



Citation: *MS v Canada Employment Insurance Commission*, 2024 SST 222

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 19, 2023
(GE-23-2904)

Tribunal member: Stephen Bergen

Decision date: March 5, 2024

File number: AD-24-79

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] M. S. is the Applicant. I will call him the Claimant because this application concerns his claim for Employment Insurance (EI) benefits.

[3] After the Claimant lost his job, he left Canada to visit family. While he was away, he received treatment from a psychotherapist. He was outside of Canada from April 24, 2023, to June 10, 2023.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), said that the Claimant was not entitled to benefits during that period for two reasons. One reason was that he was outside of Canada. The other reason was that he was not available for work.

[5] The Claimant disagreed with the Commission's decision and asked it to reconsider. It would not change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal.

[6] The General Division dismissed his appeal. Now he is asking for permission to appeal the General Division decision to the Appeal Division.

[7] I am refusing permission to appeal. The Claimant has not made out an arguable case that the General Division acted in a way that was unfair or that it made an important error of fact.

Issues

[8] Is there an arguable case that the General Division acted unfairly?

[9] Is there an arguable case that the General Division made an important error of fact by ignoring or misunderstanding how the Claimant's health issues affected him?

[10] Is there an arguable case that the General Division made an important error of fact by ignoring or misunderstanding his job search efforts?

I am not giving the Claimant permission to appeal

General Principles

[11] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[12] I may consider only the following errors:

- a) The General Division hearing process was not fair in some way.
- b) 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 (error of jurisdiction).
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.¹

[13] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an "arguable case."²

Procedural fairness

[14] When the Claimant completed his application to the Appeal Division, he selected two grounds of appeal. The first one was concerned with an error of procedural fairness.

[15] "Procedural fairness" is concerned with the fairness of the process. It is not concerned with whether a party feels that the decision result is fair.

¹ This is a plain-language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

² See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

[16] Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker.

[17] The Claimant has not explained how the General Division process was unfair. He has not said that he did not have a fair chance to prepare for the hearing or that he did not know what was going on in the hearing. He has not said that the hearing did not give him a fair chance to present his case or to respond to the Commission's case. He has not complained that the General Division member was biased or that he had already prejudged the matter.

[18] When I read the decision and review the appeal record, I do not see that the General Division did anything, or failed to do anything, that causes me to question the fairness of the process.

[19] There is no arguable case that the General Division made an error of procedural fairness.

Important error of fact

[20] The Claimant should understand that he was disentitled to benefits in two different ways. He was disentitled because he was outside of Canada and he was also disentitled because he was not available for work. The Commission had to conclude that the Claimant was not entitled to benefits if he was **either** outside of Canada (without an applicable exception), **or** unavailable for work. It did **not** have to find that he was outside of Canada and **also** unavailable for work.

[21] This means that the Claimant's appeal will only have a reasonable chance of success, if he can show that the General Division made an error in how it decided that he was outside of Canada without an applicable exception **and that it also** made an error in how it decided he was unavailable for work.

– **Effects of the Claimant's health issues**

[22] Claimants who are outside of Canada are not entitled to EI benefits unless they meet the requirements of one or more of a short list of specific exceptions.³

[23] One exception considered by the General Division concerns medical treatment. A claimant will not be disentitled for being outside Canada, if they are undergoing medical treatment at a hospital, clinic, or similar facility, that is not **readily and immediately available** in the claimant's area of residence in Canada.⁴

[24] The Claimant argues that he left Canada because of health considerations, including panic attacks. He said he had to return home to find a supportive environment to restore his health. He obtained treatment for his anxiety while he was there.

[25] It may well be that the Claimant was experiencing severe anxiety and suffering panic attacks. He may have believed, and he may have been correct, that going home to be with his family and getting treatment at the same time would be most helpful.

[26] However, I can only accept that the General Division may have made an "important error of fact" where there is an arguable case that the General Division **based its decision** on a finding that ignored or misunderstood **relevant** evidence.

[27] The General Division based its decision on a finding that the Claimant could have obtained psychotherapy locally. Because of that finding, it did not accept that the medical treatment exception was applicable.

[28] The Claimant's evidence was not relevant to whether psychotherapy treatment was readily and immediately available in the Claimant's area of Canada. He has not pointed to any other evidence that could have affected the General Division's finding that treatment was also available in his area of residence in Canada.

³ The disentitlement is found at section 37(b) of the EI Act. The exceptions are set out in section 55 of the *Employment Insurance Regulations* (Regulations).

⁴ See section 55(1)(a) of the Regulations.

– **Job search efforts**

[29] There is no arguable case that the General Division ignored or misunderstood evidence of his job search efforts.

[30] The law says that a claimant is not entitled to benefits for a working day in a benefit period for which the claimant cannot prove that they were capable of, and available for work and unable to find suitable employment.⁵ Making efforts to find work is only one factor that must be considered when assessing the claimant's availability. The other two factors require claimants to have a desire to return to work as soon as a suitable job becomes available and to avoid setting personal conditions that unduly limit their employment opportunities.⁶

[31] The General Division found that the Claimant's job search efforts were not enough. It also found that he did not have the desire to return to work as soon as a suitable job was available.

[32] The Claimant disagrees with the General Division's finding that his job search efforts were not enough. He argues that he actively pursued job opportunities and that he attended an interview when he returned to Canada. I note that he also told the General Division that he would have stopped his counselling and returned to Canada earlier if he received a job offer.

[33] According to the General Division, the Claimant said that he updated one resume and that he looked for work online. It did not accept that those job search efforts were "enough."

[34] The General Division is the primary trier of fact. The Appeal Division cannot reassess or reweigh the evidence to reach a different conclusion than the General Division.⁷ Furthermore, the courts have said that the Appeal Division is not authorized to

⁵ See section 18(1)(a) of the EI Act.

⁶ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁷ *Hideq v. Canada (Attorney General)*, 2017 FC 439; *Parchment v. Canada (Attorney General)*, 2017 FC 354; *Johnson v. Canada (Attorney General)*, 2016 FC 1254; *Marcia v. Canada (Attorney General)*, 2016 FC 1367.

interfere where the General Division has applied settled law to the facts from the evidence.⁸ This means that I cannot second-guess the General Division's judgment that the Claimant's job search efforts were "not enough."

[35] The question I must decide is whether the General Division ignored or misunderstood the evidence of the Claimant's job search efforts.

[36] The Claimant said that he actively pursued job opportunities, but he did not say that this active pursuit involved more than updating his resume and looking at some online postings – which is what the General Division understood from his evidence. He did not point to any evidence of his job search that the General Division ignored or misunderstood.

[37] The Claimant's appeal has no reasonable chance of success.

Conclusion

[38] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division

⁸ *Quadir v. Canada (Attorney General)*, 2018 FCA 21.