Citation: *KH v Canada Employment Insurance Commission*, 2024 SST 498

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. H.
Representative:	A. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 25, 2024 (GE-24-374)

Tribunal member:	Elizabeth Usprich
Decision date:	May 9, 2024
File number:	AD-24-284

Decision

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

Overview

[2] K. H. is the Applicant. The Applicant was laid off from his employer due to a shortage of work.[1] The Canada Employment Insurance Commission (Commission) decided the Applicant was disentitled to Employment Insurance (EI) regular benefits from June 19, 2022 to February 25, 2023 because he wasn't available for work. The Commission also found the Applicant to have knowingly made false statements and imposed a penalty.

[3] The Applicant appealed to the Social Security Tribunal (Tribunal) General Division. The General Division found the Applicant was available for work from June 19, 2022 to October 22, 2022. But the General Division found that he didn't show he was available from October 23, 2022 to February 25, 2023, so he remained disentitled for that period of time.

[4] The General Division also decided the Commission didn't show the Applicant knowingly gave false information, so the penalty was removed.

[5] The Applicant has now appealed to the Tribunal's Appeal Division. He is only appealing the General Division's decision that he failed to prove his availability from October 23, 2022, to February 25, 2023. He says the General Division made important errors of fact.

[6] First, the Claimant says the General Division made an important error of fact by ignoring that he could have gone to work with accommodations.

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[1] See GD7-2.

[7] Second, the Claimant says the General Division made an important error by failing to consider that he was never sent an "Active Job Search" form so he couldn't provide his job search activities.

[8] I am denying the Applicant's request for permission to appeal because there is no reasonable chance of success.

Issues

[9] Is there an arguable case that the General Division made an important error of fact by misunderstanding that the Applicant was able to return to work if he had accommodations between October 23, 2022 to February 25, 2023?

[10] Is there an arguable case that the General Division made an important error of fact by ignoring that the Applicant didn't receive an Active Job Search form, so he couldn't show his job search activities?

Analysis

[11] An appeal can only go ahead if the Appeal Division gives an applicant permission to appeal.[2] I have to be satisfied that the appeal has a reasonable chance of success.[3] It has to be shown that there is an arguable ground upon which the appeal might succeed.[4]

[12] There are only certain grounds of appeal that the Appeal Division can consider.[5] Briefly, it has to be shown that the General Division did one of the following:

- acted unfairly in some way;
- decided an issue it should not have, or didn't decide an issue it should have;[6]

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[2] See section 56(1) of the Department of *Employment and Social Development Act* (DESD Act).
[3] See section 58(2) of the DESD Act.
[4] See *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12.
[5] See section 58(1) of the DESD Act.
[6] This is also known as an error of jurisdiction.

- made an error of law; or
- based its decision on an important error of fact.

[13] So, for the Applicant's appeal to go ahead, I have to find there is a reasonable chance of success on any one of those grounds.

[14] The Applicant says there are two important errors of facts. First, the General Division ignored that he could have gone to work with accommodations and therefore should have found the Applicant was available from October 23, 2022 to February 25, 2023.

[15] Second, he says the General Division should have considered he never received the Active Job Search form the Commission says it sent him on October 5, 2023. Because he never received it, this means he couldn't fill it out and say what his job search activities were.

I am not giving the Applicant permission to appeal

[16] An error of fact happens when the General Division makes its decision based on an erroneous (wrong) finding of fact that was "made in a perverse or capricious manner or without regard for the material before it".[7] This means the General Division had to ignore, misunderstand or overlook the evidence in some way.

– There is no arguable case that the General Division made an important error of fact by misunderstanding that the Applicant was able to return to work if he had accommodations between October 23, 2022 to February 25, 2023

[17] The General Division is given some freedom when it makes findings of fact. When I look at whether I can intervene (step in), there has to be an important error that the General Division **based** its decision on. So, if the finding is "willfully going contrary to the evidence," or if crucial evidence was ignored, then I could intervene.[8]

[7] See section 58(1(c) of the DESD Act.
[8] See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[18] The General Division doesn't have to mention every piece of evidence.[9] The law is clear that I can intervene only if the General Division "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[10]

[19] In this case, the Applicant argues the General Division didn't consider that he was available to return to work with accommodations. He says he was laid off due to a shortage of work, but he always got called back to his job.[11] The Applicant says the General Division deciding he wasn't available from October 23, 2022 to February 25, 2023 is an important error of fact because he could have returned to work with accommodations.

