Citation: *DS v Canada Employment Insurance Commission*, 2021 SST 590

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. S.
Representative:	Craig Jordheim
Respondent:	Canada Employment Insurance Commission
Representative:	Tiffany Glover

Decision under appeal:	General Division decision dated February 12, 2021 (GD20-736 / Interlocutory decision)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	October 4, 2021
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	October 14, 2021
File number:	AD-21-99

Decision

[1] The appeal is allowed. The file returns to the General Division to decide all issues and Charter challenges.

Overview

[2] The Appellant (Claimant) established a claim for Employment Insurance (EI) benefits in July 2017. Over the following year or so, the Respondent, the Canada Employment Insurance Commission (Commission), paid the Claimant 50 weeks of EI regular benefits. Later, the Commission received information that caused it to reassess the Claimant's file. As part of its investigation, one of the Commission's Integrity Officers contacted the Claimant. During their conversations, the Claimant provided the Integrity Officer with information about

> - two days that he had worked in September 2017; and
>
> -the hours and requirements of a College course that he was taking while receiving EI benefits.

[3] After its investigation, the Commission made several changes to the Claimant's claim for EI benefits. Specifically, the Commission allocated the Claimant's earnings of September 2017, disentitled the Claimant from EI benefits because he was in full-time studies and not available for work and disqualified the Claimant from EI benefits because he had voluntarily left his job without just cause. As a result, the Commission concluded that it had overpaid the Claimant's benefits by over $23,300.

[4] The Commission also determined that the Claimant had knowingly made two false representations. It imposed a monetary penalty and a very serious violation against the Claimant. Later, the Commission reduced the penalty for misrepresentation to a warning and cancelled the violation altogether.

[5] The Claimant filed an appeal with the General Division. The hearing was scheduled in March 2020. However, the General Division adjourned the hearing because the Claimant made arguments based on the *Canadian Charter of Rights and Freedoms* (Charter).

[6] On February 12, 2021, the General Division decided that the Claimant did not meet the legal requirements for bringing a Charter appeal. It dismissed all of the Claimant's Charter arguments.

[7] The Appeal Division granted the Claimant leave to appeal on the basis that the General Division might have made an error of law or jurisdiction by dismissing all the Claimant's Charter arguments and not just those challenging sections of the *Employment Insurance Act* (EI Act) and *Employment Insurance Regulations* (EI Regulations).

[8] In appeal, the Claimant submits that he did raise constitutional issues before the General Division that meet the requirements of section 20(1) (a) of the *Social Security Tribunal Regulations (*SST Regulations). He submits that the General Division erred when it dismissed his Charter appeal for that reason.

[9] I must decide whether the General Division erred in its interpretation of sections 20(1) (a) of the SST Regulations.

[10] The Claimant's appeal is allowed. The file returns to the General Division to decide all issues and Charter challenges.

Issue

[11] Did the General Division make an error in its interpretation of section 20(1) (a) of the SST Regulations?

Analysis

Appeal Division's mandate

[12] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[13] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[14] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

Did the General Division make an error in its interpretation of section 20(1) (a) of the SST Regulations?

[15] Section 20(1) (a) of the SST Regulations provides that if the constitutional validity, applicability, or operability of any provision of the EI Act or the regulations made under the EI Act is to be put at issue before the Tribunal, the party raising the issue must file a notice with the Tribunal that:

> (i) sets out the provision that is at issue, and
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> (ii) contains any submissions in support of the issue that is raised.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242, *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[16] The Claimant submits that he raised several constitutional issues before the General Division that meet the requirements of section 20(1) (a) of the SST Regulations. He submits that the General Division erred when it dismissed his Charter appeal for that reason.

[17] The Commission is of the opinion that the General Division did not err in law in applying the legal test of section 20(1) (a) of the SST Regulations. It submits that the Appeal Division cannot intervene in an error that is an application of the facts to the law, which is what the Claimant is asking the Tribunal to do.

[18] In its decision, the General Division essentially agreed with the Commission that the Claimant had not complied with section 20(1) (a) of the SST Regulations. In doing so, the General Division committed what I see as an error of law. In my view, the Claimant did what was necessary to carry on with most of his Charter arguments.

