Citation: *LL v Canada Employment Insurance Commission*, 2024 SST 1017

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 18, 2024 (GE-24-1638)

Tribunal member:	Glenn Betteridge
Decision date:	August 27, 2024
File number:	AD-24-504

Decision

[1] L. L. hasn't shown her appeal of the General Division decision has a reasonable chance of success. So, I can't give her appeal permission to go forward.

[2] This means the General Division decision stands unchanged.

Overview

[3] L. L. is the Claimant in this case.

[4] She made a claim for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) paid her benefits.

[5] Later on, the Commission reviewed her claim. It decided she wasn't entitled to regular benefits because she wasn't capable of and available for work.[1]

[6] The Claimant asked the Commission to reconsider. The Commission changed part of its decision. It converted her claim for regular benefits to sickness benefits, starting August 22, 2021, for 15 weeks.[2] That is the maximum number of weeks of sickness benefits she could get. But it maintained its decision that she wasn't capable of and available for work after her sickness benefits ended. So, it could not pay her regular benefits.

[7] This means the Commission had paid her benefits she wasn't entitled to get and would have to pay them back. This is called an overpayment.

[8] The Claimant appealed to the Tribunal's General Division. It dismissed her appeal because she hadn't shown she was both capable of and available for work.

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[1] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says that a person isn't entitled to get benefits for a day unless they can show that on that day they were capable of and available for work and unable to find a suitable job.
[2] Section 18(1)(b) of the EI Act says that a person isn't entitled to get benefits for a day unless they can show on that day that they were unable to work because of prescribed illness, injury or quarantine, and that they would be available for work if it weren't for that. This section and section 21 allow the Commission to pay people what is commonly called "EI sickness benefits."

[9] The Claimant has now asked for permission to appeal the General Division decision. I can only give permission if her appeal has a reasonable chance of success. That means the same thing as having an arguable case that the General Division made an error.

Issues

[10] I have to decide three issues:

- Is there an arguable case the General Division made a legal error?
- Is there an arguable case the General Division made an important factual error?
- Is there an arguable case the General Division made any other error I can consider?

I am not giving the Claimant permission to appeal

[11] I reviewed the General Division appeal file to decide whether to give the Claimant permission.[3] I listened to the recording of the General Division hearing.[4] I read the decision and I reviewed the Claimant's application to the Appeal Division.[5]

[12] I am not giving the Claimant permission to appeal for the reasons that follow.

[3] See GD2 to GD4, GD6, GD7, GD9, GD10, GD12, GD14, and GD16 to GD18.
[4] The hearing lasted about 1 hour and 28 minutes. Then the Claimant asked to continue another day. She later chose to continue the appeal process in writing.
[5] See AD1.

The test for getting permission to appeal

[13] To get permission, the Claimant has to show her appeal has a reasonable chance of success.[6] This means the same thing as having an arguable case that the General Division made one of these errors:

- It used an unfair process, prejudged the case, or was biased—this is called a procedural fairness or natural justice error.
- It didn't decide an issue it should have decided, or decided an issue it should not have decided—this is called a jurisdictional error.
- It made a legal error.
- It based its decision on an important factual error.[7]

[14] This test is easy to meet.[8]

There isn't an arguable case the General Division made a legal error

– The Claimant's arguments

[15] On her application to the Appeal Division, the Claimant checked the box that says the General Division made an error of law.[9]

[16] She argues that by:

> "taking the Employment Insurance Law in its literal sense AND in isolation, Elyse Rosen made damaging errors, which will eventually be addressed by the CHRC. This law coexists with many more who have precedent over it, such as: Canada Labour Code, Canada Occupational Health and Safety Regulations,

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[6] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says that I have to give permission to appeal if the appeal has a reasonable chance of success. This means the same as having an "arguable case." See *O'Rourke v Canada (Attorney General)*, 2018 FC 498; *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12; and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.
[7] These are the grounds of appeal in section 58(1) of the DESD Act. I call these errors.
[8] This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12; and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.
[9] See AD1-4.

> Employment Equity Act of 1995, Canada Accessibility Act of 2019, Canadian Charter of Human Rights and Freedoms."[10]

[17] The Claimant also argued that the General Division made an error of fact when it didn't follow the Tribunal's decisions in the *LD* case.[11] The law sees this type of error as a legal error, so I will deal with it in this section.

– What counts as a legal error

[18] The General Division makes a legal error when it does one of the following:

- ignores an argument it has to consider
- misinterprets a law
- applies the wrong legal test
- doesn't follow a court decision it has to follow
- doesn't give adequate reasons for its decision

[19] There isn't an arguable case the General Division made any of these errors. I will analyze the Claimant's arguments one at a time.

– The Charter

[20] The General Division had no power to decide the appeal based on the *Canadian Charter of Rights and Freedoms* (Charter).[12] This is because the Claimant didn't do what she needed to do to make a Charter challenge.

[21] The Tribunal has a process that people have to follow if they want the Tribunal to decide their case based on a right guaranteed in the Charter. The General Division explained this to the Claimant. It gave her the opportunity to make a Charter challenge.

