[TRANSLATION]

Citation: *CD v Canada Employment Insurance Commission*, 2022 SST 1062

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 29, 2022 (GE-22-671)

Tribunal member:	Pierre Lafontaine
Decision date:	October 19, 2022
File number:	AD-22-713

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) applied for regular benefits on October 21, 2020. On July 6, 2021, the Respondent (Commission) decided that the Claimant was disentitled to Employment Insurance (EI) regular benefits as of September 28, 2020, because she was taking training on her own initiative and was not available for work.

[3] The Commission also decided that the Claimant was not entitled to benefits between October 12, 2020, and December 4, 2020, because she had not submitted her reports on time and had not shown good cause for the delay.

[4] On September 22, 2021, the Commission issued a reconsideration decision. It decided that the Claimant was not available for work from September 28, 2020, to April 30, 2021, because she was taking training on her own initiative. It also decided that the Claimant had not shown good cause for the delay in submitting her reports between October 26, 2020, and December 4, 2020. The Claimant appealed the Commission's reconsideration decision to the General Division.

[5] The General Division found that the Claimant had not shown good cause for the delay in submitting her reports between October 26, 2020, and December 4, 2020. It also found that the Claimant had not shown that she was available for work within the meaning of the law from September 28, 2020, to April 30, 2021.

[6] The Claimant now seeks leave from the Appeal Division to appeal the General Division decision. She says that the General Division did not consider the evidence or the arguments presented at the hearing.

[7] I have to decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[8] I am refusing leave to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

Issue

[9] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

Analysis

[10] 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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue 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.

[11] 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 at the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success—in other words, that there is arguably a reviewable error based on which the appeal might succeed.

[12] I will grant leave to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[13] The Claimant argues that the General Division did not consider the written arguments she submitted before the hearing.[1] She says that the issue was whether she was available, not whether she was available [translation] "enough." She says that the presumption of non-availability is incorrect and unlawful. She also says that using it without a strong factual basis is a serious error.

[14] Additionally, the Claimant says that the General Division ignored her explanations for her delay in submitting her reports. She argues that the General Division made an error by refusing to consider the evidence and to assign it the appropriate legal weight and probative value. She says that the case law cited by the Commission does not take the COVID reality into account.

[15] There is abundant and consistent case law that a claimant who is a full-time student is presumed to be unavailable for work and, even if this presumption can be rebutted in some exceptional cases, the claimant will have to provide compelling evidence that they are available for work within the meaning of the law.[2]

[16] The General Division found that the Claimant had not shown a work-school history that helped rebut the presumption of non-availability. It also considered the fact that the Claimant had repeatedly said that she would not withdraw from her training if offered a full-time job that conflicted with her training.

[17] The General Division found that the pandemic had not changed the fact that the Claimant was obligated to attend certain classes during the week. It found that the Claimant had not shown exceptional circumstances that would enable her to work while taking courses.

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[1] See GD12-1 to GD12-5.
[2] *Canada (Attorney General) v Lamonde*, A-566-04; *Landry v Canada (Attorney General)*, A-719-91; *Canada v Gagnon*, 2005 FCA 321; *Canada (Attorney General) v Loder*, 2004 FCA 18.

[18] Taking into account all the evidence, the General Division found that the Claimant had not rebutted the presumption that she was unavailable for work between September 28, 2020, and April 30, 2021.

[19] Even if the presumption of non-availability is rebutted, a claimant has to show that they meet the availability for work requirements of the law.

[20] To be considered available for work, a claimant has to prove that they are capable of and available for work and unable to find a suitable job.[3]

[21] Availability has to be determined by analyzing three factors:

a) wanting to go back to work as soon as a suitable job is available

b) expressing that desire through efforts to find a suitable job

c) not setting personal conditions that might unduly limit the chances of going back to work[4]

[22] In addition, availability is determined for **each working day** in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.[5]

[23] For the purposes of section 18 of the *Employment Insurance Act* (EI Act), a working day is any day of the week except Saturday and Sunday.[6]

[24] The issue of the availability of a claimant who is taking full-time training courses has been the subject of many decisions over the years.

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[3] See section 18(1)(a) of the *Employment Insurance Act*.
[4] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[6] See section 32 of the *Employment Insurance Regulations*.

[25] The following principle emerges from prior Umpire case law:

> Availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a training program schedule that significantly limits availability.[7]

[26] The Federal Court of Appeal (FCA) has made a number of decisions about the availability of a claimant who is taking full-time training courses.

