



Citation: *HE v Canada Employment Insurance Commission*, 2022 SST 1286

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: H. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 7, 2022
(GE-22-1895)

Tribunal member: Pierre Lafontaine

Decision date: November 30, 2022

File number: AD-22-816

Decision

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

Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Applicant (Claimant) was disentitled from receiving Employment Insurance (EI) regular benefits between November 8, 2021 and March 11, 2022, because she was not available for work. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant wanted to go back to work and that she made sufficient efforts to find a job. However, it found that the Claimant set a personal condition that might unduly limit her chances of returning to the labour market by choosing not to be vaccinated. The General Division concluded that the Claimant did not show that she was capable of, and available for work but unable to find a suitable job.

[4] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division made an error in its interpretation of the third *Faucher* factor because her choice of not receiving the vaccine is not a personal condition that limits employment. She submits that the General Division did not apply the *Employment Insurance Regulations* (EI Regulations) regarding suitable employment. She submits that the job notices that require vaccination constitute unsuitable employment because they go against her moral convictions and religious beliefs. The Claimant submits that the determination of unavailability for work due to unvaccinated status constitutes discrimination under the *Canadian Human Rights Act* (CHRA).

[5] I must decide whether there is some reviewable error of the General Division upon which the appeal might succeed.

[6] I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[7] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[8] 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.

[9] 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.

[10] Therefore, before I can grant leave, 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?

[11] The Claimant submits that the General Division made an error in its interpretation of the third *Faucher* factor because her choice of not receiving the vaccine is not a personal condition that limits employment. She submits that the General Division erred by not applying the EI Regulations regarding suitable employment. She submits that the job notices that require vaccination constitute unsuitable employment because they go against her moral convictions and religious beliefs. The Claimant submits that the determination of unavailability for work due to unvaccinated status constitutes discrimination under the CHRA.

[12] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.¹

[13] Availability must be determined by analyzing three factors:

- (1) the desire to return to the labour market as soon as a suitable job is offered,
- (2) the expression of that desire through efforts to find a suitable job, and
- (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.²

¹ Section 18(1) (a) of the *Employment Insurance Act*.

² *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[14] Furthermore, availability is determined for **each working day** in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and **unable to obtain suitable employment**.³

[15] The General Division found that the Claimant set a personal condition that might unduly limit her chances of returning to the labour market by choosing not to be vaccinated.

[16] The General Division found that by choosing not to be vaccinated, the Claimant was restricting herself to jobs without a vaccination requirement – at a time when, by her own admission, most (if not all) of the employers she was targeting required candidates to be vaccinated.

[17] The Claimant submits that the General Division made an error in not applying section 9.002 of the EI Regulations regarding suitable employment. She submits that the job notices that require vaccination constitute unsuitable employment because contrary to her moral convictions and religious beliefs.

[18] The nature of work referred to in section 9.002 of the EI Regulations relates to the type of work and duties to perform for an employer.

[19] The type of work and duties to perform offered in the job notices did not go against the Claimant's moral convictions and religious beliefs. The Claimant would have been able to accept these jobs if not for her personal decision to refuse vaccination. Therefore, the offered jobs constituted suitable employment.

[20] The Claimant submits that the determination of unavailability for work due to unvaccinated status constitutes discrimination under the CHRA.

[21] A determination of unavailability to work under the *Employment Insurance Act* due to unvaccinated status does not constitute discrimination under the CHRA.

³ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[22] In other words, the determination of unavailability is not based on a ground of discrimination under the CHRA. Furthermore, human rights protection does not extend to the Claimant's personal choices.⁴

[23] The Claimant's choice not to be vaccinated set a personal condition that unduly limited her chances of returning to the labour market. The evidence supports the General Division's conclusion that the Claimant did not demonstrate that she was available for work but unable to find a suitable job.

[24] It is well-established that payment of benefits is subject to the availability of a claimant, not to the justification of their unavailability.⁵

[25] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability. I have no choice but to 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

⁴ *Canadian National Railway Company v Seeley*, 2014 FCA 111.

⁵ *Canada (Attorney General) v. Leblanc*, 2010 FCA 60.