



Citation: *OC v Canada Employment Insurance Commission*, 2022 SST 1067

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: O. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 5, 2022
(GE-22-1474)

Tribunal member: Janet Lew

Decision date: October 20, 2022

File number: AD-22-648

Decision

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

Overview

[2] The Applicant, O. C. (Claimant) is appealing the General Division decision. The General Division found that the Claimant was not available for work from December 27, 2020, onward, while she attended a paralegal course, and even after the course ended. In particular, the General Division found that the Claimant set personal conditions that unduly limited her chances of returning to work. The Claimant was therefore disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made errors of fact regarding whether she set personal conditions that limited her chances of returning to the job market.

[4] Before the Claimant can move ahead with the 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.

[5] 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

[6] Is there an arguable case that the General Division made any factual errors over whether the Claimant set any personal conditions that limited her chances of returning to the job market?

¹ Under section 58(2) 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.

Analysis

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

[8] 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 any factual errors?

[9] The Claimant argues that the General Division made factual errors at paragraphs 30, 31, 32, and 51. She says that if the General Division had not made these errors, then it would have concluded that she was available for work from December 27, 2020, and onward.

– Paragraph 30

[10] The Claimant argues that the General Division made a factual error at paragraph 30. The General Division wrote:

[30] The Claimant has set personal conditions that might unduly limit her chances of returning to the labour market. Those personal conditions being her schooling, restricting her availability to focus on studying for her paralegal exam, and her restriction of only being willing to accept a job that works around her current retail position.

[11] The Claimant denies that she set any personal conditions. She says that she testified that she was prepared to leave her retail position for another position that offered the same number or more hours. She claims that she also testified that she did

not want to leave her current position, but was prepared to work a second part-time job to amount to full-time hours if she was unable to find a full-time job.

[12] The Claimant argues the General Division overlooked this evidence. If the General Division had not overlooked this evidence, she claims that it would have accepted that she had not set any personal conditions that limited her chances of returning to the labour market.

[13] The General Division accepted that the Claimant was looking for a second job.³ However, the General Division stated that it was focused on the Claimant's "availability during working days from Monday to Friday."⁴ In other words, it did not matter whether the Claimant was looking for and was prepared to work a second part-time job, or leave her current job for a full-time position.

[14] The General Division determined that the Claimant had to be available during working days from Monday to Friday. Whether the Claimant worked the equivalent of a full-time job did not necessarily show that she was available. After all, the General Division found that the Claimant had to be available during working days. This finding is consistent with the case law.

[15] For instance, in a case called *Primard*,⁵ the evidence showed that the claimant Primard's availability for work was limited to evenings and weekends because of her course schedule. The Federal Court of Appeal found that this showed that Primard was placing personal conditions that could unduly limit her chances of returning to the labour market.

[16] In another case, the Federal Court of Appeal found that the claimant Duquet was only available at certain times on certain days because of his university courses. The

³ See General Division decision, at paras 16 and 23,

⁴ See General Division decision, at para 37, citing section 32 of the *Employment Insurance Act* [sic]. Section 32 of the *Employment Insurance Regulations* defines a working day. The section defines a working day as any day of the week except Saturday and Sunday.

⁵ See *Canada (Attorney General) v Primard*, 2003 FCA 349.

Court found that this restricted his availability and therefore limited his chances of finding employment.⁶

[17] The Federal Court of Appeal has made it clear that a claimant needs to be available during regular hours for every working day of the week.⁷ It is in this context that I will examine whether the Claimant has an arguable case.

a) The Claimant's school schedule to April 16, 2021

[18] The General Division found that the Claimant's class schedule restricted her availability.

[19] The General Division noted the Claimant's class schedule. The Claimant had classes on Mondays, Tuesdays, and Fridays, and work co-op on Wednesdays and Thursdays.⁸

[20] The Claimant confirmed that her schedule was consistent until school ended on April 16, 2021.⁹ The General Division found that the Claimant spent approximately 15 to 22 hours a week on her work placement as part of her school and that her schedule showed 10.5 hours of school from Monday to Friday.¹⁰

[21] The General Division found that the Claimant's school schedule and co-op limited her chances of returning to the labour market. Given the case law, this was a conclusion that the General Division could reasonably draw from the evidence.¹¹ The fact that the Claimant looked for a second job was irrelevant to this consideration, given

⁶ See *Duquet v Canada Employment Insurance Commission and Canada (Attorney General)*, 2008 FCA 313.