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[10] See AD1-7 and AD1-8.
[11] See *LD v Canada Employment Insurance Commission*, 2023 SST 76.
[12] The General Division wrote about the Charter challenge issue at paragraphs 20 to 23 of its decision.

She didn't follow the Tribunal's process. So, the General Division could not decide her case based on the Charter.

– The other laws the Claimant says the General Division ignored

[22] The law gives the General Division the power to decide any question of law necessary to decide an appeal.[13] But the General Division didn't have to consider and apply any of the other laws the Claimant says it should have.

[23] The General Division had to decide whether the Claimant was available for work and unable to find a suitable job. To do that, it had to apply section 18(1)(a) of the *Employment Insurance Act* (EI Act), section 9.002 of the *Employment Insurance Regulations* (EI Regulations), and the *Faucher* test.[14] And that is what it did.

[24] The *Faucher* test is a three-part test the courts have said the Tribunal should use when it decides whether a person is available for work under section 18(1)(a) of the EI Act.

– The General Division's interpretation and application of the law

[25] The General Division didn't apply the law in its literal sense. It applied the law based on the words in the EI Act and EI Regulations as they have been interpreted by the federal courts. In other words, it followed EI law and binding court decisions it had to follow.

[26] The General Division interpreted the law keeping in mind the relevant facts, including the Claimant's disability-related restrictions and limitations, and her need for accommodation. It did that when it interpreted the law about "suitable employment" and to decide what was a suitable job for the Claimant during the period she wanted to get EI regular benefits.

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[13] See section 64(1) of the DESD Act.
[14] The General Division correctly set out the *Faucher* test at paragraphs 52 to 55 of its decision. The test is sometimes referred to as the *Faucher* factors. There are three factors, or things, a person has to show to prove they are available for work.

[27] Nothing shows me that the General Division discriminated against the Claimant in how it interpreted and applied the law. The General Division didn't have to accept the Claimant's view of her situation or accept the Claimant's arguments. Overall, the way it interpreted and applied the law was flexible and contextual. The General Division considered the Claimant's circumstances and disability-related needs in light of the barriers to employment she faced to getting a job as a person living with bipolar disorder.

[28] The General Division didn't "wrongfully accuse" the Claimant of not doing enough. Under the second part of the *Faucher* test, a person has to show their desire to return to work as soon as possible by making efforts to find a suitable job.

[29] The Federal Court of Appeal has said that whether a person has made appropriate efforts to find a suitable job is about applying settled law to the facts.[15]

[30] In the Claimant's appeal, the General Division weighed the evidence about her efforts to find a suitable job. Then it made a finding of fact based on that evidence. So, the General Division did what the courts have said the General Division has to do under the second part of the *Faucher* test. In other words, it applied the correct legal test to the facts.

– **The Tribunal's *LD* decisions**

[31] The Tribunal released three decisions in L. D.'s appeal. The case went from the General Division to the Appeal Division, then back to the General Division.[16]

[32] L. D. was a full-time student. The Commission disentitled him from getting benefits. It said he hadn't overcome the presumption that full-time students aren't available for work. And it said he hadn't shown he was capable of and available for work but unable to find a suitable job.

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[15] See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraph 83.
[16] *LD v Canada Employment Insurance Commission*, 2022 SST 989; *LD v Canada Employment Insurance Commission*, 2022 SST 988 (Appeal Division); and *LD v Canada Employment Insurance Commission*, 2023 SST 76.

[33] When the case went back to the General Division, it decided L. D. had shown he **was available for work.[17] In other words, it allowed his appeal.**

[34] In the Claimant's appeal, the General Division didn't make a legal error by not following the outcome in the General Division's second *LD* decision. I find this for two reasons.

[35] First, the *LD* decisions aren't court decisions. This means the General Division didn't have to follow them. In other words, it didn't have to grant the Claimant's appeal because the Claimant and L. D. lived with mental health disabilities and L. D. won his appeal. Also, the facts and evidence in the Claimant's case are very different from the facts and evidence in *LD*. So, there was no reason the General Division should have followed the outcome in *LD* to promote consistent decision-making. In other words, the cases aren't alike, so the General Division didn't have to treat them as if they were.

[36] Second, the General Division in the Claimant's case followed the reasoning in the General Division's second *LD* decision even though it didn't refer to that decision. The Claimant is basing her argument on that decision.[18] The General Division considered how medical limitations, personal conditions, and suitable employment interact when it applied the *Faucher* test for availability under the EI Act. Here are the key parts of the General Division's reasoning:

> [25] To assess the Claimant's availability, I must first define what is considered suitable employment for the Claimant. The criteria to consider when determining what constitutes suitable employment are: (a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work […]
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> [26] I find that suitable employment for the Claimant constitutes employment that he has the mental abilities to perform as certified by his physician. […]
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> [27] Further, the Claimant's medical limitations are not personal conditions that unduly limit his return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be

[17] See *LD v Canada Employment Insurance Commission*, 2023 SST 76.
[18] When the General Division reconsidered his case, it allowed his appeal.

