



[TRANSLATION]

Citation: *ER v Canada Employment Insurance Commission*, 2023 SST 507

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

# **Leave to Appeal Decision**

**Applicant:** E. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
December 7, 2022(GE-22-2785)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** April 26, 2023

**File number:** AD-23-33

## Decision

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

## Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Applicant (Claimant) was not entitled to Employment Insurance (EI) regular benefits as of January 11, 2021, because she was taking unauthorized training and was not available for work.

[3] On August 15, 2022, the Appeal Division found that the Claimant was not available and unable to find a suitable job because her availability was unduly restricted by the requirements of the program she was taking. Since the General Division had not decided the Claimant's argument concerning the Commission's power to reconsider, the Appeal Division sent the file back to the General Division to decide only that issue.

[4] The General Division found that the Commission has the power to verify the Claimant's entitlement after paying her benefits. It also found that the Commission exercised its discretion judicially. The General Division found that the Commission was justified in verifying the Claimant's claim for benefits.

[5] The Claimant now seeks permission from the Appeal Division to appeal the General Division decision. She argues that the General Division failed to consider her arguments and the COVID-19 crisis.

[6] On March 24, 2023, the Appeal Division asked the Claimant to explain in detail why she was appealing the General Division decision. The Claimant did not respond to the Tribunal within the allowed time.

[7] I must 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. 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

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

## Analysis

[9] 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 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.

[10] 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 on the hearing of the appeal on the merits. At the permission to appeal stage, the Claimant does not have to prove her case but must establish that her appeal has a reasonable chance of success. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] 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?**

[12] In support of her application for permission to appeal, the Claimant argues that the General Division failed to consider her arguments and the crisis caused by the pandemic.

[13] Before the General Division, the Claimant argued that she was honest and transparent about her student status and that she even talked about it with a Commission employee. The Claimant said that other students had their training officially recognized by a designated authority and were able to get benefits but she was denied this option because she did not meet the criteria even though she already had a diploma.

[14] During the pandemic, the government temporarily amended *the Employment Insurance Act* (EI Act). Section 153.161 was added to the EI Act and came into force on September 27, 2020. This provision applies to the Claimant who established an initial claim for EI benefits on September 27, 2020.

[15] Section 153.161 of the EI Act says:

#### Availability

#### **Course, program of instruction or non-referred training**

153.161 (1) For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

#### **Verification**

(2) The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) 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.

[16] This temporary provision says that, for the purposes of applying section 18(1)(a) of the EI Act, the Commission may **verify** that a Claimant is entitled to benefits by requiring proof of their **availability** for work at any point after benefits are paid. This means that the verification of entitlement may not happen when benefits are paid.

[17] The General Division correctly found that section 153.161 of the EI Act allowed the Commission to verify whether the Claimant was entitled to benefits. However, the decision to carry out a verification under section 153.161 is discretionary. This means that, although the Commission has the power to carry out a verification, it does not have to do so.

[18] The General Division found that the Commission exercised its discretion judicially because it considered all the relevant factors before making its decision, and it ignored the irrelevant ones.

[19] The General Division noted that, while the temporary measures were in place during the pandemic, the Commission's discretion to verify a claimant's availability had to be exercised with the legislative intent of section 153.161 of the EI Act in mind.

[20] In implementing this section during the pandemic, Parliament clearly wanted to **insist** on the Commission's power to verify that a claimant taking a course, program of instruction, or training was entitled to EI benefits, even after the payment of benefits.

[21] I am of the view that the General Division did not make an error when it found that the Commission exercised its discretion within the parameters set by Parliament during the pandemic.

[22] The General Division could not rely on the pandemic to relieve the Claimant of her obligation to repay the benefits received when she was not available for work within the meaning of the law. The fact that other students have had their training formally recognized by a designated authority and have received benefits does not make the Claimant entitled to benefits.

[23] 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.

## **Conclusion**

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

Pierre Lafontaine  
Member, Appeal Division