Citation: *MM v Canada Employment Insurance Commission*, 2022 SST 788

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. M.
Representative:	T. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 20, 2022 (GE-22-653)

Tribunal member:	Charlotte McQuade
Decision date:	August 24, 2022
File number:	AD-22-447

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] M. M. is the Claimant. He was attending school and collecting Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to benefits from September 6, 2021, because he had not proven his availability for work.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant had proven his availability for work from December 8, 2021, but not from September 6, 2021, to December 7, 2021. So, he was not entitled to benefits for that period.

[4] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission to appeal for the file to move forward.

[5] The Claimant argues that there was a miscommunication about his course schedule from September to December 2021. He says he was only taking one online course and it was not full-time. It was only in the morning for one hour per day, three days per week and he could complete his work on his own time. He says he would have had ample time to work part-time, while doing his course.

[6] I am satisfied that the appeal has no reasonable chance of success. So, I am refusing leave to appeal. This means the Claimant's appeal cannot proceed.

Issue

[7] The Claimant's Application to the Appeal Division raises the following issue:

a) Is it arguable that the General Division based its decision that the Claimant was not available for work from September 6, 2021, to December 7, 2021, on a mistake of fact about the requirements of his schooling?

Analysis

[8] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[9] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1]

[10] The law says that I can only consider certain types of errors.[2] There errors are:

- The General Division hearing process was not fair in some way
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided or it decided something it did not have the power to decide)
- The General Division based its decision on an important error of fact
- The General Division made an error of law

[11] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

[12] This is a low bar. Meeting the test for leave to be granted does not mean the appeal will necessarily succeed.

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[1] Section 58(2) of *the Department of Employment and Social Developme*nt Act (DESD Act) says this is the test I have to apply.
[2] Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal.
[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.

It is not arguable that the General Division based its decision about the Claimant's availability on an important error of fact

[13] It is not arguable that the General Division based its decision that the Claimant was not available for work from September 6, 2021, to December 7, 2021, on an important error of fact about the requirements of his schooling.

[14] The Commission disentitled the Claimant from benefits from September 6, 2021, because he had not proven his availability for work. The Claimant appealed that decision to the Tribunal's General Division.

[15] The General Division had to decide whether the Claimant had proven his availability from September 6, 2021.

[16] The General Division assessed the Claimant's availability by considering three factors.[4] These were whether the Claimant:

- wanted to go back to work as soon as a suitable job was available
- made efforts to find a suitable job
- set personal conditions that might have unduly limited his chances of going back to work

[17] The General Division decided that the Claimant had shown that he was available for work from December 8, 2021, but not from September 6, 2021, to December 7, 2021.

[18] The General Division found as a fact that, from September 6, 2021, to December 7, 2021, the Claimant was attending an online course that he had to attend at a set

[4] The case of *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96 says these three factors must be considered to decide about a person's availability for work.

time, three times a week, during regular working hours.[5] He was also playing hockey from September 6, 2021, to the end of September 2021.[6]

[19] The General Division decided that, from September 6, 2021, to December 7, 2021, the Claimant did not meet the third availability factor because he had set personal conditions that unduly limited his chances of returning to the labour market.

[20] The General Division decided that from September 6, 2021, to the end of September 2021, the Claimant was only available to work around his hockey schedule and his schooling. Then, when his hockey was over, from the end of September to December 7, 2021, he was still limiting his availability for work around his school schedule.[7]

[21] The General Division referred to case law from the Federal Court that said limiting availability around a school schedule does not meet the availability requirements of the *Employment Insurance Act* (EI Act). Following that law, the General Division decided that by limiting his availability for work around his hockey and school schedule, the Claimant could have unduly limited his chances of returning to work.[8]

[22] The Claimant says in his Application to the Appeal Division that there was a miscommunication about his course schedule from September to December 2021. He says he was only taking one online course and it was not full-time. He says it was only one hour per day, three days per week and he could complete his work on his own time.[9]

[23] I understand the Claimant to be arguing that the Appeal Division made an important error of fact about the requirements of his schooling.

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[5] See paragraph 45 of the General Division decision.
[6] See paragraphs 23 and 24 of the General Division decision. See also paragraph 43 of the General Division decision.
[7] See paragraphs 40 to 43 of the General Division decision.
[8] See paragraphs 42 to 45 of the General Division decision. See also paragraph 42 of the General Division decision where the General Division refers to the Federal Court decision of *Horton v Canada (Attorney General)*, 2020 FC 743.
[9] See AD1-4.