[20] The General Division considered the Applicant's arguments. In fact, the Commission had denied the Applicant benefits from June 19, 2022 to February 25, 2023.[12] But the General Division found that, although he didn't look for any work, it was reasonable for the Applicant to have waited to be called back to work as this had happened in the past.[13] Due to this history of being laid off and recalled, it found it was reasonable that the Applicant waited to be recalled during the first four months he wasn't working.[14] So, the General Division said the Applicant was available from June 19, 2022 to October 22, 2022.[15]

[21] The General Division also analyzed whether the Applicant had shown that he was available from October 23, 2022 to February 25, 2023. The General Division decided that the Applicant didn't make enough efforts to find a suitable job.[16]

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[9] See *Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at paragraph 39.
[10] See section 58(1)(c) of the DESD Act.
[11] See AD1-4.
[12] See GD3-117 and GD3-140.
[13] See *Page v Attorney General of Canada*, 2023 FCA 169.
[14] See the General Division decision at paragraph 40.
[15] See the General Division decision at paragraph 2.
[16] See the General Division decision at paragraph 41.

[22] During this time the General Division found that the Applicant didn't engage in any job search activities.[17] So, he didn't prepare a resume, register with any job sites, and didn't do any kind of networking.

[23] The General Division had a meaningful analysis about what suitable employment for the Applicant would be.[18] This analysis included what the Applicant's health and physical capabilities were.[19]

[24] The General Division considered that the Applicant said he didn't understand that he had to search for a job. He believed he could just wait to be called back by his former employer. He says only his previous employer would hire him.[20]

[25] Unfortunately, the law is clear. The *Employment Insurance Act* (EI Act) says to receive EI regular benefits a claimant must show that they are available for work.[21] Part of showing that one is available for work includes actually looking for work. Although the Applicant says he wasn't aware of the obligation, it is set out under the Rights and Responsibilities section of the application he filled out for regular EI benefits.[22] It says when requesting EI regular benefits, a claimant must "actively search for and accept offers of suitable employment".

[26] The General Division considered the Applicant's arguments. So, it can't be said that it misunderstood or ignored the Applicant's arguments. It seems that the Applicant is attempting to reargue his case to the Appeal Division, with the hope of a different outcome. It isn't the role of the Appeal Division to reweigh the evidence that was before the General Division.

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[17] See the General Division decision at paragraph 32.
[18] See the General Division decision at paragraphs 36 to 39.
[19] See the General Division decision at paragraph 41.
[20] See the General Division decision at paragraph 30.
[21] See section 18(1) of the EI Act.
[22] See GD3-8.

[27] Alternatively, the issue the Applicant raises could be seen as a mixed error of fact and law. The Appeal Division can't consider whether there is an error with how the General Division applied the law to the specific facts of this case.[23]

[28] In this case, the General Division stated the correct legal test. The Applicant doesn't explain how the issues he raises are errors of fact that were misunderstood or ignored by the General Division. Instead, it is clear the General Division did consider the issues the Applicant is raising now. I can't consider whether there were errors in how the General Division applied the law to the specific facts of this case.[24]

[29] So, I find there is no arguable case that the General Division made an error of fact with how it considered the Applicant's availability under the EI Act. That is because the General Division considered all of the Applicant's arguments including that he could have returned to work with accommodations.

– **There is no arguable case that the General Division made an important error of fact by ignoring that the Applicant didn't receive an Active Job Search form**

[30] The Applicant argues the General Division made an important error of fact because it didn't consider that the Commission never sent him an Active Job Search form.

[31] I find the General Division did consider this very issue and found in the Applicant's favour.[25]

[32] The General Division agreed with the Applicant that the evidence did not show that the Commission sent the job search form. So, I do not find there is an arguable case that it made an error of fact about the job search form.

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[23] See *Garvey v Attorney General of Canada*, 2018 FCA 118; *Cameron v Canada (Attorney General)*, 2018 FCA 100; and *Quadir* v *Attorney General of Canada*, 2018 FCA 21.
[24] See *Quadir v Canada (Attorney General)*, 2018 FCA 21.
[25] See the General Division decision at paragraphs 12 to 15.

– **There are no additional errors in the General Division decision**

[33] I have reviewed the file and looked at the decision the Applicant is appealing. I have not found any other error that the General Division may have made.[26]

Conclusion

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

Elizabeth Usprich
Member, Appeal Division

[26] See *Karadeolian v Canada (Attorney General)*, 2016 FC 615 which suggests that doing such a review is recommended.