Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *ZB v Canada Employment Insurance Commission*, 2020 SST 907

Tribunal File Number: AD-20-785

BETWEEN:

Z. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 19, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Applicant, Z. B. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division decided that the Claimant was not entitled to receive family caregiver benefits. The Claimant argues that the General Division made legal and factual errors.

[4] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

ISSUES

[5] The issues are as follows:

> **Issue 1**: Is there an arguable case that the General Division ignored section 2 of the *Social Security Tribunal Regulations*?
>
> **Issue 2:** Is there an arguable case that the General Division failed to consider whether section 23.2(1) of the *Employment Insurance Act* is discriminatory under the *Canadian Human Rights Act*?
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> **Issue 3:** Is there an arguable case that the General Division made a legal error by failing to apply recent COVID-19 legislation in her case?

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

[6] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the reasons for appeal fall into at least one of the types of errors listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) did not hold a fair hearing, or the process was unfair;

(b) did not decide an issue that it should have decided, or it decided something that it did not have the power to decide;

(c) made an error of law when making a decision; or

(d) based its decision on an important error of fact.[2]

[7] The appeal also has to have a reasonable chance of success. This is a relatively low bar because applicants do not have to prove their case at this stage of the appeal process. As long as I am satisfied that there is an arguable case, it is enough to grant leave to appeal.

Issue 1: Is there an arguable case that the General Division ignored section 2 of the *Social Security Tribunal Regulations*?

[8] The Claimant argues that the General Division ignored section 2 of the *Social Security Tribunal Regulations* (SSTR). She argues that, if the General Division had applied the section, it would have granted family caregiver benefits to her. The Claimant argues that allowing the appeal would have been the just, most expeditious and least expensive outcome.

[9] Section 2 describes the general principle that applies to the SSTR. The section requires the SSTR to be "interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications."

[2] Under section 58(1)(c) of the DESDA, there is a ground of appeal 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] The Claimant refers to section 2. However, the Claimant does not refer to nor point to any other section(s) of the SSTR that she says the General Division ignored.

[11] The Claimant argues that rejecting her appeal for family caregiver benefits leads to greater costs for the government. This occurs because the caregiver can no longer afford to provide care for an ill child. Without care, the child then becomes more ill. The child then requires more medical care, thus costing the government more money over the longer term.

[12] The Claimant argues that the General Division would have saved the health care system considerable money if it had allowed the appeal. If it had allowed the appeal, she would have been able to take time off work and care for her child. (The Claimant took time off work.[3]) But, without that care, her child's condition would have gotten worse. Quite likely, the child would have required more surgery. This would have added costs to the health care system.

[13] The Claimant relies on a medical report that her child's orthopaedic surgeon wrote. The surgeon wrote:

> I understand that the [child's] mother .. stayed home from work to care for [the child] following her fracture. Initially this was in an attempt to minimize her constant movements, so that displacement of her fracture did not occur. Similarly, postoperatively, she stayed home to care for [the child] and to help reduce movements that might subsequently disrupt the surgical repair.
>
> If the surgical repair had been disrupted, this would have required additional surgical treatment and extensive cost to the health care system.
>
> Ultimately, the treatment was successful …
>
> [The Claimant] staying home from work to care for her special needs daughter was quite reasonable, it certainly helped [the child] to achieve a successful outcome from this injury, and lower costs to the health care system.

[14] The root of the Claimant's argument deals with the interpretation and application of section 2 of the SSTR.

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[3] The General division held a hearing in August 2000. By then, the child's fracture had healed or was close to healed. The child no longer needed anyone to help her reduce movements. The medical evidence suggests that, at that point, the child did not need more medical care for her fracture. So, there was no ongoing issue about whether the General Division would have saved the health care system any money if it had allowed the appeal.

[15] The Claimant argues that the section required the General Division to give a decision that led to the least expensive outcome. In this case, she suggests that outcome is to the health care system.

[16] However, the section lays out the general principle by which one interprets the SSTR. It is concerned with the process of appeals itself, rather than with the outcome of any appeals. After all, the SSTR sets out the general rules of procedure that the Social Security Tribunal (SST) and the parties follow.

[17] Nothing in section 2 of the SSTR supports the Claimant's interpretation. Section 2 refers to the interpretation of "These Regulations." Nowhere is there any reference to the outcome of appeals in any of the SSTR, or to the impact on the health care system. There is no consideration given in the SSTR to public finances.

[18] For instance, in an appeal to the Appeal Division, section 39 of the SSTR describe how a party files an application for leave to appeal. Section 40 lists what form that application should take. Section 42 provides how much time parties have to file submissions after the Appeal Division has granted leave to appeal. Like sections 39 and 40 of the SSTR, many of the sections in the SSTR deal with process and procedure.

[19] It is clear that section 2 of the SSTR requires the SST to interpret these types of sections in the SSTR to ensure a just, expeditious and least expensive appeals process.

[20] The Claimant's interpretation would make eligibility requirements in the *Employment Insurance Act* (EIA) meaningless. They would be meaningless if the overriding consideration were the costs to the health care system.

