



Citation: *CE v Canada Employment Insurance Commission*, 2023 SST 633

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: C E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 28, 2023
(GE-23-12)

Tribunal member: Pierre Lafontaine

Decision date: May 25, 2023

File number: AD-23-290

Decision

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

Overview

[2] The Applicant (Claimant) established a claim for employment insurance sickness benefits effective October 3, 2021. The Record of Employment (ROE) indicated an expected date of recall of January 9, 2022. The employer issued a subsequent amended ROE on January 19, 2022, for the same period stating that the Claimant had refused work on her projected return to work date of January 9, 2022. The Claimant submitted a medical note that indicates she is only able to work starting February 1, 2022.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was disentitled indefinitely from receiving Employment Insurance (EI) regular benefits as of January 30, 2022. The Commission determined the Claimant wasn't available for work. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant did not prove that she wanted to go back to work as soon as a suitable job was available. It found that the Claimant did not make enough efforts to find a full-time job. The General Division found that the Claimant did not want full-time employment and therefore set personal conditions that limited her chances of going back to work.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. In support of her application, the Claimant submits that she was not offered a written offer of full-time employment by her employer until August 24, 2022. She submits that she could not accept it because she had a planned surgery for September 26, 2022. She also had a difficult working relationship with her superior through no fault of her own. The Claimant submits that she was always looking for work

elsewhere, and available to work full-time but could not find work in her small community.

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

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

Issue

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

Preliminary matters

[9] It is well established that the Appeal Division must consider the evidence presented to the General Division to decide the present leave to appeal application.¹

Analysis

[10] 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:

- a) the General Division: failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

¹ *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[11] An application for leave to appeal is a preliminary step to a hearing on the merits. The Claimant must meet this initial hurdle, but it is lower than the one of 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.

[12] In other words, 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 in appeal, in order to grant leave.

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

[13] In support of her application, the Claimant submits that she was not offered a written offer of full-time employment by her employer until August 24, 2022. She submits that she could not accept it because she had a planned surgery for September 26, 2022. She also had a difficult working relationship with her superior through no fault of her own. The Claimant submits that she was always looking for work elsewhere, and available to work full-time but could not find work in her small community.

[14] To be eligible to receive benefits, claimants must prove that they are capable of and available for work—on any given workday—and are unable to find suitable employment.²

[15] Availability must be determined by reviewing three factors:

- the desire to return to the labour market as soon as a suitable job is offered;
- the expression of that desire through efforts to find a suitable job, and
- the non-setting of personal conditions that might unduly limit the chances of returning to the labour market.³

² Section 18(1)(a) of the *Employment Insurance Act*.

³ *Faucher v Canada* (CEIC), A-56-96.

[16] Furthermore, availability is determined for each working day in a benefit period for which a claimant can prove that on that day they are capable of and available for work, and unable to obtain suitable employment.⁴

[17] The General Division found that the Claimant did not show a desire to return to the labour market as soon as a suitable job was available. She was offered full-time employment by her employer which she did not want. The General Division did not give weight to her claim that she was working in a hostile environment.

[18] The General Division determined that the Claimant was doing a limited job search to find a full-time job because she didn't keep track of applications, job alerts, contacts for networking, and didn't follow up on applications.

[19] The General Division finally found that the Claimant set personal conditions on her job search by limiting her chances of returning to the job market because she did not want full-time work.

[20] During an interview held on January 31, 2022, the Claimant declared that her job is always 3 days a week and she is not looking for 5 days a week. She stated that 3 days a week is her normal workload.⁵

[21] During an interview held on October 5, 2022, the employer confirmed that the Claimant mentioned a few times that she did not need full-time work. She only wanted to work 3 days a week and part-time hours. The employer stated that the Claimant refused full-time hours and did not want to work more than that.⁶

[22] During another interview held on October 14, 2022, the Claimant confirmed that she was only looking for part-time work because she needed to take care of her uncle and that full-time work would not give her time to rest and enjoy life.⁷

⁴ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

⁵ See Exhibit GD3-16.

⁶ See Exhibit GD3-20.

⁷ See Exhibit GD3-22.

[23] In its decision, the General Division clearly placed more weight on the Claimant's consistent, initial responses provided to the Commission that she only wanted part-time work, than on her testimony provided at the hearing.

[24] To obtain EI benefits, the Claimant had to actively look for full-time employment even if it seemed more reasonable to be content with her part-time work.

[25] Availability is a prerequisite for entitlement to benefits. The claimant bares the burden of proving availability. A mere statement of availability is not enough for a claimant to discharge the burden of proof. Before the General Division, the Claimant did not meet her burden of proof.

[26] An appeal to the Appeal Division is not a new hearing where a party can re-present evidence and hope for a different outcome.

[27] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I am of the view that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability.

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

Conclusion

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

Pierre Lafontaine
Member, Appeal Division