[19] I consider it necessary to reiterate that the Appeal Division case law interpreting section 20(1) (a) of the SST Regulations does not impose a high burden on claimants who seek to challenge the constitutionality of some aspect of benefits-conferring legislation.[3]

[20] At the section 20(1) (a) stage, the General Division does not have to be persuaded or convinced by the party's submissions. Section 20(1) (a) of the SST Regulations only requires that a claimant set out the provision that is at issue, and provide submissions in support of the issue that is raised sufficiently specific to permit a decision-maker to see the outline of a Charter argument.

[21] Before the General Division, the Claimant argued that section 32 of the EI Regulations deprives a claimant of security of the person in a manner not in

[3] See for example: *R. S. v Minister of Employment and Social Development*, 2017 CanLII 84970.

accordance with the principles of fundamental justice, and therefore offends section 7 of the Charter.

[22] The Claimant submitted that exempting arbitrarily Saturdays and Sundays from being “working days” denies a specific group from establishing “availability” under the EI Act and denies them of benefits even though they made contributions for hours worked on those days.

[23] The Claimant put forward that under section 7 of the Charter, the economic security cited by the courts is part of the security of the person of all Canadians. He submitted that arbitrarily depriving claimants of it through the application of section 32 of the EI Regulations breaches the right to fundamental justice.

[24] I am of the view that the Claimant met the low burden required to seek to challenge the constitutionality of section 32 of the EI Regulations in regards to section 7 of the Charter.

[25] I find that the Claimant did in fact set out the provision that is at issue, and filed submissions in support of the issue that is raised sufficiently specific to permit a decision-maker to see the outline of a Charter argument.

[26] The Claimant raised the issue that section 32 of the EI Regulations prevents claimants from demonstrating their availability to work by excluding arbitrarily Saturdays and Sundays and therefore denies them EI benefits and impacts on their right to life, liberty and security of the person. It was not the General Division’s role at that stage to decide on the quality or merits of his submissions.

[27] I am therefore of the view that the General Division made an error in its interpretation of section 20(1) of the SST Regulations when it concluded that the Claimant did not meet his burden regarding the challenge to the constitutionality of section 32 of the EI Regulations in regards to section 7 of the Charter.

[28] The Claimant further argued that section 125(14) of the EI Act breaches sections 7, 10 and 11 of the Charter.

[29] The Claimant put forward in his submissions that the audit/investigative process is a criminal investigation because the Commission, from the beginning, can bring criminal charges. He put forward that whether the Commission chooses later not to do so is irrelevant. The Claimant argued that the right to remain silent and the protection against self-incrimination is required from the beginning.

[30] The Claimant submitted that section 125(14) of the EI Act, that creates a reverse onus provision, compels claimants to make a statement at the investigatory stage and violates their right to remain silent and right against self-incrimination.

[31] I am of the view that the Claimant met the low burden required to seek to challenge the constitutionality of section 125(14) of the EI Act in regards to sections 7, 10 and 11 of the Charter.

[32] I find that the Claimant did in fact set out the provision that is at issue, and filed submissions in support of the issue that is raised sufficiently specific to permit a decision-maker to see the outline of a Charter argument.

[33] The Claimant raised the issue that section 125(14) of the EI Act reverses the onus of proof and forces him to make a statement, notwithstanding the Commission's later choice not to prosecute, and therefore violates his right to remain silent and right against self-incrimination guaranteed by the Charter. It was not the General Division's role at that stage to decide on the quality or merits of his submissions.

[34] I am therefore of the view that the General Division made an error in its interpretation of section 20(1) of the SST Regulations when it concluded that the Claimant did not meet his burden regarding the challenge the constitutionality of section 125(14) of the EI Act in regards to sections 7, 10 and 11 of the Charter.

[35] The Claimant also argued that Section 32 of the EI Regulations offends section 15 of the Charter because it discriminates between a claimant who works a 40 hours week from Monday through Friday and a claimant who works a 40 hours week from Wednesday through Sunday.

