Citation: *RM v Canada Employment Insurance Commission*, 2024 SST 645

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R.M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 5, 2024 (GE-24-413)

Tribunal member:	Stephen Bergen
Decision date:	**June 7, 2024**
File number:	AD-24-303

Decision

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

Overview

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

[3] The Claimant enrolled in a full-time pre-apprenticeship program that was to run from June 5, 2023, to August 11, 2023. On July 10, 2023, he applied to receive EI benefits to support him while he went to school.

[4] The Commission decided that the Claimant was not entitled to benefits after July 10, 2023 (the date of his application), because he had not proven he was available for work while he was attending his training. When the Claimant asked the Commission to reconsider, it changed its decision so that the disentitlement period was more specific. The Commission said that he could not receive benefits from July 10, 2023, to August 11, 2023, because he was on a non-referred training program and had not proven his availability for work.

[5] The Claimant appealed to the General Division of the Social Security Tribunal, but the General Division dismissed his appeal. He is now asking for permission to appeal to the Appeal Division.

[6] I am refusing permission to appeal. The Claimant has not made out an arguable case that the General Division made an important error of fact or an error of law.

Issues

[7] Is there an arguable case that the General Division made an important error of fact?

[8] Is there an arguable case that the General Division made an error of law?

I am not giving the Claimant permission to appeal

General Principles

[9] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." 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.

[10] The grounds of appeal identify the kinds of errors that I can consider. 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]

[11] The Courts have equated a reasonable chance of success to an "arguable case."[2]

Error of fact

[12] The Claimant selected the ground of appeal that is concerned with an error of fact. However, he did not explain what error of fact he thought the General Division had made. He said that the General Division's conclusion that he had not shown he was available within the meaning of the law was "inaccurate."

[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.

[13] An important error of fact is where the General Division bases its decision on a mistaken finding that ignored or misunderstood relevant evidence, or a finding that does not follow from the evidence.[3]

[14] While it is clear from the Claimant's application to the Appeal Division that he disagrees with the General Division's findings and decision, it is not obvious what error of fact he thought the General Division had made.

[15] As a result, I wrote the Claimant on May 13, 2024. I explained the errors that I can consider, and I asked him again to explain how the General Division made an error. I gave him until May 24, 2024, to respond, but he did not respond.

[16] In his application to the Appeal Division, the Claimant argued that he should have been entitled to the same EI benefits as other apprentices. This is the same argument he made to the General Division, where he argued that the Commission should have treated his participation in pre-apprenticeship training in the same way as it would have considered the participation of first-year apprentice in Level 1 training. He told the General Division that his pre-apprenticeship course exempted him from Level 1 apprenticeship training, which meant that he would not need to take a leave for training and collect EI benefits later on.

[17] However, the Claimant did not dispute the facts that were relevant to the General Division's decision that he did not meet the test for availability.

[18] He did not dispute that he was in pre-apprenticeship training but had not been referred to that training. He acknowledged that his program was full-time, requiring him to attend classes during regular hours from Monday to Friday. He also testified that he wanted to work part-time while going to school but that it would not have been possible for him to work with the demands of his program.[4] He agreed with the General Division

[3] This is a paraphrase. More precisely, section 58(1)(c) of the DESDA states that the General Division makes a (reviewable) error of fact when it has "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."
[4] Listen to the audio recording of the General Division hearing at timestamps 40:50 and 42:15.

member that it was not his priority to look for work while he was going to school and he confirmed that he had never been in school full-time while also working.[5]

[19] When he completed his application for benefits, he indicated that he had not made efforts to find work since starting his training, and that he would only accept a job if he could first finish his program.[6]

[20] There was evidence before the General Division which confirmed that, during the period of his disentitlement, the Claimant

- was going to school in a non-referred training program,
- did not look for work while he was in his training program,
- could not have worked at the same that time that he was in the program, and
- would not have accepted work if it required him to quit his training.

There was no evidence to suggest otherwise.

[21] There is no arguable case that the General Division ignored or misunderstood evidence that was relevant to its decision. When the General Division decided that the Claimant was not available for work, its decision was based on its finding that a legal presumption of non-availability applied and that the Claimant had not rebutted the presumption. It was also based on a finding that he had not satisfied the factors in the "*Faucher* test" (the legal test of availability).[7] These findings relied on evidence that was before the General Division and the findings followed rationally from this evidence.

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[5] Listen to the audio recording of the General Division hearing at timestamps 41:25 and 43:00.
[6] See GD3-12.
[7] This test was described in a decision called *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. I outline the factors in the *Faucher* test later in the decision.

Error of law

[22] When an application is at the leave to appeal stage, the Federal Court has given the Tribunal some latitude to look beyond the grounds of appeal raised by unrepresented claimants.[8]

[23] The Claimant did not select the ground of appeal that is concerned with an error of law. However, his disagreement with the General Division decision seems to be more related to how it applied the law in his particular circumstances, than to its particular findings of fact.

[24] Therefore, I have also considered whether the General Division may have made an error of law.

[25] There is no arguable case that the General Division made an error of law.

[26] For a claimant to be entitled to benefits, they must be capable of and available for work. The General Division correctly noted that a claimant must show three things to be considered available. According to the *Faucher* test, they must show that they have a desire to return to work as soon as a suitable job was available; they must show that they have demonstrated that desire through job search efforts, and; they cannot have set personal conditions that unduly limited their employment opportunities.[9]

[27] There is a legal presumption that full-time students are not available because it is uncommon that they will meet the requirements of the availability test. They can only overcome the presumption by proving that they have a history of going to school full-time while also working, or by showing some other exceptional circumstance by which they could be available and also go to school full time.[10] If they can overcome the presumption, they must still prove that they meet the availability test.

[8] *Karadeolian v. Canada (Attorney General),* 2016 FC 615.
[9] Supra note 7. The General Division identified these factors at para 33 of its decision.
[10] See *Canada (Attorney General) v Lamonde* 2006 FCA 44; *Canada (Attorney General) v Cyrenne*, 2010 FCA 349. The General Division discussed the legal presumption at paras 17-18.

[28] The General Division correctly and appropriately considered the presumption for full-time students and the Claimant's availability.

[29] There is also an exception in the *Employment Insurance Act* by which certain students may be entitled to benefits without having to demonstrate their availability for work. Students are deemed to be capable of and available for work if they are attending a training program to which they have been referred by an authority designated by the Commission.[11]

[30] The Claimant understands that he was not an apprentice at the time he applied for benefits. (He testified that he did not apply to be an apprentice until September 2023 and that his apprenticeship was not finally approved until November 2023.) He understood that — as a pre-apprenticeship student, he did not, and could not, obtain the approved training code by which he could satisfy the Commission that he was referred to apprenticeship training.

[31] I appreciate that the Claimant believes he should have been referred to his training, or that the Commission should have treated him in the same way that it treats claimants who are referred.

[32] Unfortunately, there is no arguable case that the General Division made an error of law. The law is quite specific. Only a claimant who has actually been referred by an authority designated by the Commission may be deemed to be available in this way. The General Division correctly stated that it had no discretion to ignore the law related to the referral requirement.

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

[11] Section 25(1) of the *Employment Insurance Act*.

Conclusion

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

Stephen Bergen

Member, Appeal Division