⁷ See also *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA), *Vézina v Canada (Attorney General)*, 2003 FCA 198, *Canada (Attorney General) v Rideout*, 2004 FCA 304, and *Canada (Attorney General) v Gauthier*, 2008 FCA 40.

⁸ See Supplementary Record of Claim dated March 31, 2022, at GD3-46. The Commission noted the Claimant's advice that she was attending in class training on Mondays from 5 pm to 7 pm, Tuesdays from 5 pm to 10 pm and Fridays from 1 pm to 4 pm. Her placement at a law firm was from Wednesdays and Thursdays from 9 am to 5 pm.

⁹ See General Division decision, at para 34, referring to GD2-30 and GD2-31.

¹⁰ See General Division decision, at para 36.

¹¹ See, for instance, the Claimant's school attendance, at GD3-40, for the period from February 17, 2021 to April 8, 2021. The General Division also referred to the Claimant's oral testimony and to her request for reconsideration, at GD3-20.

her school schedule. I am not satisfied that there is an arguable case that the General Division made an error of fact that the Claimant's schedule restricted her availability.

b) April 16, 2021 to March 1, 2022 - Studying for the paralegal exam

[22] The General Division found that the Claimant continued to restrict her availability even after her paralegal course ended on April 16, 2021.

[23] The General Division found that the Claimant focussed on studying for her paralegal exam until March 1, 2022, when the Commission informed her that it was disentitling her from receiving Employment Insurance benefits from December 27, 2020. The General Division accepted that the Claimant became too stressed to focus on her paralegal exam at that point, so put her exam aside.

[24] The General Division noted the evidence regarding the Claimant's availability between April 16, 2021 and March 1, 2022:

- The Claimant told the Commission that she could not work full-time as she was studying for her paralegal exam and could not work full-time until after her paralegal exam was over.¹² The Commission's notes of its phone call with the Claimant on March 31, 2022 read, "The Claimant said she graduated on 23/06/2021 and still not available for work because she is studying for her paralegal licence."¹³

The notes also read, "She said she is and was available for only part-time employment because of school. The Claimant stated that she is available to the maximum capacity after school and placement. Claimant said she is trying to better her life and has always been available for part-time work only."¹⁴

¹² See General Division decision, at para 46, referencing GD3-46.

¹³ See Supplementary Record of Claim, dated March 31, 2022, at GD3-46.

¹⁴ See Supplementary Record of Claim, dated March 31, 2022, at GD3-46.

- The Claimant testified that she could work any day, any shift, when she was out of school, as she could do her studying whenever she was not working.¹⁵

[25] The General Division examined the Claimant on this evidence. The Claimant claims that the Commission misunderstood her. She denied that she restricted her availability so she could study for her paralegal exam. She explained that simply because she was not working full-time did not mean she was unavailable for the equivalent of full-time work.

[26] The General Division examined the types of jobs to which the Claimant applied after her schooling ended. The General Division found that they were part-time jobs. The General Division found that this supported the Claimant's statements to the Commission that she could work only part-time because she was studying for her paralegal exam.¹⁶

[27] The Claimant's schooling ended in April 2021. By then, she had already received a layoff notice from her employer. Her last day of work was April 7, 2021. Her employer expected that the layoff would be temporary, for a duration of approximately four weeks.¹⁷ The Claimant received some work after this, in the months of July, August, September and October 2021,¹⁸ but her shifts were for only a week per month, with varying hours.

[28] The Claimant applied for a part-time position in July 2021,¹⁹ but it did not lead to any work. The Claimant applied for another part-time position in late September 2021.²⁰ This time, she received a job offer.

¹⁵ See General Division decision, at para 47.

¹⁶ See General Division decision, at para 55, citing applications for part-time employment at GD2-33 and GD2-43.

¹⁷ See employer's layoff notice dated April 8, 2021, at GD3-35.

