



Citation: *EL v Canada Employment Insurance Commission*, 2023 SST 923

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: E. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 5, 2023
(GE-23-410)

Tribunal member: Pierre Lafontaine

Decision date: July 17, 2023

File number: AD-23-437

Decision

[1] Leave 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 disentitled from receiving Employment Insurance (EI) regular benefits from December 19, 2020, because she wasn't available for work. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant showed that she wanted to go back to work as soon as a suitable job was available. However, it found that the Claimant did not make enough efforts to find employment because she didn't take active steps to find a job. The General Division found that the Claimant did not set a personal condition that would unduly limit her chance to return to the labour market. It concluded that the Claimant did not show that she was capable of, and available for work but unable to find a suitable job. The General Division also concluded that the Commission acted judicially when it reviewed the Claimant's claim.

[4] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division made important errors of fact and erred in law when it concluded that she was not available for work and that the Commission could review her claim.

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

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

Issue

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

Analysis

[8] 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:

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.

[9] An application for leave 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 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. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[10] Therefore, before I can grant leave, 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.

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

Availability

[11] The Claimant submits that at the time of the pandemic, many businesses were forced to shut down. As a result, her ability to work was impacted because of constant restrictions. She submits that she made enough efforts to try to find a job as she was employed and reported all her hours on the report.

[12] To be considered available for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.¹

[13] Availability must be determined by analyzing three factors:

- (1) the desire to return to the labour market as soon as a suitable job is offered,
- (2) the expression of that desire through efforts to find a suitable job, and
- (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.²

[14] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and unable to obtain suitable employment.³

[15] The General Division found that the Claimant did not make enough efforts to find employment because she didn't take active steps to find a job. It considered that the Claimant did not apply for any jobs during the relevant period.

[16] The Claimant's numerous declarations demonstrate that she never made any sustained efforts to search for work because she was already employed. She never applied to any other jobs in the retail or food service previously. When she did provide a job search later, every provided example coincided with the end of her education. This

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

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

³ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

late search was in accordance with the Claimant's earlier statement to the Commission that she was working part-time during school and that she was looking for full-time work that would begin after her school in December 2021.⁴

[17] A claimant must establish their availability for work, and to do this, they must look for work. A claimant must establish their availability for work for each working day in a benefit period and this availability must not be unduly limited.

[18] Case law has also established that a claimant cannot merely wait for their employer to call them back to work and must look for employment to be entitled to benefits. It follows the position that no matter how little chance of success a claimant may feel a job search would have, the employment insurance program is designed so that only those who are genuinely unemployed and **actively looking for work** will receive benefits.⁵ The pandemic did not change this essential requirement to obtain EI benefits.

[19] The evidence supports the General Division's determination that the Claimant did not demonstrate that she was actively looking for work during the relevant period and its conclusion that the Claimant was not available for work.

[20] I see no reviewable error made by the General Division. The Claimant does not meet the 2nd Faucher factor to establish availability.

[21] This ground of appeal has no reasonable chance of success.

⁴ See GD3-30.

⁵ *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *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; CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.

Review of claim

[22] The Claimant submits that the debt should be reduced since she was in good faith and answered all questions truthfully. She was even told by the Commission that she was eligible for the money received. Her claim should therefore not be reviewed.

[23] Section 153.161 must be read together with section 52 of the *Employment Insurance Act* (EI Act). Both sections aim to reclaim amounts improperly received by a claimant. Furthermore, the decision to seek verification under section 153.161, and to reconsider a claim under section 52, are discretionary decisions. This means that although the Commission has the power to seek verification of entitlement and to reconsider a claim, it does not have to do so.

[24] During the temporary measures put in place during the pandemic, the Commission's discretion in deciding whether to verify or reconsider a claim had to be exercised by keeping in mind the legislative intent of section 153.161 of the EI Act. By implementing this temporary section during the pandemic, Parliament clearly wanted to emphasize that the Commission had the power to review availability and reconsider whether a claimant attending a course, program of instruction or training, was entitled to EI benefits, even after benefits were paid.

[25] I see no reviewable error in the General Division conclusion that the Commission exercised its discretion properly. The Commission considered all the relevant information in deciding to verify or reconsider the claim. There were no new relevant facts provided at the General Division hearing that the Claimant had not already provided to the Commission. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in verifying the claim, that being verification of entitlement to benefits.⁶

⁶ The Tribunal does not have the power to reduce or annul a debt. Such a request must be made directly to the Commission. If not satisfactory, the Commission's decision on a write-off can be appealed to the Federal Court.

[26] This ground of appeal has no reasonable chance of success.

Conclusion

[27] 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.

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

Pierre Lafontaine
Member, Appeal Division