[36] The Claimant submitted that the government cannot collect EI contributions for work on Saturday and Sunday and then say, “but those days don’t count when we determine if you are available for employment.” He argued that the section requires the Commission and the courts to treat similarly situated claimants differently based on an irrelevant consideration, and therefore, deprives certain claimants of the right to the equal protection and equal benefit of the law, as required by section 15(1) of the Charter.

[37] I find that the Claimant did not meet the low burden regarding section 15(1) of the Charter.

[38] A person claiming a violation of section 15(1) of the Charter must establish differential treatment under the law that constitutes discrimination on the basis of an enumerated or analogous ground.

[39] The first step in the section 15(1) analysis ensures that the courts address only those distinctions that the Charter seeks to prohibit. Section 15(1) of the Charter protects only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.

[40] An analogous ground is one based on “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[4]

[41] The Claimant does not identify a distinction on an enumerated or analogous ground in his submissions. At best, he gives an example, such as religion.

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[4] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 at para 13.

[42] Therefore, in the absence of an analogous ground, I do not find that the Claimant's submissions are sufficiently specific to permit a decision-maker to see the outline of a Charter argument. I also note that the courts have clearly determined that employment status is not a trait that meets the threshold of inherent immutability required to trigger protection under section 15 of the Charter.[5]

[43] I am of the view that the General Division did not make an error in its interpretation of section 20(1) of the SST Regulations when it concluded that the Claimant did not meet his burden regarding the challenge the constitutionality of section 32 of the EI Regulations in regards to section 15(1) of the Charter.

Other Charter arguments

[44] Did the General Division make an error of law or jurisdiction by dismissing all the Claimant's Charter arguments that were not challenging sections of the EI Act and EI Regulations?

[45] I believe so.

[46] In his Amended Notice of Appeal, the Claimant argued that the Commission failed to afford him his Charter rights under section 7, 10 and 11 of the Charter during the review and investigative process. He also argued that the case law presumption concerning "availability for work" reverses the onus of proof on the Claimant and therefore offends sections 7 and 11 of the Charter.

[47] Section 20(1) (a) of the SST Regulations provides that notice is required if the constitutional validity, applicability, or operability of any provision of the EI Act or the regulations made under the EI Act is to be put at issue before the Tribunal.

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[5] *Thomson v Canada (Attorney General)*, 2016 FCA 253; *Workers' Compensation Act* 1983 (Newfoundland), 1989 CanLII 86 (SCC), [1989] 1 S.C.R. 922 (CanLII); *Delisle v Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989 at paras. 43-44, 176 D.L.R. (4th) 513; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para. 165, [2007] 2 S.C.R. 391.

[48] The section does not provide to give notice to declare unconstitutional and of no force or effect, in whole or in part, any rule or principle of law applicable to the proceedings or on account of an infringement or denial of any right or freedom guaranteed under the Charter.

[49] I am of the view that a notice pursuant to section 20(1) (a) of the SST Regulations was not necessary to invoke the Claimant's other Charter arguments before the General Division.

[50] Therefore, I find that the General Division made an error in dismissing the Claimant's other Charter arguments for failure to give notice in accordance with section 20(1) (a) of the SST Regulations.

Conclusion

[51] I am allowing the Claimant's appeal.

[52] The file returns to the General Division to decide all issues and the following Charter challenges:

a) Does section 32 of the EI Regulations offend principles of fundamental justice and law (arbitrariness) under section 7 of the Charter, as it prevents claimants from using the days of Saturday and Sunday to prove they are "available for employment"?

b) Does section 125(14) of the EI Act breach sections 7, 10 and 11 of the Charter?

c) Did the Commission fail to afford the Claimant his rights under section 7, 10 and 11 of the Charter during the audit and investigative process?

d) Does the case law presumption concerning "availability for work" that reverses the onus of proof on the Claimant offend sections 7 and 11 of the Charter?

[53] I leave it to the General Division to decide how it will conduct its own proceedings.

[54] I do however recommend that the General Division invite the parties to provide a fulsome record, which should include their evidence, submissions, and the authorities that they intend to rely upon.

Pierre Lafontaine
Member, Appeal Division