Citation: *TR v Canada Employment Insurance Commission*, 2022 SST 824

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	T. R.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 21, 2022 (GE-22-1604)

Tribunal member:	Janet Lew
Decision date:	August 29, 2022
File number:	AD-22-439

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, T. R. (Claimant), is appealing the General Division decision.

[3] The General Division found that the Claimant was not available for work. As a result, she was not entitled to receive Employment Insurance benefits.

[4] The Claimant argues that the General Division made important factual errors.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving the Claimant permission to move ahead with her appeal.

Issue

[7] Is there an arguable case that the General Division made factual errors about the Claimant's availability for work?

Analysis

[8] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.

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[1] Under section 58(1) of the *Department of Employment and Social Development Act*, I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[9] For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[10] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

Is there an arguable case that the General Division made factual errors about the Claimant's availability for work?

[11] The Claimant argues that the General Division made factual errors about whether she was available for work. She argues as follows:

> The inconsistency with which the mandatory vaccination policy was applied by [my employer] meant that my actual job was in limbo and I could be called back to work anytime. It is unreasonable to try to find a job that will accommodate returning to the first without having to lie to the new employer that I am seeking a permanent position. I was seeking temporary employment.
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> It is also not an unreasonable personal barrier to not take an experimental use injection that could irreversably [*sic*] cause injury to health, is a known side effect and continuing to seek employment that doesn't require this injection as a condition of employment. This falls under security of person—guaranteed in the *Charter of Rights and Freedom*[*s*].

[12] From this, I understand that the Claimant is challenging the General Division's findings that her efforts to find a job were not reasonable and customary, or that she had not made enough efforts to find a suitable job. She is also challenging the General Division's findings that she set personal conditions that might unduly limit her chances of going back to work.

– The Claimant's efforts to find a job

[13] The Claimant does not dispute the General Division's findings regarding the scope of her job search. But, she is trying to explain why her efforts did not meet the

"broad and sustained search efforts described in the *Employment Insurance Regulations*."[3]

[14] From the Claimant's view, it was unreasonable to look for a permanent position elsewhere, knowing that she would be returning to her old employer once recalled. Hence, she says that she had made, "reasonable and customary efforts to find a suitable job". She says that she met the definition of what is considered "reasonable and customary".

[15] The General Division acknowledged that the Claimant expected and wanted to return to her old job. The General Division noted that the Claimant waited for her employer to recall her back to work. The General Division noted that, while the Claimant was "engaged in several job-seeking activities,"[4] her job application were very limited. She had applied for only a couple of jobs since October 31, 2021.

[16] As the General Division noted, the *Employment Insurance Regulations* defines what "reasonable and customary efforts" to look for work means. Section 9.001 lists the criteria for determine whether a claimant's efforts are reasonable and customary. So, while the Claimant felt that it was unreasonable to have to extend her job search because she was going to return to her old employment anyway, the *Employment Insurance Regulations* still required her to pursue a more sustained job effort.

[17] The General Division cited *De Lamirande*,[5] a decision by the Federal Court of Appeal. There, the Court wrote that a claimant cannot wait to be called to work. In the Claimant's case, she was looking for work, but the law required her to be more active in her job search efforts in order to be entitled to benefits.

[18] So, the Claimant's explanation for her job search would not have changed the outcome. The Division still had to consider the Claimant's efforts, whether they were sustained, and whether they were directed toward obtaining suitable employment.

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[3] General Division decision, at para 24.
[4] General Division decision, at para 24.
[5] *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

– The Claimant's conditions for returning to work

[19] The Claimant also does not dispute the General Division's findings regarding the limits she placed on her job search. The Claimant had been looking for work. But, she limited her search to jobs that did not require her to be vaccinated. She is saying that her restriction was justified because she does not believe in the safety of the vaccine.

[20] The General Division did not overlook the Claimant's reasons for her restriction on her availability. The General Division noted that the Claimant was unwilling to be vaccinated and that this was a major barrier to finding work.

[21] The Claimant felt that she had a reasonable excuse for limiting her job search. But, to prove availability under the *Employment Insurance Act*, she still had to show that she did not set any personal conditions that could unduly limit her chances of returning to the labour market.

[22] The General Division's findings were consistent with the law. As the General Division noted, the Federal Court of Appeal has determined that availability "cannot depend on the particular reasons for the restrictions on availability."[6]

Conclusion

[23] I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This means that the appeal will not be going proceed.

Janet Lew
Member, Appeal Division

[6] *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 at para 19 (FCA).