> suitable jobs. As stated above, the Claimant's medical limitations restricts what is suitable employment for him.

[37] I agree that this second *LD* decision sets out the correct legal approach. So, the General Division should have followed it in the Claimant's case.

[38] The General Division's reasoning shows me that this is what it did. It decided what a suitable job was for her at the relevant time based on her medical limitations and restrictions at that time.[19] Then, under the third *Faucher* factor, it decided she had set personal conditions that unduly limited her chances of going back to work—not taking her illness into account.[20]

– Summary of my findings about legal errors

[39] To summarize this section, the Claimant hasn't shown there is an arguable case the General Division made a legal error.

There isn't an arguable case the General Division made an important factual error or another error I can consider

– The Claimant's argument

[40] On her application to the Appeal Division, the Claimant checked the box that says the General Division made an important error of fact.[21]

[41] The Claimant refers to the danger posed to her by social situations:

> Since every social situation has the potential of exposing someone like me, with a severe mood disorder, to triggers that lead to strong emotional, often inappropriate, reactions/confrontations, my physician has mentioned that there are no adequate measures of protection for mitigating this risk and has expressed valid concerns (more than recommendations) at this point.[22]

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[19] See paragraphs 43 to 46 of the General Division decision.
[20] See paragraph 80 of the General Division decision.
[21] See AD1-4.
[22] See AD1-8.

[42] She then gives the example of a team-building exercise. She refers to an accommodation an employer put in place to respond to concerns about her dignity, safety, and first aid and to protect her rights. Then she argues the following:

> These concerns were taken into account by my employer who judged it better that I refrain from presenting myself to the team building exercise in person at the offices because they are incapable of ensuring these guarantees. It is my point that by ignoring these facts, and by applying a "one size fits all" interpretation of the facts and the law, I was unfairly discriminated against by Elyse Rosen, Member of SST General division and wrongfully accuse of "not doing enough."[23]

[43] As I understand it, the Claimant isn't arguing that the General Division process was procedurally unfair or that the member was biased or prejudiced. She is arguing that the General Division's interpretation and application of the law discriminated against her.

– **What counts as an important factual error**

[44] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding relevant evidence.[24] In other words, if the evidence goes squarely against or doesn't support a factual finding the General Division had to make in order to reach its decision.

[45] The law also says I can presume the General Division reviewed all the evidence—it doesn't have to refer to every piece of evidence.[25]

– **My reasons for finding there is no arguable case**

[46] I can't accept the argument that the General Division ignored or misunderstood the facts of the Claimant's previous accommodation for three reasons.

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[23] See AD1-8.
[24] Section 58(1)(c) of the DESD Act says it is a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.
[25] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.

[47] First, her evidence about the accommodation that a previous employer put in place wasn't before the General Division. In other words, it is new evidence at the Appeal Division. So, it could not ignore it or misunderstand it. And the law says that I can't consider new evidence when I decide whether the Claimant has shown an arguable case the General Division made an error.[26]

[48] Second, the Claimant hasn't referred to a specific fact or piece of evidence that was before the General Division that it ignored or misunderstood.

[49] Third, the General Division did take the Claimant's evidence (about her disability-related needs and her need for accommodation) into account. It did that when it decided what suitable employment was for her. And it did that when it applied the *Faucher* factors.[27] The General Division writes the following:

> [59] The Appellant makes the point that those who are bipolar face numerous challenges finding work. She claims that only one in three who suffer with the illness are able to work. She says that because those who are bipolar need accommodations and highly supportive work environments, there are very few suitable jobs available to them. I accept this to be true.
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> [60] I find that the Appellant's availability must be assessed in relation to what a suitable job would be for her given her particular circumstances and must take her illness into account.

[50] The Claimant is representing herself in this appeal. So, I looked beyond the argument she made to see whether there was an arguable case the General Division made any other important factual errors.[28] I didn't find relevant evidence that the General Division ignored or misunderstood. And its decision is supported by relevant evidence it had to consider.

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[26] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[27] The General Division decision shows me it considered and weighed her evidence about her disability-related restrictions, limitations, and needs, including as they changed over time. See paragraphs 2, 3, 31 to 36 (including footnote 9), 42 to 44, 46, 59, 60, 70, 73, 74, 77, and 88.
[28] Where a self-represented claimant is asking for permission to appeal a General Division decision, I should not apply the permission to appeal test in a mechanistic manner. I take this to mean I should review the law, the evidence, and the decision from the General Division. See for example *Griffin v Canada (Attorney General)*, 2016 FC 874; *Karadeolian v Canada (Attorney General)*, 2016 FC 615; and J*oseph v Canada (Attorney General)*, 2017, FC 391.

[51] This means there isn’t an arguable case the General Division made an important factual error.

Conclusion

[52] The Claimant hasn’t shown an arguable case the General Division made an error that I can consider. In other words, her appeal doesn’t have a reasonable chance of success.

[53] So, I can’t give her permission to appeal the General Division decision.

[54] This means her appeal won’t go ahead. And the General Division decision stands unchanged.

Glenn Betteridge
Member, Appeal Division