



**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: Zoran Boskovic

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 10, 2023
(GE-22-2840)

Tribunal member: Pierre Lafontaine

Decision date: March 28, 2023

File number: AD-23-153

Decision

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

Overview

[2] The Respondent (Commission) decided that the Applicant (Claimant) was disentitled from receiving Employment Insurance (EI) benefits as of January 24, 2022.

[3] The Commission determined that the Claimant was not available to work because he did not search for work for the first two months of his claim. He was hoping to return to his previous employer. When he did start looking for work, the most suitable employers had the similar vaccine policy requirements. The Claimant disagreed. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant wanted to go back to work and that he made sufficient efforts to find a job. However, it found that the Claimant set personal conditions that unduly limited his chances of returning to the labour market by refusing to be vaccinated. The General Division concluded that the Claimant was not available to work under the law until October 14, 2022.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division failed to respect a principle of natural justice, made errors in fact and in law, when it concluded that he was not available to work until October 14, 2022.

[6] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[7] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[9] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. 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.

[10] 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 his 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.

[11] Therefore, before I can grant leave to appeal, 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.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Natural Justice

[12] The Claimant submits that the whole process with Service Canada staff was a very humiliating experience. Their lack of impartiality was evident in every step of the process.

[13] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. It is not the General Division's role to investigate the claim or to rule on the Commission's conduct during the claim process.

[14] The concept of "natural justice" includes the right of a claimant to a fair hearing before the General Division. A fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations.

[15] The Claimant submits that having two separate files for his appeal created a logistical and administrative burden for him as a self-represented client but also for the Tribunal's staff who made an administrative error by attaching the same supplemental information to both files under appeal although he provided two separate sets of supplemental information after the hearing held on Dec. 06, 2022.

[16] I note that the staff did attach the same supplemental information to both files.¹ However, I don't see any prejudice suffered by the Claimant following this administrative error.

[17] The Claimant had a fair hearing. He received adequate notice of the hearing. He had the opportunity to be heard, the right to know what is alleged against him and the opportunity to answer those allegations. The Claimant suffered no prejudice because the General Division proceeded with two separate appeals during the same hearing.

¹ See GD7.

[18] I cannot see a breach of natural justice by the General Division. This ground of appeal has no reasonable chance of success.

Availability

[19] The Claimant submits that the vaccination restrictions are clearly involuntary and beyond his control and should not be held against him. They are restrictions imposed by employers, not himself. He submits that claimants are not required to be available for and seeking employment that is not considered suitable.² The Claimant submits that his actions and behaviour strongly indicated the intent to become re-employed as a reasonable person who is seeking employment would do under similar circumstances. The Claimant further submits that the General Division ignored the employment contract terms and conditions pertaining to leave that specifically prohibits job search while on leave of absence. He submits that the member's decision is not the result of an "internally coherent and rational chain of analysis."³

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

[21] 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

² Pursuant to section 6(4) of the *Employment Insurance Act* and 9.002 of the *Employment Insurance Regulations*.

³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653.

⁴ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.

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

[23] A claimant must establish their availability for work and this availability must not be unduly limited to receive benefits. The *Employment Insurance (EI) Act* is designed so that only those who are genuinely unemployed and **actively looking for work** will receive benefits. The fact that the Claimant is prohibited by his employment contract from looking for work does not exempt him from that obligation under the EI Act. It is an essential condition to receiving EI benefits.

[24] The General Division found that the Claimant set a personal condition that might unduly limit his chances of returning to the labour market by choosing not to be vaccinated.

[25] The General Division found that by choosing not to be vaccinated, the Claimant was restricting himself to jobs without a vaccination requirement – at a time when, by his own admission, most (if not all) jobs in his own field or in government occupations required candidates to be vaccinated.

[26] The Claimant submits that the General Division made an error in not applying section 9.002 of the *Employment Insurance (EI) Regulations* regarding suitable employment. He submits that jobs that require him to be vaccinated constitute unsuitable employment.

[27] The claimant's health and physical capabilities referred to in section 9.002 of the EI Regulations refer to work performance. The available jobs did not go against the Claimant's health and capabilities. The Claimant would have been able to accept and perform these jobs if not for his personal decision to refuse vaccination. Therefore, the jobs constituted suitable employment.

[28] The Claimant's choice not to be vaccinated set a personal condition that unduly limited his chances of returning to the labour market. The evidence supports the General Division's conclusion that the Claimant did not demonstrate that he was available for work but unable to find a suitable job.

[29] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the evidence before it and properly applied the *Faucher* factors in determining the Claimant's availability. I have no choice but to find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division