



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *DF v Canada Employment Insurance Commission*, 2021 SST 13

Tribunal File Number: AD-20-865

BETWEEN:

**D. F.**

Applicant / Claimant

and

**Canada Employment Insurance Commission**

Respondent / Commission

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Janet Lew

Date of Decision: January 25, 2021

## 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 D. F. is seeking leave to appeal the General Division's decision in Social Security Tribunal file number GE-20-2061, issued on November 18, 2020.<sup>1</sup> This is another way of saying that applicants have to get permission from the Appeal Division 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.<sup>2</sup> If the appeal does not have a reasonable chance of success, that ends the appeal process.

[3] The General Division found that the Claimant did not prove that he was entitled to an extension of his qualifying period. The General Division found that he did not meet any of the conditions for an extension under sections 8(2) and (3) of the *Employment Insurance Act*.

[4] The Claimant argues that the General Division made several procedural errors in his case. For example, he claims that the General Division did not allow him to cross-examine any witnesses or submit any rebuttal evidence. He also claims that the General Division failed to exclude the evidence of the Respondent, the Canada Employment Insurance Commission. The Claimant suggests that if the General Division member had not made the procedural errors, he would have established that he met the requirements to allow for an extension of his qualifying period.

[5] The procedural arguments are the same as those that the Claimant made in another appeal to the Appeal Division.<sup>3</sup> For that reason, these reasons mirror my decision in that other appeal, though there are some major factual differences. The differences arise out of the fact that the

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<sup>1</sup> The Claimant had two appeals at the General Division, under Tribunal file numbers GE-20-1564 and GE-20-2061. Appeal file number GE-20-1564 deals with the issue of whether the Claimant had good cause for the delay in applying for employment insurance benefits. The Claimant is appealing both General Division decisions.

<sup>2</sup> *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>3</sup> Tribunal file number AD-20-864.

General Division conducted two separate hearings, one relating to the antedate issue, and the other, to the issue regarding the extension of the qualifying period.

[6] I have to determine whether the appeal has a reasonable chance of success. I am not satisfied of this. Therefore, I am refusing leave to appeal.

### **PRELIMINARY MATTERS**

[7] The Claimant has another application to the Appeal Division under Tribunal file number AD-20-864. He is asking the Appeal Division to consolidate both proceedings into one file. He argues that it would be efficient to do so. He suggests that the decision in one application affects his other application, so claims that it would be efficient to consolidate the two matters. However, he does not articulate how a decision in one application affects the decision in his other application.

[8] I considered the Claimant's request in Tribunal file number AD-20-864. I determined that, despite some overlapping considerations, there are key differences between the two applications to the Appeal Division. The Claimant's procedural arguments are the same, but the facts upon which those arguments are based differ. These differences justify having two separate decisions and maintaining two separate Appeal Division files.

### **ISSUE**

[9] Is there an arguable case that the General Division made any procedural errors?

### **ANALYSIS**

[10] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the General Division committed the type of error that is set out in section 58(1) of the *Department of Employment and Social Development Act (DESDA)*. These errors would be where the General Division:

- (a) Failed to provide a fair process;
- (b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;

- (c) Made an error of law; or
- (d) Based its decision on an important factual error (perverse, capricious, or without regard for the evidence).

[11] Of these, the Claimant argues that the General Division did not provide him with a fair process. In particular, he argues that the General Division made several procedural errors, as follows, by:

- Failing to notify him that the Commission would not be attending the General Division hearing.
- Failing to provide him with the opportunity to cross-examine the Commission on its evidence.
- Failing to allow him to reply to the Commission's submissions, and finally,
- Failing to exclude the Commission's evidence.

[12] I will review each of these claims to determine whether there is an arguable case.

**i. The Claimant claims that the General Division should have notified him that the Commission would not be attending the General Division hearing**

[13] There is no arguable case that the General Division should have notified the Claimant that the Commission would not be attending the General Division hearing.

[14] The General Division hearing took place over two days, on November 9 and 12, 2020. No one appeared for the Commission on either date. The Claimant argues that the Tribunal or the General Division should have notified him that no one would be appearing for the Commission. He claims that the Commission's absence at the hearing affected his ability to present his case fully and fairly, primarily because he could not cross-examine the Commission on its evidence.

