Citation: *AS v Canada Employment Insurance Commission*, 2024 SST 1022

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 14, 2024 (GE-24-2293)

Tribunal member:	Pierre Lafontaine
Decision date:	August 27, 2024
File number:	AD-24-533

Decision

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

Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), disentitled the Applicant (Claimant) for failing to prove her availability to work from July 3, 2023, onward. Upon reconsideration, the Commission maintained its initial decision on her availability. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division concluded that the Commission acted judicially when it made the decision to go back and review the Claimant's claim as the Commission did not act in bad faith, or for an improper purpose or motive; did not consider an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner. The General Division found that the Claimant was not making enough efforts to find a suitable job. The General Division concluded that the Claimant had failed to prove her availability for work pursuant to the *Employment Insurance Act* (EI Act).

[4] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that that the employer made a mistake on her *Record of Employment* (ROE) when coding the reason for separation as a leave of absence. She did not take a leave of absence but instead had a reduced work schedule. She was available to work Monday to Friday from 8am to 9pm but the employer did not give her any shifts. The Claimant submits that she was trying to get shifts last July/August but with her low seniority, she was not able to secure any day shifts. She submits that she was looking on Indeed and Facebook for baby sitting/respite work. The Claimant puts forward that her friend that works with her had the same availability and her file was closed and corrected.

[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] The law specifies the only grounds of appeal of a General Division decision.[1] 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.

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

I am not granting the Claimant leave (permission) to appeal

[11] The Claimant submits that that the employer made a mistake on her ROE when coding the reason for separation as a leave of absence. She did not take a leave of absence but instead had a reduced work schedule. She was available to work Monday to Friday from 8am to 9pm but the employer did not give her any shifts. The Claimant submits that she was trying to get shifts last July/August but with her low seniority, she was not able to secure any day shifts. She submits that she was looking on Indeed and Facebook for baby sitting/respite work. The Claimant puts forward that her friend that works with her had the same availability and her file was closed and corrected.

[12] The General Division had to decide whether the Claimant was available to work. It could only decide the Claimant's case based on the evidence before it.[2] The fact that the employer made a mistake in the ROE when coding the reason for separation is irrelevant in deciding whether the Claimant was available to work under the EI Act.

[13] To be considered available for work and receive EI benefits, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.[3]

[14] 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.[4]

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[2] The General Division could not consider the coworker's case since it was not before it and the facts of each case must be considered to decide an issue.
[3] Section 18(1) (a) of the *Employment Insurance Act*.
[4] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

[15] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day they are capable of and available for work, and unable to obtain suitable employment.[5]

[16] The General Division found that the Claimant was not making enough efforts to find a suitable job. The General Division concluded that the Claimant had failed to prove her availability for work pursuant to the EI Act because she was not making sufficient efforts to find work.

[17] The General Division found that the Claimant's hope of obtaining a day shift did not constitute a sufficient effort to find work. It found that when no shifts were materializing, the Claimant had to take active steps to try and find employment. The General Division found that hanging a flier in the local coffeeshop and making a post on Facebook, are not sufficient efforts, since they are minimal efforts that are not ongoing.

[18] The General Division based its findings on a document provided by the Claimant which indicated that in July and August 2023 she put up a flyer in a coffee shop and posted two community Facebook pages offering respite care or childcare from her home.[6]

[19] The General Division understood the Claimant's feeling that it is not worth it to try and find other suitable employment because it is hard to find employment for just two months but correctly noted that the requirement to actively look for employment is an ongoing requirement to receive EI benefits.

[20] Case law has established that a claimant cannot merely wait for their employer to call them 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

[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[6] GD3-68.

would have, the employment insurance program is designed so that only those who are genuinely unemployed and **actively looking for work** will receive benefits.[7]

[21] The evidence supports the General Division's conclusion that the Claimant did not show that she was available for work within the mean of the EI Act.

[22] After reviewing the appeal file, the General Division decision, and the arguments in support of her 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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

[7] *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.