[21] Similarly, the Claimant's interpretation would also make any eligibility requirements in the *Canada Pension Plan* (CPP) and the *Old Age Security Act* (OASA) meaningless. (The SST has jurisdiction over the EIA, the *Canada Pension Plan* and the *Old Age Security Act*.)

[22] The Claimant's interpretation of section 2 of the SSTR would lead to an unintended and incongruous result.

[23] In one case, granting benefits might reduce overall costs to the health care system. Conversely, granting benefits in another case could result in substantial costs to public finances. Applying the Claimant's interpretation, an appellant in the latter example would not receive any benefits because of the public cost. This would be so, even if the appellant had been otherwise eligible for benefits. Such a result would be highly undesirable and unintended. It would defeat the goal of social benefits conferring legislation.

[24] As it is, the eligibility requirements under the EIA, CPP and the OASA remain in place. There is no consideration given to the impact on public finances.

[25] The Claimant has not established any bases to support her interpretation of section 2 of the SSTR. I am not satisfied that there is an arguable case that the General Division ignored section 2 of the SSTR by failing to consider the impact its decision would have on public finances or on the public health care system.

[26] The Claimant also encourages amendments to the Employment Insurance program. The Claimant argues that the government should expand the program. She argues the program should provide compassionate care benefits to parents of ill children and family members. The Claimant argues that parents should be eligible for compassionate care benefits when they stay home to provide care. She argues that this approach benefits public finances because the public would otherwise have to bear the costs of that care.

[27] The SST does not have any authority to make amendments to the EIA or to the *Employment Insurance Regulations* (EIR). The Claimant's recourse for legislative amendments lies elsewhere.

Issue 2: Is there an arguable case that the General Division failed to consider whether section 23.2(1) of the *Employment Insurance Act* is discriminatory under the *Canadian Human Rights Act*?

[28] The Claimant argues that that the General Division made a legal error. She argues that it failed to consider whether section 23.2(1) of the EIA is discriminatory under the *Canadian Human Rights Act* (CHRA). She claims that section 23.2(1) of the EIA discriminates against major attachment claimants with disabled children.

[29] Section 23.2(1) of the EIA provides for benefits to a "major attachment claimant who is a family member of a critically ill child in order to care for or support that child."

[30] Section 5 of the CHRA states that it is a discriminatory practice in the provision of services customarily available to the general public

(a) to deny, or to deny access to, any such service, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination. Section 3 of the CHRA defines prohibited grounds of discrimination. Prohibited grounds include one's disability.

[31] The Claimant argues that the website of the Canadian Human Rights Tribunal shows that the CHRA applies to the SST and to the Employment Insurance program. She says that the CHRA applies because the SST and the EI program are part of the federal government. The Claimant argues that the SST "must apply the code in its decisions."[4]

[32] In fact, the General Division found that the SST has jurisdiction to decide whether a discriminatory practice occurred under section 5 of the CHRA.[5]

[33] The General Division then decided whether the Respondent, the Canada Employment Insurance Commission, engaged in a discriminatory practice in the provision of a "service" customarily available to the general public, contrary to section 5 of the CHRA.

[34] The General Division concluded that the Claimant had not identified a discriminatory practice within the meaning of section 5 of the CHRA. The General Division determined that the Claimant's complaint was really a challenge to the legislation, and nothing else.

[35] Because of this, the General Division did not address the validity of section 23.2(1) of the EIA. It did not consider whether section 23.2(1) of the EIA is discriminatory. The General

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[4] Claimant's submissions, at AD1-12.
[5] See paragraphs 31 to 34 of the General Division's decision.

Division noted that the Claimant acknowledged that, "a challenge to legislation and nothing else is not a discriminatory practice."

[36] The Claimant argues that section 23.2(1) of the EIA is discriminatory. She claims that, under the section, benefits are available to only a major attachment claimant who is a family member of a critically ill child, while benefits are unavailable to a family member of a disabled child. She argues that the family caregiver benefit should be available to family members of a disabled child.

[37] The problem with the Claimant's argument is simple. It is possible for a child to be both critically ill and disabled, but it does not follow that a disabled child is necessarily critically ill.

[38] The family caregiver benefits is in fact available to family members of a disabled child. But, the disabled child would have to be critically ill, as defined by the EIR, for benefits to flow. Section 1(6) of the EIR defines a critically ill child as:

> A person who is under 18 years of age on the day of which the period referred to in subsection 23.2(3) or 152.06(3) of the Act begins, whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. ("enfant gravement malade")

[39] In other words, the Claimant was ineligible for the family caregiver benefit not because her child was disabled, but because her child was not critically ill. Her ineligibility had nothing to do with her child's disability. It had everything to do with the fact that her child was not critically ill.

[40] Had the Claimant's child been critically ill, it would have made no difference whether the child was disabled or not. As long as the child was critically ill, the family caregiver benefit was available. The Claimant would have been entitled to receive the family caregiver benefit in that case. However, the evidence fell short in establishing that the Claimant's child was critically ill.