[15] Unless a party notifies the Tribunal that it will not be attending the hearing, the General Division cannot anticipate whether a party will attend the hearings. In this case, there is no indication that the Commission ever informed the Tribunal that it would not be sending a representative to the hearing on November 9 or on November 12, 2020 (although the Claimant was likely aware that the Commission would not be attending the second day of the hearing, since no one attended on the first day).

[16] Without knowing the Commission's intentions, the Tribunal could not tell the Claimant whether the Commission would be attending the hearing. Apart from that, there is no obligation on a party to attend hearings. The Tribunal alluded to this in the Notice of Hearing. There is a section titled, "Failure to Attend the Hearing." The section reads:

If a party does not attend the hearing, the Tribunal member may proceed in the absence of the party if the member is satisfied that the party has received the notice of hearing.<sup>4</sup>

[17] It is clear from the Notice of Hearing that parties can choose not to attend a hearing. The General Division member has no authority to compel a party, including the Commission, to attend a hearing.

[18] If a party does not attend a hearing, the General Division member can still go ahead with the hearing, as long as the member is satisfied that the absent party received notice of the hearing.

[19] Even if the Commission had notified the General Division that it would not be sending a representative to the hearing, neither the Tribunal nor the General Division were required to alert the Claimant that the Commission would not be attending. That said, I cannot envision that that would ever happen. As a matter of practice, the Tribunal distributes copies of any correspondence or documents from a party to all other parties.

**ii. The Claimant claims that the General Division did not give him the chance to cross-examine the Commission**

[20] As no one appeared for the Commission at the hearing, the Claimant argues that the General Division deprived him of the chance to cross-examine the Commission on its evidence.<sup>5</sup>

[21] However, the Claimant does not have an arguable case. This is not a situation where the General Division did not let the Claimant cross-examine a witness. There simply were no (Commission) witnesses for the Claimant to cross-examine. The Commission did not produce any witnesses, let alone send a representative to the hearing.

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<sup>4</sup> Notice of Hearing dated October 29, 2020, at GD1-4, and Notice of Hearing dated November 10, 2020, at GD5-4.

<sup>5</sup> The Commission's evidence was set out in the Reconsideration file, at GD3.

[22] It would have been a different matter altogether if a witness had testified for the Commission and if the General Division had refused to give the Claimant a chance to cross-examine that witness. Under that scenario, I would have found that the Claimant had an arguable case that the General Division made a procedural error and that the Claimant did not get a fair hearing.

[23] This also is not a situation where the Claimant had alerted the General Division or the Commission that he intended to cross-examine a representative or witness on behalf of the Commission. (Typically, this arises when there is opinion evidence.) The Claimant did not give advance notice to the Commission that he required a named representative to attend so that he could cross-examine that representative on their evidence. If that witness had appeared and given evidence, the General Division should have then allowed for cross-examination of that witness.

[24] But, it is too late now for the Claimant to object that he did not get a chance to conduct any cross-examination when he did not identify a witness(es) and did not ask the other party to produce that witness(es) for cross-examination.

**iii. The Claimant claims that the General Division did not give him the chance to rebut the Commission's submissions**

[25] The Claimant argues that he did not get a fair opportunity to present his case because the General Division did not let him reply to the Commission's submissions.

[26] The Claimant does not have an arguable case. The General Division gave the Claimant a fair chance to respond to the Commission's submissions, both before and during the hearing.

[27] The Claimant filed his notice of appeal with the General Division on October 19, 2020. The Commission produced its reconsideration file and its written arguments within a week, on October 26, 2020.<sup>6</sup> The General Division then issued a Notice of Hearing on October 29, 2020. The General Division held a hearing on November 9 and 12, 2020.

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<sup>6</sup> Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4.

[28] The Claimant submits that the General Division violated his rights and the “principles of a judicial process” because the General Division did not give him the opportunity to respond to the Commission’s submissions.<sup>7</sup>

[29] But, this is not a situation where the General Division ruled against the Claimant by denying him the chance to rebut the Commission’s submissions. There is no evidence that the Claimant ever alerted the Tribunal or the General Division that he intended to file a written rebuttal to the Commission’s submissions. If the Claimant ever intended to file a rebuttal, the General Division was unaware of it.

[30] While the General Division did not invite the Claimant’s rebuttal to the Commission’s arguments, the evidence shows that neither the Tribunal nor the General Division denied the Claimant the opportunity to reply to the Commission’s submissions.

[31] It is clear from the Tribunal’s letters to the Claimant that it was always open to him to file any additional documents with the Tribunal, including any reply.

