



Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 781

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: J. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 6, 2023
(GE-22-3284)

Tribunal member: Janet Lew

Decision date: June 15, 2023

File number: AD-23-352

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, J. W. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Claimant had not shown that he was available for work. Because he was found to be unavailable for work, he was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural, jurisdictional, legal, and factual errors. However, most of the Claimant's arguments centre around whether he was dismissed from his employment because of misconduct. The appeal is about whether the Claimant was available for work. So, the arguments about the Claimant's dismissal are not relevant to this appeal.

[4] On the issue of availability, the Claimant argues that the General Division made a factual error about whether he had limited his chances of returning to the workforce.

[5] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with his appeal.

¹ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) of the *Department of Employment Social Development (DESD) Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issue

[7] Is there an arguable case that the General Division made any procedural, jurisdictional, legal, or factual errors?

I am not giving the Claimant permission to appeal

[8] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division potentially made a jurisdictional, procedural, legal, or certain type of factual error.³

[9] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Is there an arguable case that the General Division made any procedural, jurisdictional, legal, or factual errors?

[10] The Claimant argues that the General Division made procedural, jurisdictional, legal errors.

[11] The Application to the Appeal Division-Employment Insurance asks applicants to explain the basis of their appeal of the General Division decision. The application form lists four potential reasons that the Appeal Division can consider. The reasons include:

- The General Division didn't follow procedural fairness.
- The General Division made an error of jurisdiction.
- The General Division made an error of law.
- The General Division made an important error of fact.

³ See section 58(1) of the DESD Act.

[12] The Claimant ticked off each of these four reasons. However, he did not identify any specific procedural, jurisdictional, or legal errors nor explain how the General Division might have made one of these types of errors.

– **The Claimant did not identify any procedural errors**

[13] None of the Claimant's arguments deal with whether the process was fair at the General Division. For instance, the Claimant does not suggest that the General Division member failed to give him adequate notice of the hearing, that it did not give him adequate disclosure of any documents, or that it did anything that affected the Claimant's right to be heard or to present his case.

[14] The Claimant also does not suggest that the General Division member was biased or had prejudged the appeal.

[15] The Claimant argues that the Respondent, the Canada Employment Insurance Commission (Commission), should have provided him with copies of applicable legislation relating to his employer's authority to collect any personal information.

[16] I understand that the Claimant is arguing that he did not get full disclosure, but the arguments he is making lie against the Commission, rather than the General Division. For a reasonable chance of success to be made out, the Claimant's arguments have to be about any errors that relate to the General Division. Besides, the documents that the Claimant wants from the Commission are unrelated to the availability issue.

[17] As the Claimant's arguments do not address whether the process was fair at the General Division, I am not satisfied that the appeal has a reasonable chance of success on this point.

– **The Claimant did not identify any jurisdictional errors**

[18] The Claimant does not suggest that the General Division failed to consider any issues or that it considered something that was beyond its jurisdiction.

[19] The Claimant referred to sections 29 and 30 of the *Employment Insurance Act*. Section 29 deals with whether or not a claimant has just cause for voluntarily leaving or taking leave from an employment. Section 30 deals with disqualification for misconduct or leaving one's without just cause. It is unclear whether the Claimant is suggesting that the General Division should have considered or applied the sections. However, neither of these sections are relevant to the availability issue.

[20] The Claimant also discussed the circumstances around his dismissal from his employment. He disagreed with his employer's vaccination policy for several reasons. He argued that his employer wrongfully dismissed him from his employment. He filed a grievance. It seems that the Claimant may be suggesting that the General Division should have addressed these issues. However, the issues are unrelated to the availability issue.

[21] The Claimant says that because he had active grievances, it was inappropriate to look for other work elsewhere. While that may be, that is of no relevance in deciding whether the Claimant was available for work.

[22] So, I am not satisfied that he has a reasonable chance of success on the Claimant's argument that the General Division made any jurisdictional errors.

– The Claimant did not identify any legal errors

[23] Finally, the Claimant argues that the General Division made legal errors. However, there is no suggestion that the General Division misinterpreted the law or set out the wrong factors to determine whether he was available for work. The General Division determined that the Claimant had to prove three things, that:

- i. he wanted to go back to work as soon as a suitable job was available,
- ii. he made efforts to find a suitable job, and
- iii. he did not set any personal conditions that overly limited his chances of going back to work.

[24] The General Division properly set out the factors that the Claimant had to prove to establish his availability. The General Division referred to the factors established by the Federal Court of Appeal in a case called *Faucher*.⁴

[25] The Claimant disputes how the General Division applied the *Faucher* factors to the facts of his case. But, as the Federal Court of Appeal set out in a case called *Quadir*, the application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. The Appeal Division does not have any jurisdiction to interfere with the General Division decisions on matters of mixed fact and law,⁵ unless there are succinct factual errors.

[26] I will examine whether there is an arguable case that the General Division made any succinct factual errors.