[24] For the Appeal Division to intervene on an error of fact made by the General Division, it has to be a material fact. This means the General Division must have based its decision on the error of fact. Also, the error of fact must have made in a perverse or capricious manner or without regard for the material before it.[10]

[25] It is not arguable that the General Division based its decision about the Claimant's availability on an error of fact about the requirements of the Claimant's schooling.

[26] The General Division specifically decided that the Claimant was not a full-time student.[11] The General Division understood the Claimant was taking one on-line course. The General Division made a finding of fact that, in the first term, the Claimant was taking an online course that he had to attend at a set time, three times a week, during regular working hours.[12]

[27] I have reviewed the documentary record and listened to the audio recording from both the General Division hearing of April 26, 2022, and the reconvened hearing of June 16, 2022. This finding of fact was consistent with the evidence before the General Division.

[28] The Claimant testified at the April 26, 2022, hearing that he was attending an online course in the morning, three days a week. He said that would show up for the lecture, listen to the lecture and do the work after.[13] The Claimant testified he spent an average of three to four hours a day, including the classroom time, on his online course in the first semester.[14] The General Division member asked the Claimant when he was able to work in the first semester and the Claimant testified that he was available to work any time he wasn't doing that three to four hours of schoolwork.[15]

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[10] See section 58(1)(c) of the DESD Act.
[11] See paragraph 17 of the General Division decision.
[12] See paragraph 45 of the General Division decision.
[13] I heard this on the audio recording from the General Division hearing at approximately 0:16:30 to 0:17:30.
[14] I heard this on the audio recording from the General Division hearing at approximately 0:29:52.
[15] I heard this on the audio recording from the General Division hearing at approximately 0:30:38.

[29] Although the General Division did not specifically refer to the Claimant's testimony about the hours he was spending on the course, the General Division is presumed to have considered all the evidence before it.[16]

[30] Now the Claimant is saying that he only attended the class in the morning for one hour, three times per week and he could complete his work during his own time.

[31] But this is different evidence than the Claimant gave to the General Division that he was attending class three times per week and spending three to four hours per day, including the class time on those days, and was only available to work after that.

[32] An appeal before the Appeal Division is not an opportunity to reargue the case with new or different evidence. The Appeal Division cannot consider new evidence and come to a different conclusion.[17] Instead, the Appeal Division decides whether the General Division made certain errors, on the evidence before it, and if so, how to fix those errors.

[33] It is not arguable that the General Division overlooked or misconstrued any evidence concerning the requirements of the Claimant's first term online course. The General Division's finding of fact that the Claimant had to attend an online course at a set time, three times a week, during regular working hours was consistent with the evidence before it.

[34] In my review of the documentary record and the audio recordings from the April 26, 2022, and June 16, 2022, hearings, I have not found any other key evidence that the General Division ignored or misinterpreted.[18]

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[16] See *Simpson v Canada (Attorney General),* 2012 FCA 82.
[17] See *Sharma v Canada (Attorney General)*, 2018 FCA 48, which explains the test for accepting new evidence on judicial review. New evidence can only be accepted if it provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. Given that the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.
[18] The Federal Court has recommended such a review be done in *Karadeolian v Canada (Attorney General),* 2016 FC 615.

It is not arguable the General Division breached procedural fairness

[35] The Claimant has not pointed to any procedural unfairness on the part of the General Division. However, since he has said there was a miscommunication, I have considered whether there may have been a breach of procedural fairness.

[36] It is not arguable there was a breach of procedural fairness.

[37] The audio recording from the General Division hearing reveals that the Claimant participated in the hearing with his mother acting as his representative. The Claimant provided testimony. The General Division permitted the Claimant's representative to provide testimony as well.

[38] The General Division member was aware the Claimant had memory difficulties. The audio recording reveals the General Division member allowed the Claimant to try to access his school schedule online during the hearing. When he was not able to access the schedule online, the General Division member permitted the Claimant an opportunity to provide post-hearing documentation about his schedule.

[39] Following receipt of that documentation, the General Division member then reconvened the hearing to ask the Claimant about the documentation he had submitted. During both the initial hearing and the reconvened hearing, the General Division member asked multiple questions of the Claimant and his representative to ensure the evidence being provided was understood.

[40] It is not arguable there was any procedural unfairness in how the General Division conducted its proceeding. The General Division gave the Claimant a full and fair opportunity to present his case.

[41] In his application for leave to appeal, the Claimant has not identified any other reviewable errors such as an error of jurisdiction or an error of law.

[42] After reviewing the record, the decision of the General Division and considering the arguments the Claimant made in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success. So, I am refusing permission to appeal.

Conclusion

[43] I am refusing permission (leave) to appeal. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division