¹⁸ See Claimant's work schedule, at GD3-36 to GD3-39.

¹⁹ See application at GD2-33.

²⁰ See application at GD2-43.

[29] The General Division noted that, once the Claimant landed a different retail job that paid better and offered more hours, she left her existing retail job. In other words, she worked one part-time retail job at a time.

[30] Although the Claimant received more hours from this new employment, this still left her with part-time employment. So, for the General Division, this undercut her claims that she was prepared to work two part-time positions to add up to full-time work.

[31] Against this backdrop, and after weighing the evidence, the General Division preferred the Claimant's initial statements to the Commission that she could not work full-time as she was studying for her paralegal exam. The General Division placed greater weight on the Claimant's initial statements and rejected the Claimant's testimony, finding that it did not stand up to scrutiny.

[32] The General Division was entitled to assess and weigh the evidence and draw conclusions based on that evidence.

[33] I am not satisfied that there is an arguable case that the General Division overlooked the fact that the Claimant was looking for other work. The General Division noted this evidence, finding however that it fell short of demonstrating that she was making herself available to the extent that she claimed.

c) Working around her existing job

[34] The General Division found that the Claimant restricted her availability to accepting a job that worked around her existing retail position.

[35] The Claimant testified as follows:

Well, I was planning on doing, having a second job on top of [U.B.] because when I started working at [U.B.], the pay was better, the hours were better, and I got a bonus, commission, so I was willing. My manager, I spoke with my manager and asked, "Would you be willing to work around my schedule so I can have a second job?" And he said "yes".²¹

²¹ At approximately 34:25 of the audio recording of the General Division hearing.

[36] The General Division member summarized the Claimant's evidence. He confirmed that she was not getting close to full-time hours at the retail position she started in October 2021. Other employers had more seniority. She looked for another part-time position that worked around her existing part-time employment. She valued the existing part-time employment because of the compensation scheme and the chance to earn commission. The Claimant agreed that the General Division member understood her evidence.²²

[37] Based on the Claimant's evidence, the only conclusion the General Division could have drawn was that the Claimant would take on a second part-time position that worked around her existing retail position. For this reason, I am not satisfied that there is an arguable case that the General Division made an error of fact that the Claimant restricted her availability to accepting a job that worked around her existing retail position.

– **Paragraphs 31 and 32**

[38] The General Division set out the Commission's submissions at paragraphs 31 and 32, on the issue of whether the Claimant set personal conditions that could have limited her chances of returning to work. I have addressed the Claimant's underlying arguments above, regarding whether she set personal restrictions.

[39] The Commission also argued that the Claimant did not have a history of working full-time while attending school. The General Division found that the Claimant had not demonstrated a history of working full-time while in school.²³

[40] The Claimant maintains that she had a history of working full-time. She contacted her former employer. The Claimant has since received records from her former employer. She claims that these records verify that she worked full-time.²⁴ However, the

²² At approximately 50:35 to 52:07 of the audio recording of the General Division hearing.

²³ See General Division decision, at para 43.

²⁴ See employer's letter dated August 31, 2022, at AD1-24.

Claimant provided this information after the General Division had already issued its decision. The General Division did not have these records.

[41] The General Division could only make a determination based on the evidence before it. As it was, the Claimant indicated on a training questionnaire that she worked 20 hours weekly from December 2019 to December 2020. When questioned about the questionnaire, the Claimant responded that 20 hours represented an average. She also explained that, while she occupied a full-time position, she was not getting full-time hours.²⁵

[42] Given the evidence before it, the General Division was entitled to conclude that the Claimant did not have a history of full-time work. I am not satisfied that there is an arguable case that the General Division made any factual errors arising out of paragraphs 31 or 32.

[43] The Appeal Division does not accept new evidence. Even so, I would have found that the employer's letter of August 31, 2022 does not establish that the Claimant worked full-time. The employer wrote that the Claimant "held a Full-Time Key Holder position from December 15, 2019 to October 25, 2020 ..."²⁶ The employer confirmed that the Claimant held a full-time position, but the employer did not state that she actually worked full-time hours.

