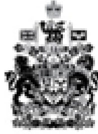

Citation: *HB v Canada Employment Insurance Commission*, 2023 SST 914

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	H. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 20, 2023 (GE-22-2730)

Tribunal member:	Melanie Petrunia
Decision date:	July 13, 2023
File number:	AD-23-269

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, H. B. (Claimant), received employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), later decided that the Claimant was not available for work because she was in school full-time when she was receiving benefits. This meant that she was disentitled to benefits and was assessed an overpayment.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was not available for work and that the Commission acted judicially when it decided to reassess her claim for benefits.

[4] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division based its decision on an important factual error. However, she needs permission for her appeal to move forward.

[5] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[6] The issues in this appeal are:

a) Was the application to the Appeal Division late?

b) Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

Analysis

The application was not late

[7] The General Division decision was issued on January 20, 2023, but was not sent to the Claimant until February 16, 2023. The Claimant filed her application for leave to appeal on March 15, 2023.

[8] An application for leave to appeal must be made within 30 days after the General Division decision and reasons are communicated to a claimant.[1] In this case, the decision is dated January 20, 2023, it appears that that the decision was not communicated to the Claimant until February 16, 2023. The Claimant filed her application for leave within 30 days after this date, so it was not late.

I am not giving the Claimant permission to appeal

[9] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?[2]

[10] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the *Department of Employment and Social Development Act* (DESD Act).[3]

[11] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

a) failed to provide a fair process;

b) failed to decide an issue that it should have, or decided an issue that it should not have;

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[1] See section 57(1)(a) of the *Department of Employment and Social Development Act*.
[2] This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[3] DESD Act, s 58(2).

c) based its decision on an important factual error;[4] or

d) made an error in law.[5]

[12] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.[6]

– **The General Division decision**

[13] In its decision, the General Division explained that there is a presumption that claimants who are in school full-time are not available for work.[7] It then considered whether the Claimant had rebutted the presumption that she was not available while in school full-time. It looked at whether the Claimant showed a history of working full-time while in school or if she had shown that there were exceptional circumstances.

[14] The General Division found that the Claimant did not have a history of working full-time while in school.[8] It considered the Claimant's evidence that she was not willing to leave her studies if she found a job that conflicted with her schedule. The General Division also looked at the Claimant's course load and schedule.[9]

[15] Based on the Claimant's testimony and circumstances, the General Division found that she did not rebut the presumption that she was not available for work while in school full-time. Even though it found that the presumption applied, and the Claimant

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[4] The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.
[5] This paraphrases the grounds of appeal.
[6] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[7] General Division decision at para 15.
[8] General Division decision at para 29.
[9] General Division decision at paras 24 to 28.

was considered not available for work, the General Division went on to consider the test for availability.[10]

[16] The General Division looked at whether the Claimant had made reasonable and customary efforts to find suitable employment. It found that she did not make sustained efforts to find work and she was focused on her studies.[11]

[17] The General Division then considered the three factors that a claimant has to prove to show that they are capable of and available for work but unable to find a suitable job:

a) A desire to return to work as soon as a suitable job is available;

b) Making efforts to find a suitable job; and

c) Not setting personal conditions that unduly limit the chances of returning to work.[12]

[18] The General Division considered the Claimant's conduct and attitude when looking at each of these factors.[13] It found that the Claimant did not have a desire to return to work as soon as she found a suitable job.[14] It also found that the Claimant did not make enough efforts to find a suitable job and imposed personal conditions which limited her chances of finding a job.[15]

– **No arguable case that the General Division made an important factual error**

[19] In her application for leave to appeal, the Claimant argues that the General Division made an important error of fact when it found that she was not available for

[10] General Division decision at para 30.
[11] General Division decision at para 46.
[12] General Division decision at para 47.
[13] General Division decision at para 48.
[14] General Division decision at para 49.
[15] General Division decision at paras 50 and 54.

work for personal reasons. The Claimant argues that this isn't true because she was working at the time that she was receiving EI benefits.[16]

[20] The Claimant says that her job had very limited hours available even with open availability. She argues that she did look for other jobs, but no one was hiring during the pandemic. The Claimant says that she was unsuccessful finding other work because there were no jobs, not because she wasn't trying.[17]

[21] The General Division raised these arguments before the General Division, and they were taken into consideration.[18] I find that there is no arguable case that the General Division ignored these facts.

[22] The Claimant does not appear to take issue with the General Division's finding that she was presumed to be unavailable while she was in school full-time. The General Division applied the proper legal test for availability and considered the relevant evidence before it in coming to its determination that she was not available.

[23] The Claimant is restating the same arguments as at the General Division and asking for the Appeal Division to re-weigh the evidence and come to a different conclusion. I have found that there is no arguable case that the General Division based its decision on an important error of fact, and I cannot re-weigh the evidence.[19] I am not satisfied that the appeal has a reasonable chance of success.

[24] Aside from the Claimant's arguments, I have also considered the grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any errors of law.

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[16] AD1-9
[17] AD1-9
[18] General Division decision at paras 35 to 37.
[19] *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para 42.

[25] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[26] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division