



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *VS v Canada Employment Insurance Commission*, 2021 SST 217

Tribunal File Number: AD-21-151

BETWEEN:

V. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 27, 2021

DECISION AND REASONS

DECISION

[1] I am refusing the application for leave to appeal.

OVERVIEW

[2] The Applicant, V. S. (Claimant), lost his job at his employer (CC) and applied for Employment Insurance on October 30, 2020. In his application for benefits, he stated that his last day of work was also October 30, 2020. The Respondent, the Canada Employment Insurance Commission (Commission), established the Claimant's benefit period and waived the usual weeklong waiting period.

[3] The Commission originally waived the benefit period because of legislation related to the Emergency Relief Benefit (ERB) that permitted the waiver where the Claimant's benefit period starts on or before October 25, 2020.¹ The Commission did not understand that the Claimant's last day of work was October 30 until it received the Record of Employment (ROE) from the Claimant's job at CC. This meant that the Claimant's benefit period could not start until November 1, 2020. November 1 was outside the period in which the legislation allowed for a waiver of the waiting period. The Commission realized that it should not have paid the Claimant for the first week in his benefit period.

[4] The Claimant did not know that the Commission had changed its original decision about waiving the waiting period until he received a notice of debt from the Canadian Revenue Agency (CRA). He followed up with the Commission and requested a reconsideration, but the Commission would not change its decision. Next, he appealed to the General Division of the Social Security Tribunal, which denied his appeal. He is now asking the Appeal Division for leave (permission) to appeal the General Division decision.

[5] I am refusing leave to appeal. The Claimant has no reasonable chance of success because he has not made out an arguable case that the General Division made an error.

¹ Section 153.191(1) of the *Employment Insurance Act* (EI Act).

PRELIMINARY MATTERS

[6] I called a case conference for May 21, 2021, to make sure that the Claimant understood the grounds for appeal that I would be reviewing. I also wanted to explore whether the Commission could apply its policy on Commission mistakes, to relieve the Claimant from having to repay the overpayment.²

[7] In the case conference, the Commission declined to apply its policy, stating that the mistake in this case was one that involved “the structure of the Employment Insurance Act.” The policy says that the Commission must still give retroactive effect to the correction of the mistake, if the mistake involved the structure of the *Employment Insurance Act* (EI Act).

[8] To be clear, the manner in which the Commission chooses to interpret and apply its “mistake” policy is not an issue in this appeal. I was exploring the Commission’s position to assess the possibility of a resolution that was outside of the Claimant’s appeal. The case conference did not result in a resolution, so I must consider the Claimant’s application for leave to appeal.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[9] To allow the appeal process to move forward, I must find that there is a “reasonable chance of success” on one or more of the “grounds of appeal” found in the law. A reasonable chance of success means that there is an arguable case. This would be some argument that the Claimant could make and possibly win.³

[10] “Grounds of appeal” means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:⁴

² Digest of Benefit Entitlement Principles, Policy 17.2.2.2, accessed at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-17/reconsideration.html#a17_3_2_2

Under this policy, the Commission can decide not to declare an overpayment related to its own mistake. This where it had all the information it needed to make a decision but still made a decision that was not supported by the information.

³ This is explained in a case called *Canada (Minister of Human Resources Development) v Hogervorst*, 2007, FCA 41; and in *Ingram v Canada (Attorney General)*, 2017 FC 259.

⁴ This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

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.

ISSUES

[11] Is there an arguable case that the General Division process was unfair to the Claimant?

[12] Is there an arguable case that the General Division made an error of law?

[13] Is there an arguable case that the General Division made an important error of fact?

Issue 1: Procedural Fairness

[14] There is no arguable case that the General Division process was unfair to the Claimant.

[15] The “procedural fairness” ground of appeal is concerned with the fairness of the *appeal* process. It involves the right of a person to be heard at the General Division, and the person’s right to an unbiased decision-maker.

[16] The Claimant has not raised a particular concern with any action or procedure of the General Division that could have affected his right to be heard or to answer the case. He has not said that there was any problem with the pre-hearing disclosure or exchange of documents, or that he did not have enough time to prepare. He has not complained about the manner in which the General Division conducted the hearing or asserted that he did not understand the appeal process.

[17] Finally, the Claimant has not suggested that the General Division member did or said anything that would lead him to believe that the member was biased or that she had prejudged the matter.

[18] Instead, the Claimant raised concerns with how he was treated by the *Commission*. He does not accept that it was fair that the Commission could tell him it was waiving his waiting

period but then reverse its decision without notice to him. The Commission's reversal is what resulted in the demand that he repay an overpayment.