[27] In *Bertrand*, the Court found that the claimant, whose availability was restricted to the hours of work between 4 p.m. and midnight, was not available for the purposes of the EI Act.[8]

[28] In *Vezina*, the Court followed *Bertrand*, finding that the claimant's intentions to work weekends and evenings showed a lack of availability for work under the EI Act.[9]

[29] In *Rideout*, the Court found that the fact that the claimant was available for work only two days per week plus weekends was a limitation on his availability for full-time work.[10]

[30] In *Primard* and *Gauthier*, the Court pointed out that a working day excludes weekends under the *Employment Insurance Regulations*. It also found that a work availability that is restricted to evenings and weekends alone is a personal condition that might unduly limit the chances of going back to work.[11]

[31] In *Duquet*, the Court, applying the *Faucher* factors, found that being available only at certain times on certain days restricts availability and limits a claimant's chances of finding employment.[12]

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[7] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[8] *Bertrand*, A-613-81: The FCA followed this case in student files even though it involved a claimant who could not work regular weekday hours because of her difficulties finding a babysitter.
[9] *Vezina v Canada (Attorney General)*, 2003 FCA 198.
[10] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[11] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[12] *Duquet v Canada (Attorney General)*, 2008 FCA 313.

[32] The following principles can be drawn from the case law of the FCA:

1. A claimant has to be available during regular hours for every working day of the week.

2. Restricting availability to certain times on certain days of the week, including evenings and weekends, is a limitation on availability for work and a personal condition that might unduly limit the chances of going back to work.

[33] On her application for benefits, the Claimant indicated that she was a full-time student at Université X. She said that she would finish her program if offered a full-time job.[13]

[34] In her written arguments filed before the General Division hearing, the Claimant reported the following availabilities for work for the fall 2020 term: Mondays, Thursdays, Fridays starting at noon, and Sundays.[14]

[35] Additionally, the Claimant reported the following availabilities for work for the winter 2021 term: Mondays, Wednesdays starting at 11:20 a.m., Thursdays starting at 11:20 a.m., Fridays starting at 11:20 a.m., Saturdays, and Sundays.[15]

[36] When she testified before the General Division, the Claimant reiterated that, during the fall 2020 term, she was available for work on Mondays, Thursdays, and Sundays and that she was also available for work on Fridays starting at noon. For the winter 2021 term, she reiterated that she was available for work on Mondays, Saturdays, and Sundays and that she was also available on Wednesdays, Thursdays, and Fridays starting at 11:20 a.m. She said that she was able to work 40 hours per week outside her training hours.

[37] The evidence shows, on a balance of probabilities, that the Claimant was enrolled in training full-time at Université X. She was available for work only outside her

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[13] See GD3-8 and GD3-30.
[14] See GD12-4.
[15] See GD12-3.

school hours, on weekday evenings and weekends. In addition, she was unwilling to drop her course to accept a full-time job. These two conditions kept her from having jobs during regular hours, Monday to Friday.

[38] In accordance with section 18(1)(a) of the EI Act, and taking into account the case law of the FCA, the Claimant was not available and unable to find a suitable job each working day of her benefit period because, despite the pandemic, her availability was unduly restricted by the requirements of the program she was taking.

[39] As for the late claimant reports, the General Division found that the Claimant had not proven that she had good cause for the delay in submitting her reports throughout the entire period from October 26, 2020, to December 4, 2020.

[40] The General Division considered the Claimant's initial statement that she was too busy with her training and put her reports aside to complete them later.[16] It considered the Claimant's testimony that she did not know she had to submit claimant reports.

[41] The General Division found that not knowing or not having the time does not justify late reports.

[42] Before the General Division, the Claimant failed to show that she had done what a reasonable person in her situation would have done to find out about their rights and obligations under the law. Also, there were no exceptional circumstances that justified her delay.

[43] I see no reviewable error by the General Division on the issue of the Claimant's delay in submitting her claimant reports.

[44] Lastly, at the hearing, the Claimant said that she had suffered damages because the Commission had misinformed her and that she was eligible for the recovery benefit.

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[16] See GD3-40.

Unfortunately for her, the Tribunal does not have the authority to order compensation for any damages she suffered. That issue must be debated in another forum.[17]

[45] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I find that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

Conclusion

[46] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

[17] *TT v Canada Employment Insurance Commission*, 2018 SST 43; *Canada (Attorney General) v Romero*, A-815-96; *Canada (Attorney General) v Tjong*, A-672-95.