



Citation: *LH v Canada Employment Insurance Commission*, 2023 SST 1009

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: L. H.
Representative: C. Z.
Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 17, 2023
(GE-22-3543)

Tribunal member: Pierre Lafontaine
Decision date: July 31, 2023
File number: AD-23-528

Decision

[1] Leave to appeal is refused. This means 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 because she was taking a training course on her own initiative, and had not proven that she was available for work.

[3] On May 11, 2023, the General Division rendered a decision on the issue of availability. The Claimant appealed the decision to the Appeal Division. The Appeal Division returned the file to the General Division to decide on only whether the Commission should act and whether they acted judicially when deciding to reconsider the Claimant's claim.

[4] The General Division found that the Commission had the power to review the claim and that it had exercised its discretionary authority in a judicial manner.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. In support of her application for permission to appeal, the Claimant submits that the Commission should assume full (or at least partial) responsibility for their error. She did nothing wrong. The Claimant submits that a fair settlement should be proposed in the circumstances.

[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?

Analysis

[9] Section 58(1) of the *Department of Employment and Social Development Act* (DESD 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.

[10] 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.

[11] 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?

[12] The Claimant submits that the Commission should assume full (or at least partial) responsibility for their error. She did nothing wrong. The Claimant submits that a fair settlement should be proposed in the circumstances.

[13] The General Division determined that the Commission did have the power to go back to a claimant and request proof of availability retroactively, as stated in section 153.161 of the *Employment Insurance Act (EI Act)*.

[14] The General Division found that the Commission exercised its power in a judicial manner because it did not act in bad faith, or for an improper purpose or motive, or consider an irrelevant factor or ignore a relevant factor or act in a discriminatory manner when it made the decision to review its initial decision.

[15] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section provides that the Commission may reconsider a claim for benefits within 36 months of the benefits having been paid or payable.

[16] Case law has established that the only restriction on the Commission's reconsideration power under section 52 of the EI Act is the time limit. Therefore, the Commission can reconsider a claim under section 52 even if there are no new facts. In other words, it can withdraw its earlier approval and require claimants to repay the benefits that were paid pursuant to such approval.

[17] During the pandemic, the government made various Interim Orders amending the EI Act. Section 153.161 was added to the EI Act and came into effect on September 27, 2020.

[18] Section 153.161 of the EI Act mentions the following:

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(1)(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.

[19] This temporary provision provides that in applying section 18(1) (a) of the EI Act, the Commission may **verify** whether a claimant is entitled to benefits by requiring proof of their availability to work **at any point after benefits are paid**. Section 52 of the EI Act is worded differently. It provides that the Commission may **reconsider a claim** for benefits within 36 months after the benefits have been paid.

[20] Section 153.161 must be read together with section 52 of the 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.

[21] The law says that discretionary powers must be exercised in a judicial manner. This means that when the Commission decides to reconsider a claim, it cannot act in bad faith or for an improper purpose or motive, consider an irrelevant factor or ignore a relevant factor or act in a discriminatory manner.

[22] I have no doubt that the Claimant acted in good faith and declared her schooling to the Commission. The Commission reconsidered the claim on facts that were available to it when the initial entitlement decision was made, and benefits were paid.

[23] During the temporary measures put in place during the pandemic, the Commission's discretion in deciding whether to 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.

[24] One of the principles of the interpretation of statutes is that Parliament does not speak needlessly. In implementing section 153.161 of the EI Act, Parliament clearly decided that the re-opening of an initial decision regarding a student's availability made during the pandemic outweighed the importance of the initial decision being final. The Commission exercised its discretion within the pandemic parameters set by Parliament.

[25] In these circumstances, I see no reviewable error made by the General Division when it concluded that the Commission exercised its discretion properly.

[26] This Tribunal does not have the jurisdiction to impose a settlement on a party. If the Claimant wants to request a write-off of her debt, she can do so by asking the Commission directly so that a decision be made on that issue.¹

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

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

¹ See section 56 of the *Employment Insurance Regulations*. A write-off decision is appealable to the Federal Court of Canada.