment Insurance (EI) benefits on October 23, 2021. At the Claimant's request, the employer issued a Record of Employment (ROE) indicating that she had worked from September 6, 2020, to October 9, 2021, and that she was paid bi-weekly.

[3] The Respondent (Commission) notified the Claimant that her claim for EI benefits was cancelled, because it could not be established that starting October 10, 2021, she had seven consecutive days without work or pay prior to the start of her claim. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant worked one week on and one week off and that she was paid bi-weekly. It found that although the Claimant stopped work on October 9, and returned on October 17, 2021, which was one day more than seven-days, she needed to have seven consecutive days off work outside her bi-weekly pay period for an interruption of earnings to occur. It concluded that the Claimant did not have an interruption of earnings, because she did not have seven consecutive days without work or pay prior to the start of her claim.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division found that she had established a 7-day period without work or earnings from October 9 to October 17, 2021. She puts forward that she would normally work one week and received pay for one week. The second week, she would not be paid if she did not work. Therefore, the Claimant submits that the General Division erred when it

concluded that she did not have an interruption of earnings for seven consecutive days.

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

[7] I refuse 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 *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.

[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 to appeal, 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 General Division found that although the Claimant stopped work on October 9, 2021, and returned on October 17, 2021, which was one day more than seven-days, she needed to have seven consecutive days off work outside her bi-weekly pay period for an interruption of earnings to occur. It found that the week in question was her week off work.

[13] The General Division concluded that the Claimant did not have an interruption of earnings, because she did not have seven consecutive days without work or pay prior to the start of her claim.

[14] The Claimant submits that the General Division found that she had established a 7-day period without work or earnings from October 9 to October 17, 2021. She puts forward that she would normally work one week and receives pay for one week. The second week, she would not be paid if she did not work. The Claimant submits that the General Division erred when it concluded that she did not have an interruption of earnings for seven consecutive days.

[15] An interruption of earnings occurs when the following three conditions are satisfied:

- 1) A claimant is laid off or separated from their employment;
- 2) A claimant did not work for seven consecutive days; and
- 3) A claimant did not receive earnings from that employment.¹

¹ See Section 14(1) of the *Employment Insurance Regulations*; *Massé v Canada (Attorney General)*, 2007 FCA 82; *Canada (Attorney General) v Enns*, A-559-89.

[16] The employer declared that it has employees that work one week on and one week off to maintain the employees. The employer also declared that the Claimant works a week on and a week off and that other than her normal week off, she did not have a period of seven consecutive days with no work or earnings.² The ROE issued by the employer indicates that the Claimant's pay period type is bi-weekly.³

[17] In her application for reconsideration, the Claimant states that she has been working for the employer for at least the last five years.⁴

[18] During the reconsideration interview, the Claimant confirmed that she was still working for the employer her normal schedule of one week on, one week off.⁵

[19] The evidence before the General Division clearly shows that the Claimant's weeks off have been part of her work schedule for years, that this schedule is agreed upon with the employer and, during her weeks off, the employment relationship with the employer is not broken. The employer issued the ROE only because the Claimant requested it. The ROE indicates that the Claimant is paid bi-weekly.

[20] I am of the view that the evidence does not support a conclusion that the Claimant was laid-off or separated from her employment from October 9 to October 17, 2021. It was clearly her scheduled week off. The Claimant's work was not interrupted and she maintained her bond with the employer.⁶

[21] Furthermore, the law provides that where an insured person is employed under a contract of employment under which the usual remuneration is payable in respect of a period greater than a week, no interruption of earnings occurs

² See GD3-19.

³ See GD3-17.

⁴ See GD3-22.

⁵ See GD3-24.

⁶ *Canada (Attorney General) v Foy*, 2003 FCA 51.

during that period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration is paid.⁷

[22] I also note that it is a well-established principle under the EI Act that claimants who have a schedule that includes periods of work and of leave are deemed to be employed during the leave periods that are part of this established schedule.⁸

[23] I see no reviewable error made by the General Division when it concluded that the Claimant did not have an interruption of earnings for seven consecutive days under the EI Act.

[24] In her application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. She has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[25] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of her request for leave to appeal, I find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

⁷ See section 14(4) of the *Employment Insurance Regulations*.

⁸ See sections 9 and 11 of the *Employment Insurance Act*: *Canada (Attorney General) v Jean*, 2015 FCA 242; *Canada (Attorney General) v Merrigan*, 2004 FCA 253; *Canada (Attorney General) v Duguay*, A-75-95.