[41] If section 23.2(1) of the EIA had stipulated that family caregiver benefits were payable to a major attachment claimant of a family member of a critically ill child, with the exception of any child with a disability, that would have been a different matter. Under those circumstances,

the Claimant would have had a legitimate basis to challenge the legislation. Such an exception would have represented differential treatment based on a prohibited ground of discrimination. However, no such restriction was in place.

[42] Neither the purposes nor effect of section 23.2(1) of the EIA drew any distinction between the Claimant and others because of the disability of the child. Ultimately, there was no differential treatment or any discrimination based on disability under section 23.2(1) of the EIA.

[43] I am not satisfied that the General Division failed to consider whether the family caregiver provisions under section 23.2(1) of the EIA are discriminatory under the CHRA.

[44] The General Division may not have decided whether section 23.2(1) of the EIA is discriminatory. Even so, I am not satisfied that the section discriminates against major attachment claimants who are family members of a disabled child. If that claimant were a family member of a disabled child who is critically ill, that claimant is eligible for the family caregiver benefit.

Issue 3: Is there an arguable case that the General Division made a legal error by failing to apply recent COVID-19 legislation in her case?

[45] The Claimant argues that the General Division made a legal error by failing to apply recent legislation that responds to the impacts of COVID-19. The result was that the General Division required her to produce a medical certificate to qualify for family caregiver benefits.

[46] Under section 23.2(1) of the EIA, benefits are payable if a medical doctor or nurse practitioner has issued a certificate that

(a) states that the child is a critically ill child and requires the care or support of one or more of their family members; and

(b) sets out the period during which the child requires that care or support.

[47] However, as of March 11, 2020, this requirement for a medical certificate was deemed to be of no effect under *An Act respecting certain measures in response to COVID-19*. This Act is commonly known by its short title as *COVID-19 Emergency Response Act* (CERA).

[48] In particular, section 58(1)(a) of the CERA states that every reference in the EIA to a certificate issued by a medical doctor or other medical professional, including by a nurse practitioner, is deemed to be of no effect.

[49] At the General Division, the Claimant argued that section 58(1) of the CERA should apply in her case. However, when the Claimant applied for the family caregiver benefit in October 2019, there were no known outbreaks of the coronavirus disease. Canada did not introduce legislation to respond to the impacts of COVID-19 until months later. The section did not exist, so the Claimant could not rely on it when she applied for benefits.

[50] The only way the Claimant can rely on section 58(1) of the CERA is if it were to apply retroactively. For this reason, the Claimant argues that section 58(1) of the CERA should apply retroactively.

[51] The General Division rejected the Claimant's argument that section 58(1) of the CERA applies retroactively. The General Division determined that CERA had no retrospective application. As a result, the Claimant could not rely on section 58(1) of the CERA. The Claimant still had to provide a medical certificate.

[52] On one hand, the Claimant says that she is no longer arguing that section 58(1) of the CERA applies retroactively to section 23.2(1) of the EIA. She wrote, "We had mentioned the new law for COVID not to say we think it should apply to us."[6]

[53] Instead, the Claimant argues that section 58(1) of the CERA proves, by its very existence, that the family caregiver provisions of the EIA are discriminatory. She claims that because section 23.2(1) of the EIA is discriminatory, the requirements under that section are invalid.

[54] On the other hand, the Claimant argues that section 23.2(1) of the EIA ""invalidates the previous law with its critical care condition." She argues that legislation can apply retroactively. She argues that this situation is similar to compensating ethnic groups for past historical wrongs. In other words, she says that there is no time limit for providing compensation when discrimination has taken place.

[6] Claimant's submissions, at AD1-14.

[55] A detailed statutory analyses and review on retroactivity is unnecessary in this case. While legislation may apply retroactively, that is not the general norm. There is a general presumption against retroactivity. This presumption is rebuttable, but there must be a clear statement to that effect. The Claimant has not referred to anything that would justify rebutting the presumption.

[56] Section 58(1) of the CERA applied until September 30, 2020.[7] It was in effect for only a limited time. This end date suggests that Parliament did not intend for the section to have any retroactive effect. Parliament did not state that the section would apply retroactively.

[57] There is no clear statement that section 58(1) should have be applied retroactively. I find that the Claimant has not rebutted the presumption. She cannot rely on section 58(1) of the CERA. She had to provide a medical certificate. The General Division did not make any legal error when it determined that the Claimant could not rely on section 58(1) of the CERA.

[58] Even if section 23.2(1) of the EIA did not require a medical certificate, benefits are only payable if a major attachment claimant is a family member of a critically ill child.

[59] The child is autistic. She fractured her arm and required medical treatment. The child's medical circumstances have been challenging. But, her life was not at risk as a result of an illness or injury. She did not meet the definition of a "critically ill child" under section 1(6) of the EIR.

[60] The Claimant also argues that the existence of section 58(1) of the CERA alone proves that section 23.2(1) of the EIA is discriminatory. But, section 58(1) of the CERA no longer applies and is no longer available. Hence, this argument has no merit either.

CONCLUSION

[61] I am not satisfied that the appeal has a reasonable chance of success. The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

[7] See section 58(3) of the CERA.

REPRESENTATIVE:	Mark Brown (paralegal), for the Applicant