Citation: *NL v Canada Employment Insurance Commission*, 2023 SST 71

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 8, 2022 (GE-22-2357)

Tribunal member:	Pierre Lafontaine
Decision date:	January 26, 2023
File number:	AD-22-948

Decision

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

Overview

[2] The Respondent (Commission) decided that the Applicant (Claimant) was disentitled from receiving Employment Insurance (EI) regular benefits from January 18, 2021, to April 22, 2022, because she was not available for work while attending school. 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 showed that she wanted to go back to work and that she had made enough efforts to find a suitable job. However, it found that the Claimant set personal conditions that might have unduly limited her chances of going back to work by attending school. The General Division concluded that she was not available for work under the law.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that she made the point before the General Division that she would have changed her school schedule, if necessary, to allow her to work. She submits that she applied for a full-time job but was offered flex hours that permitted her to work around her school schedule. After she graduated, the job would shift into a more traditional full-time job with regular hours. The Claimant submits that she was actively looking for a job and that she was available to work.

[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 she made the point before the General Division that she would have changed her school schedule, if necessary, to allow her to work. She submits that she applied for a full-time job but was offered flex hours that permitted her to work around her school schedule. After she graduated, the job would shift into a more traditional full-time job with regular hours. The Claimant submits that she was actively looking for a job and that she was available to work.

[12] The Claimant established a claim for employment insurance benefits effective January 10, 2021.

[13] The law says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.[1]

[14] This provision, which is part of the Temporary Measures to Facilitate Access to Benefits during the pandemic, acknowledges implicitly that during the pandemic, verification of entitlement may not have been possible at the time benefits are initially paid, and to allow for subsequent verification even after benefits have been paid.

[15] I note that the provision was in force when the Claimant applied for benefits.[2]

[16] On February 7, 2021, in her training questionnaire, the Claimant indicated that she was attending school at X College from 18/01/2021 until 23/04/2021. The Claimant declared that she spent about 15-24 hours per week in her studies. She stated that she would finish her course if she found full time work that conflicted with her school.[3]

[17] On September 28, 2021, in her second training questionnaire, the Claimant indicated that she was attending school at X College from 07/09/2021 until 23/04/2022. The Claimant declared that she spent about 15-24 hours per week in her studies. She

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[1] See section 153.161 of the *Employment Insurance Act*..
[2] In force between September 27, 2020, to September 25, 2021: See section 153.15 and following, of the *Employment Insurance Act*.
[3] See GD3-72 to GD3-74.

stated that would accept a full-time job as long as she could delay the start date to allow her to finish the course.[4]

[18] On March 23, 2022, when interviewed by the Commission, the Claimant declared that she was not looking for full-time work while in school. The Claimant stated for a third time that she would not have left schooling if offered full-time employment that conflicted with her course.[5]

[19] In the Claimant's appeal application to the General Division, she then stated that she was ready to take on any job offered her way, and if schooling was an issue, she would fix her school schedule around it.[6]

[20] During the General Division hearing, the Claimant put forward that she would have taken night classes, or weekend classes, and worked around her schooling as only three classes a week were mandatory attendance, the others were recorded, so she could watch them at any time. The Claimant had friends in the classes who could have brought her up to speed on the class content if she was busy at work.

[21] To be considered available for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.[7]

[22] 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,
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> (2) the expression of that desire through efforts to find a suitable job, and
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> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[8]

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[4] See GD3-88 to GD3-91.
[5] See GD3-93.
[6] See GD2-9.
[7] Section 18(1) (a) of the *Employment Insurance Act*.
[8] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[23] 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.[9]

[24] For the purposes of sections 18 of the *Employment Insurance* (EI) *Act*, a working day is any day of the week except Saturday and Sunday.[10]

[25] The Federal Court of Appeal has rendered several decisions regarding the availability of a claimant attending training courses. The following principles are well established:

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

2. Restricting availability to only 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.[11]

[26] The preponderant evidence before the General Division shows that the Claimant was a student following a college program, and that she was available for work only outside of her mandatory class hours— certain weekdays, evenings and weekends. The Claimant reiterated on several occasions that she was not willing to give up her course to take a full-time job. Both of those restricted her from going back to work during regular business hours, Monday to Friday.

[27] The preponderant evidence before the General Division clearly shows that school was the Claimant's priority and that she was not willing to drop her school for a full-time job that conflicted with her school schedule.

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[9] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[10] Section 32 of the *Employment Insurance Regulations*.
[11] *Bertrand*, A-613-81; *Vezina v Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40; *Duquet v Canada (Attorney General)*, 2008 FCA 313.

[28] As stated by the General Division, the Claimant's arguments that she would have done night or weekend classes and have her friends help her keep up on her school work, is only a possibility of availability, as she was not taking such classes, and had mandatory classes that she had to work around; a possibility of availability is not actual availability.[12]

[29] I am of the view that the General Division made no reviewable error when it found that the Claimant's school schedule was a personal condition that might unduly limit her chances of going back to work. The Claimant did not meet the third factor established in *Faucher*.

[30] I find that the preponderant evidence supports the General Division's conclusion that the Claimant showed a lack of availability for work under the EI Act, because of the limitations imposed by her school.

[31] 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.

[32] I have no choice but to find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

[12] See *Canada (Attorney General) v Primard*, 2003 FCA 349. para 9.