



[TRANSLATION]

Citation: *NO v Canada Employment Insurance Commission*, 2023 SST 64

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** N. O.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
November 10, 2022 (GE-22-2619 and GE-22-2639)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** January 25, 2023

**File number:** AD-22-940 and AD-22-941

## Decision

[1] Permission to appeal is refused. The appeal will not proceed.

## Overview

[2] The Record of Employment the Applicant (Claimant) received from his employer said that he had quit. Later, the employer said that the employment relationship was not severed and that the separation could be considered unpaid leave.

[3] The Respondent (Commission) found that the Claimant voluntarily took a leave of absence from November 15, 2021, and it did not pay him benefits. In its written arguments to the General Division, the Commission conceded the appeal because it considered that it had decided incorrectly. However, it asked the General Division to find that the Claimant had stopped working because of misconduct.

[4] The Commission made a second decision. It told the Claimant that it was unable to pay him benefits from December 20, 2021, because he had not shown that he was available for work.

[5] The General Division found that the Claimant had not asked for or voluntarily taken a leave of absence. It refused to address the issue of misconduct because that was not the reconsideration decision that the Claimant had appealed. It also found that the Claimant was not available for work within the meaning of the law between December 20, 2021, and June 24, 2022.

[6] The Claimant now seeks permission from the Appeal Division to appeal the General Division decision. He says that the General Division was not entitled to decide the issue of misconduct when the case was about a leave of absence.

[7] The Claimant argues that he was available for work and that he did not set personal restrictions on his job search. He says that looking for only deckhand jobs is not what lowered his chances of finding a job. It is the fact that no shipping company in

Canada was hiring unvaccinated workers during the period from November 15, 2021, to June 24, 2022. He had the right to look for a suitable job in his occupation.

[8] 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.

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

## **Issue**

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

## **Analysis**

[11] 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.

[12] An application for permission 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 permission to appeal stage, the Claimant does not have to prove his case; he 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.

[13] I will grant permission 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?**

**– Leave of absence**

[14] The Claimant says that the General Division was not entitled to decide the issue of misconduct when the case was about a leave of absence.

[15] I note that the General Division found that the Claimant had not asked for or voluntarily taken a leave of absence. It refused to address the issue of misconduct because that was not the reconsideration decision that the Claimant had appealed. So, the General Division did not make a decision on the issue of misconduct.

[16] Since the Claimant was successful on the leave of absence issue, I do not have to decide permission to appeal on this issue.

**– Availability**

[17] The Claimant argues that he was available for work and that he did not set personal restrictions on his job search. He says that looking for only deckhand jobs is not what lowered his chances of finding a job. It is the fact that no shipping company in Canada was hiring unvaccinated workers during the period from November 15, 2021, to June 24, 2022. He had the right to look for a suitable job in his occupation.

[18] 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.<sup>1</sup>

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<sup>1</sup> See section 18(1)(a) of the *Employment Insurance Act*.

[19] 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<sup>2</sup>

[20] 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.<sup>3</sup>

[21] The General Division found that the Claimant had shown a desire to go back to work as soon as a suitable job was available.

[22] The General Division found that the Claimant had not expressed his desire to go back to work through significant efforts to find a suitable job each working day of his benefit period between December 20, 2021, and June 24, 2022.

[23] The General Division relied on the Claimant's initial statement to the Commission that he was not looking for work. He said that he was not interested in finding a job other than as a deckhand and that no employer would want to hire him because he was unvaccinated. He was waiting for Transport Canada's Interim Order No. 7 to be lifted so that he could go back to work.<sup>4</sup>

[24] The General Division found that the Claimant's availability was unduly limited because he did not want to look for work other than as a deckhand. It also took into account that the Claimant had not actually tried to find a job.

[25] The *Employment Insurance Act* says that, to be entitled to benefits, a claimant has to establish their availability for work and, to do this, they have to **actively look** for

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

<sup>3</sup> *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

<sup>4</sup> See GD3-27.

work. No matter how little chance of success a claimant may feel a job search would have, the law is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits. A claimant must establish their availability for work for each working day in a benefit period, and this availability must not be unduly limited.

[26] I am of the view that, on a balance of probabilities, the evidence supports the General Division's finding that the Claimant was not available and unable to find a suitable job between December 20, 2021, and June 24, 2022, since he was not actively looking for a job and his availability was unduly limited by his choice to wait until Transport Canada's Interim Order No. 7 was lifted so that he could go back to work.

[27] In this case, a warning was certainly unnecessary because the Claimant admitted to the Commission that he was not looking for work and was waiting for the interim order to be lifted.

[28] As the General Division pointed out, it may have been convenient for the Claimant to remain available for his employer until it called him back, but it is not enough to show his availability for work within the meaning of the law.<sup>5</sup>

[29] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission 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.

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<sup>5</sup> *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *DB v Canada Employment Insurance Commission*, 2019 SST 1277; CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.

## **Conclusion**

[30] Permission to appeal is refused. The appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division