[44] I am not satisfied that there is an arguable case that the General Division made an error of fact over whether the Claimant had a history of working full-time while attending school.

– **Paragraph 51**

[45] At paragraph 51, the General Division wrote:

The Claimant testified that when the Commission made the decision to disentitle her on March 1, 2022, she decided to put aside her paralegal exam as she was too stressed to focus on it.

²⁵ See General Division decision, at paras 41 and 42.

²⁶ See employer's letter dated August 31, 2022, at AD1-24.

[46] The Claimant argues that the General Division overlooked the fact that she had already deferred her exam several times. And, because she had deferred her exam, she suggests that she would not have studied for the exam and therefore would have been available for work.

[47] The Claimant argues:

I had already deferred my exam January 24, 2022 to July 27, 2022. This matter started in March of 2022. I had to defer this exam because the exam date I had chosen was the same date of the hearing. I also do not even have the materials printed for this year and have not once looked at the study materials.

Because of this appeal I had to change it again. I deferred the exam again on June 20, 2022 to write in the fall. I had absolutely zero intentions on writing the Paralegal Exam this year, nor the previous year. The reason I have deferred so many times is to avoid losing the \$1000.00 I have already paid to write this exam. If I do not continue to defer, I would be losing that money. I would have deferred again until 20203 but the Law Society does not have the deferment forms for the licensing examination for 2023.²⁷

[48] I will focus on the evidence between January 24, 2022 and March 1, 2022. I will not address any deferrals after March 1, 2022, because the General Division noted the Claimant's testimony that she put aside her paralegal exam after learning that the Commission disentitled her from receiving Employment Insurance benefits on March 1, 2022. The General Division accepted that the Claimant deferred her exam after March 1, 2022.

[49] From the General Division's viewpoint, it was irrelevant that the Claimant deferred her exam again after March 1, 2022. The General Division recognized that the Claimant focussed on working after this point.

[50] The evidence regarding any deferrals between January 24, 2022 and March 1, 2022, is as follows:

²⁷ See Claimant's Application to the Appeal Division-- Employment Insurance, at AD1-22.

- The Claimant declared that “since the beginning of her claim on 27/12/2020 and currently, she had never sought nor [was] available for full-time employment.”²⁸ Although she was no longer in school, she was studying for her exams and could not work full-time hours while studying. The Claimant purportedly stated that she was unwilling to leave her part-time employment to accept other suitable employment until she finished her exams sometime in July 2022. She did not know the exact date of her exam since it had not been scheduled yet.²⁹
- The General Division examined the Claimant on what she meant by her statement that she was unwilling to leave her part-time employment until after she finished her exam sometime in July 2022.³⁰ The Claimant testified that it was an error and that she was looking for other jobs as well. She claims that she was looking for other work. She denied that she limited her availability.
- Her exam had been scheduled for July 27, 2022, but she had a lot on her mind due to the appeal, so deferred that exam.³¹ She testified that she would either write the exam in the fall or the following year. She decided that she would not write the exam in 2022.
- At the General Division hearing, the Claimant testified that she decided to defer her exam in March 2022.

[51] There was no evidence at the General Division hearing or in the hearing file of any deferrals before March 2022.³²

[52] The General Division did not mischaracterize or misstate the evidence when it found that the Claimant’s initial deferral of her exam was in March 2022. I am not satisfied that there is an arguable case that the General Division made an error of fact over when she initially deferred her paralegal exam.

²⁸ See Supplementary Record of Claim, dated February 28, 2022, at GD3-17.

²⁹ See Supplementary Record of Claim, dated February 28, 2022, at GD3-17.

³⁰ At approximately 11:22 of the audio recording of the General Division hearing.

³¹ At approximately 9:42 of the audio recording of the General Division hearing.

³² At approximately 30:41 to 31:38 of the audio recording of the General Division hearing.

Overpayment

[53] The Claimant faces a substantial overpayment because of the disentitlement to Employment Insurance benefits. I do not have any authority to waive or reduce any of the overpayment, but in terms of any potential relief, the Claimant can ask the Commission to consider writing off the debt because of undue hardship. She can also contact Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 about a repayment schedule.

Conclusion

[54] Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division