[19] I appreciate how this must seem unfair to the Claimant. However, I can only consider how the General Division may have made an error under the grounds of appeal. The Claimant's concern that the Commission did not treat him fairly does not mean that the General Division process was unfair.

Issue 2: Error of Law

[20] In his application for leave to appeal, the Claimant selected the ground of appeal that relates to an error of natural justice, or procedural fairness. However, the Claimant asserted an additional error at the case conference. His argument was something like this: If the Commission acted unlawfully in waiving his waiting period initially, then the General Division made an error of law by not holding the Commission to its original decision.

[21] There is no arguable case that the General Division made an error by confirming a correct application of the law.

[22] The law says that the Commission can waive a claimant's benefit period if the benefit period starts on or before October 25, 2020.⁵

[23] The law also says that the benefit period begins on the later of the Sunday of the week of his application for benefits or the Sunday of the week of his interruption of earnings.⁶ The Claimant's application was on October 30, 2020. Because the Commission was mistakenly reviewing a ROE with a last day of work in April 2020, it initially used the October 30, 2020, application date to establish his benefit period. The Sunday of that week was October 25, so the Commission set October 25 as the start-date for the Claimant's benefit period. Therefore, the Claimant qualified for the waiver.

[24] Eventually, the Commission realized that the Claimant had worked for CC more recently, and that his last day of work was actually October 30, 2020. The Commission must use the

⁵ Section 153.101(1) of the *Employment Insurance Act* (EI Act).

⁶ Section 10(1) of the EI Act.

Sunday of the week of the “interruption of earnings” if that date is later than the Sunday of the week of the application for benefits. The law says that a claimant does not have an interruption of earnings until he has had seven consecutive days without work or pay.⁷ Therefore, the Sunday of the week of the interruption of earnings was November 1, 2020. Unfortunately, November 1, 2020, did not fall within the period in which the Commission could have waived his waiting period.

[25] The Claimant does not feel that it is fair that the Commission changed its decision. However, the EI Act allows the Commission to change its decision—or correct its mistake—for any reason, if it acts within three years.⁸

[26] The Claimant is of the view that the General Division should have considered the unfairness of the Commission process. He said that the General Division should have considered, “equity.” However, the General Division is not a court. The General Division can only do what the statute (in this case, the DESD Act) says it can do. It does not have the jurisdiction to grant a remedy for unfairness.⁹

[27] The General Division had no choice but to confirm the Commission’s lawful decision. It would have made an error of law if it had restored the Commission’s original decision, when that decision was contrary to the law.

Issue 3. Important Error of Fact

[28] The Claimant did not identify any important error of fact.

[29] However, the Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal when it considers leave to appeal applications from self-represented parties like the Claimant.¹⁰ In accordance with the direction of the Federal Court, I have reviewed the appeal record for any finding that may have ignored or misunderstood significant evidence.

⁷ Section 14(1) of the *Employment Insurance Regulations* (Regulations).

⁸ Section 52(1) of the EI Act.

⁹ See for example, *Alberta v McGeady*, 2015 ABCA 54, leave to appeal to S.C.C. refused.

¹⁰ *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

[30] The Claimant suggested that that the General Division failed to consider the “unfairness” of the Commission’s actions. However, the “fairness” of the Commission’s actions is not actually evidence. It is a legal conclusion from the evidence, or an interpretation of the evidence.

[31] The General Division considered the circumstances that caused the Claimant to feel that the Commission acted unfairly. However, the manner in which the Commission’s mistake and the overpayment recovery efforts affected the Claimant was not relevant to its decision.

[32] The Claimant has not disputed that his last day of work was October 30, 2020. The General Division understood this. The General Division also understood the Claimant’s evidence that the Commission originally notified him that it was waiving his waiting period. It understood that he received benefits for the week of November 1, 2020, and that CRA asked him to pay it back.

[33] The General Division also understood that the Commission’s original decision relied on a ROE from an earlier employment, which showed a last day of work of April 16, 2020. The Commission changed its decision after it received the ROE from the Claimant’s most recent employment with CC.

[34] This is the evidence on which the General Division decision found the Claimant must repay the overpayment. The Claimant has not said that the General Division ignored or misunderstood any of this evidence, and I have not discovered any evidence that it ignored or misunderstood. The General Division’s conclusions follow from the evidence. There is no arguable case that the General Division made an important error of fact.

[35] The Claimant has no reasonable chance of success in his appeal.

CONCLUSION

[36] I am refusing the application for leave to appeal.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	V. S., Self-represented
------------------	-------------------------