[32] In its letter of October 20, 2020, the Tribunal advised the Claimant that the Tribunal did not obtain documents or gather evidence. It highlighted the fact that it was “each party’s responsibility to file with the Tribunal any documents they would like the Tribunal member to consider.”<sup>8</sup>

[33] After receiving the Commission’s reconsideration file, the Tribunal sent another letter to the Claimant. In its letter of October 27, 2020, the Tribunal advised the Claimant how he could send documents to the Tribunal. The Tribunal provided an address, email and fax number.

[34] In both of its Notices of Hearing, the Tribunal again described how both parties could send documents to the Tribunal.<sup>9</sup> The Tribunal did not set any time limits or deadlines for filing documents or submissions.

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<sup>7</sup> Application to the Appeal Division – Employment Insurance, AD1-6.

<sup>8</sup> Tribunal’s letter dated October 20, 2020.

<sup>9</sup> Notice of Hearing dated October 29, 2020, at GD1-4, and Notice of Hearing dated November 10, 2020, at GD5-4.

[35] The Claimant could have filed reply submissions at any point from the time that he received the Commission's submissions, up to the time of the hearing.

[36] Furthermore, the Claimant was not required or limited to replying to the Commission's position in writing. He could have responded to the Commission's submissions orally, during the General Division videoconference hearing on November 9, 2020. The General Division member let the Claimant testify, reply to the Commission's evidence and submissions, and make any arguments during the videoconference hearing. Indeed, the Claimant did just that during the hearing.

[37] During the hearing, the General Division member invited the Claimant to testify and make submissions. This happened several times. The member clearly asked the Claimant whether he had anything else to add.<sup>10</sup> Before concluding, the member asked, "Is there anything else then before we conclude today?" The Claimant responded, "No, I think that's it."<sup>11</sup>

[38] The evidence shows that the Tribunal and the General Division allowed the Claimant to make both written and oral submissions. Hence, I am not satisfied that there is an arguable case that the General Division did not give the Claimant a chance to reply to the Commission's arguments.

**iv. The Claimant argues that the General Division should have excluded the Commission's evidence from the record (GE-20-1564)**

[39] The Claimant argues that the General Division should have excluded the Commission's evidence because no one attended the hearing for the Commission. The Claimant claims that he questioned evidence provided by the Commission in the hearing under Tribunal file number GE-20-1564.<sup>12</sup>

[40] The Claimant does not have an arguable case on this point. The hearing under Tribunal file number GE-20-1564 took place on September 1, 2020, before a different General Division member from the hearing that took place on November 9, 2020. If the General Division member

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<sup>10</sup> At approximately 37:38, 39:10, 45:20 54:20, and 1:03:54 of the audio recording of the General Division hearing on November 9, 2020.

<sup>11</sup> Question and answer of the General Division member and the Claimant, at approximately 1:03:54 of the audio recording of the General Division hearing on November 9, 2020.

<sup>12</sup> Application to the Appeal Division, AD1-6.



made any procedural errors on September 1, 2020, they are her errors alone, not those of another member in a separate hearing.

[41] Setting that aside, there was no indication that the Claimant made any objections to the admissibility of the Commission's evidence during the hearing on September 1, 2020 anyway. So, he cannot now say that the General Division did not consider his objections.

[42] It may be that the Claimant had a typographical error in his Application to the Appeal Division, and that he meant to refer to the General Division hearing on November 9, 2020. The audio recording of the General Division hearing on November 9, 2020 clearly indicates that the Claimant objected to the Commission's documents. I will consider the Claimant's arguments as if he had made them in regards to the November 9, 2020 hearing.

**The Claimant objected to the Commission's documents at the November 9, 2020 hearing (GE-20-2061)**

[43] Even if a party's non-attendance can form the basis for an objection to the admissibility of records, the Claimant did not object to the Commission's documents because of the Commission's non-attendance. The Claimant's objections at the time had nothing to do with the fact that no one appeared for the Commission.

[44] If the Claimant had objected on this basis, the General Division would have had to weigh the objection and determine if there was any merit to it, and then rule on it. There is no rule that promptly leads to the exclusion of a document merely because a party has raised an objection.

[45] In this case, the Claimant objected to the admissibility of the Commission's submissions<sup>13</sup> and to a Supplementary Record of Claim dated September 18, 2020.<sup>14</sup> The Claimant objected to the admissibility of these two documents because he claimed that the documents were neither factual nor consistent.<sup>15</sup>

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<sup>13</sup> Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4.