– **The Claimant argues that the General Division made factual errors about his training program**

[27] The Claimant argues that the General Division made a factual error when it found that he set personal conditions that unduly limited his chances of returning to the workforce.

[28] The Claimant attended a training program. The Claimant explains that he remained in the training program as it increased his chances of re-employment.⁶

[29] But the Claimant denies that attending the training program was a personal condition that unduly limited his chances of returning to the workforce. He denies that it was a personal condition because he says that if an employer had offered him a position, he would have considered suspending his training program.⁷ In other words, he says the training program did not interfere with his availability as he would have been able to return to work.

⁴ *Faucher v Canada Employment Insurance Commission*, A-56-96 and A-57-96.

⁵ *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9. Affirmed in *Stavropoulos v Canada (Attorney General)*, 2020 FCA 109

⁶ Claimant's arguments in Application to the Appeal Division, at AD 1B-8.

⁷ Claimant's arguments in Application to the Appeal Division, at AD 1B-7.

[30] On the issue of whether the Claimant unduly limited his chances of going back to work, the General Division wrote:

[49] The [Claimant] also told this Tribunal that he made the intentional decision not to apply for any jobs with any employers for as long as his grievance with his former employer was unresolved.

[50] He says that applying to another job would be dishonest as it would “undermine the legitimate contractual interests of a new employment contract with a new employer in bad faith.” [Citation omitted] He also believes that starting to work for a new employer would violate the good faith contract that he had entered into with his former employer, which in his view remains until his grievance is decided despite the fact that he was terminated.

[51] I find that by pursuing full-time training **and limiting his employment options exclusively to being reinstated to his previous job**, the [Claimant] made choices that unduly limited his ability to return to work.

(my emphasis)

[31] The Claimant denied that he limited his employment opportunities. He argued that improving his work skills enhanced his job prospects. He also noted that he volunteered in his industry.⁸

[32] Early on, the Claimant told the Commission that if he found a full-time job, he would leave his training.⁹

[33] Yet, there was also evidence that the Claimant would continue with his schooling. He told the Commission that he was concentrating on his full-time school and would not be looking for work until after he completed his schooling.¹⁰ So, he had not applied for any jobs.

[34] Clearly, there was some evidence that could support a finding that the Claimant’s training served to limit his chances of going back to work.

⁸ Claimant’s letter dated November 12, 2022, at GDJ 4-5.

⁹ Supplementary Record of Claim dated March 30, 2022, at GD 3-28.

¹⁰ Supplementary Record of Claim dated June 21, 2022, at GD 3-29.

[35] The Claimant later confirmed that he had not looked for other work. He explained that he was unable to enter a new employment contract until he had resolved his grievances against his former employer.¹¹

[36] The Claimant also told the Commission that he had moved on from his employer and was not waiting for the outcome of the grievances against it.¹² But, reinstatement was a possible outcome.¹³

[37] While the General Division considered the Claimant's training as a factor that unduly limited his chances of going back to work, it was not the only factor. The General Division also considered the fact that the Claimant "limit[ed] his employment options exclusively to being re-instated to his previous job,"¹⁴ and to the Claimant's ongoing grievance against his employer. The General Division found that these two factors contributed to unduly limit the Claimant's ability to return to work.

[38] The General Division was able to conclude that the Claimant set personal conditions by limiting his options (to being reinstated to his former employment) because the Claimant simply did not look for other employment. The General Division was entitled to make this finding based on the evidence before it.

[39] The Claimant may have had a good reason to delay looking for other employment while his grievances were ongoing. But that contributed to the personal conditions that he set and did not leave him available for work.

[40] I am not satisfied that there is an arguable case that the General Division overlooked any material evidence, or that it misstated or misapprehended the evidence, or that it came to a perverse or capricious finding. Its findings were consistent with the evidence before it.

¹¹ Claimant's letter dated July 11, 2022, at GD 3-33. See also Supplementary Record of Claim dated September 15, 2022, at GD 3-40.

¹² Supplementary Record of Claim dated June 21, 2022, at GD 3-29.

¹³ Application to the Appeal Division (appeal of General Division file GE-22-2346) filed April 13, 2013, at AD1.

¹⁴ General Division decision, at para 51.

[41] Finally, even if the General Division had made a factual error about whether the Claimant set any personal conditions that unduly limited his chances of returning to the workforce, there are two other factors that the Claimant had to prove, to show his availability.

[42] The Claimant also had to show that he wanted to go back to work as soon as a suitable job was available and that he made efforts to find a suitable job. The evidence shows that the Claimant made no efforts to look for other work while his grievances were ongoing. Hence, the General Division found that the Claimant did not meet these conditions. The Claimant does not deny that he did not meet these two other conditions.

[43] As the Claimant was unable to prove that he wanted to go back to work as soon as a suitable job was available and that he made efforts to find a suitable job, he would have been unable to show that he was available anyway.

Conclusion

[44] I am not satisfied that the appeal has a reasonable chance of success.

[45] Permission to appeal is refused. This means that the appeal will not proceed.

Janet Lew
Member, Appeal Division