<sup>14</sup> Supplementary Record of Claim, dated September 18, 2020, at GD3-22 to GD3-23.

<sup>15</sup> At approximately 41:31 to 42:22 of the audio recording of the General Division hearing on November 9, 2020.

### **“Admissibility” of the Commission’s submissions**

[46] The General Division did not exclude the Commission’s submissions. But, the Commission’s submissions is not evidence. The Commission’s submissions merely represent arguments. The Commission was entitled to make whatever arguments it wished, but that did not thereby mean that its submissions proved the truth of its contents. Even if, as the Claimant suggests, the Commission’s submissions were littered with inaccuracies and fabrications, the Commission still had to prove any arguments that it made.

[47] Because the Commission’s submissions did not represent not evidence, they were not subject to any of the considerations that applies to evidence. There was no basis for the General Division to rule on the admissibility of the Commission’s arguments. In short, the Commission was allowed to file submissions with the Tribunal. To be clear, this is not to suggest that the General Division had to accept the Commission’s submissions. As with any submissions—whether from the Commission or another party—the General Division could either accept or reject them.

### **Admissibility of a Supplementary Record of Claim**

[48] The Claimant also objected to the admissibility of a Supplementary Record of Claim. This record purports to document a telephone conversation between the Claimant and an agent for the Commission. The Claimant denies that he had a telephone conversation with the Commission on September 18, 2020. He argued that the Commission had to prove that such a conversation occurred.

[49] If these had been court proceedings, such an objection generally would have required the author of the document to appear as a witness to tender the document into evidence. However, the General Division is an administrative tribunal. It does not adhere to the strict rules of evidence. It can accept evidence that courts might exclude or deem inadmissible. Historically, the Tribunal has routinely accepted the Commission’s records as evidence.

[50] There is also the possibility that exceptions could allow documents to be admitted into evidence, without requiring the author of the document to attend the proceedings to tender the document into evidence.

[51] The General Division queried whether the Supplementary Record of Claim or the existence of the telephone call between the Commission and the Claimant was even relevant to the appeal. The Claimant agreed with the General Division member that the issue in dispute was whether he qualified for an extension of the qualifying period, rather than whether the Commission spoke with him. But, he noted that "...it's the credibility of their submissions that [he was] worried about."<sup>16</sup>

[52] The Claimant's objections to the Supplementary Record of Claim appear to stem from the fact that the Commission documented his responses about whether he was entitled to an extension of his qualifying period under section 8(2) of the EIA. But, the Claimant asserts that he had asked the Commission to consider his entitlement to an extension of his qualifying period under section 8(3) of the EIA.

[53] The General Division member dismissed the Claimant's objection to the Supplementary Record of Claim. The member admitted the document into the record. Having considered the Claimant's objections, the member was entitled to dismiss them.

[54] The member did not accept the Claimant's allegations that the Commission had fabricated the document. If anything, the member found that the document showed that the Commission's agent was likely confused over the Claimant's request.<sup>17</sup> This explained any discrepancies in the account of the telephone conversation.

[55] Despite the Claimant's objections to the Supplementary Record of Claim, the General Division member did not rely on or base her decision on the document. She gave little, if any, weight to this evidence. The member did not bind herself to the Claimant's responses set out in the Supplementary Record of Claim.

[56] The General Division member conducted her own assessment, independent of the Supplementary Record of Claim. The General Division member methodically examined the Claimant on section 8(2) AND 8(3) of the EIA to determine whether the Claimant met any of the

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<sup>16</sup> At approximately 44:55 to 45:20 of the audio recording of the General Division hearing on November 9, 2020.

<sup>17</sup> General Division decision, para. 12.

conditions for an extension of his qualifying period. Based on the Claimant's own testimony, the member determined that he did not qualify for an extension.

[57] I am not satisfied that there is an arguable case that the General Division should have excluded the Commission's evidence. After considering the Claimant's objections, the General Division member dismissed them, which she was entitled to do. Even so, she gave little weight to the Supplementary Record of Claim. The member conducted her own assessment outside of the Supplementary Record of Claim.

**CONCLUSION**

[58] I am not satisfied that there is an arguable case that the General Division committed the alleged procedural errors. Therefore, I am refusing the application for leave to appeal.

Janet Lew  
Member, Appeal Division

REPRESENTATIVE:	D. F., Self-represented
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