



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

Citation: *DS v Canada Employment Insurance Commission*, 2021 SST 712

Tribunal File Number: GE-20-736

BETWEEN:

D. S.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

INTERLOCUTORY DECISION
General Division – Employment Insurance Section

INTERLOCUTORY DECISION BY: Solange Losier

DATE OF INTERLOCUTORY DECISION: February 12, 2021

INTERLOCUTORY DECISION

[1] This appeal does not raise a constitutional issue that meets the requirements. This means that the Claimant cannot proceed with his constitutional arguments and the appeal will be returned to the regular process to be heard on the merits.

BACKGROUND

[2] The Claimant filed a Notice of Appeal to the *Social Security Tribunal* (Tribunal) appealing the Canada Employment Insurance Commission (Commission) reconsideration decision on the issue of voluntary leave and availability for work (GD2-1 to GD2-20).

[3] The Commission's reconsideration decision determined that the Claimant voluntarily left his employment without just cause, that he was not available for work and a penalty for misrepresentation was reduced to warning (GD2-19 to GD2-20; GD3B-64 to GD3B-65).¹ Further, the Commission also issued a reconsideration decision on the issue of a violation classified as "very serious" and overturned it, ruling in favour of the Claimant (GD31-1 to GD31-3).

[4] The initial merit hearing was scheduled for March 31, 2020 (GD1; GD8). At that hearing, the Claimant raised constitutional arguments based on the *Canadian Charter of Rights and Freedoms* (Charter).² As a result, the merit hearing was adjourned and a pre-hearing teleconference was held with another Tribunal Member on April 14, 2020 (GD12A-1 to GD12A-4).

[5] The Claimant, his representative and the Commission's representative attended the pre-hearing conference to discuss next steps and timelines for filing the Claimant's "Charter Argument Notice" as required under Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*. I will refer to this as a "section 20 notice" in this interlocutory decision (GD15;

¹ The Commission's reconsideration decision dated February 5, 2020.

² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11.

GD16; GD17; GD18).³ The Claimant filed his section 20 notice to the Tribunal on May 21, 2020 and a copy was provided to the Commission (GD19-1 to GD19-75).

[6] On July 9, 2020, I reviewed the section 20 notice and the submission from both parties. I made an interlocutory decision on the issue of jurisdiction and deferred my decision on the section 20 notice. The Claimant appealed that interlocutory decision to the Appeal Division of the Tribunal. At the Appeal Division of the Tribunal, the parties came to a settlement agreement, as well as determining that the General Division has jurisdiction over the issue of whether the Claimant knowingly made misrepresentations. Therefore, the issue of misrepresentation was added to the existing agenda of issues to be determined by the General Division (GD23-1 to GD23-4).⁴

[7] The Commission then filed their submissions on the sufficiency of the Claimant's section 20 notice and a copy was provided to the Claimant (GD30-1 to GD30-463; GD31-1 to GD31-3).

ISSUE

[8] I must decide if the Claimant's appeal raises a constitutional issue meets the requirements.⁵

ANALYSIS

[9] I cannot decide Charter issues without a proper understanding of the factual context which led to the alleged breach or infringement of a claimant's rights and a focus on the specific part of the legislation which caused it.⁶ For this reason, claimants who intend to raise Charter issues in their appeals have to file a notice with the Tribunal stating the section of the legislation at issue and brief submissions in support of the issue raised.⁷ If I am satisfied that a claimant has laid this foundation, they then must file a more detailed document (this is called the "record") which includes the evidence, submissions, and authorities that they intend to rely on.

³ Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*

⁴ The issue of misrepresentation was relevant and added because the Commission had issued a warning to the Claimant.

⁵ Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*.

⁶ The Supreme Court of Canada explained this general principle in *Mackay v Manitoba*, [1989] 2 SCR 357.

⁷ Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*.

[10] Paragraph 20(1)(a) of the *Social Security Tribunal Regulations* does not impose an unduly high burden on claimants who seek to challenge the constitutionality of some aspect of benefits-conferring legislation, such as employment insurance benefits.⁸ However, I must reject a claimant’s section 20 notice if they do not identify the law they intend to put at issue or if they do not outline a constitutional argument.⁹ It is not sufficient for a claimant to make indirect generalized references to the Charter without further clarification.¹⁰ A claimant’s submissions must be sufficiently specific to permit a decision-maker to see the outline of a Charter argument.¹¹

The Claimant’s Amended Notice of Appeal and Section 20 Notice

[11] On May 21, 2020, the Claimant filed a combined Amended Notice of Appeal and section 20 notice (GD19-1 to GD19-75).¹² The Claimant submits that section 125(14) of the *Employment Insurance Act* and section 32 of the *Employment Insurance Regulations* infringe the following Charter sections: 1, 7, 10, 11, 15, 24 (GD19-75).

[12] Section 125(14) of the *Employment Insurance Act* says: “In a prosecution for an offence under this Act, other than Part IV, the production of a return, certificate, statement or answer required by or under this Act, other than Part IV, or the regulations appearing to have been filed or delivered by or for the person charged with the offence or to have been made or signed by or for the person is, in the absence of evidence to the contrary, proof that the return, certificate, statement or answer was filed or delivered by or for that person or was made or signed by or for them”.

[13] Section 32 of the *Employment Insurance Regulations* says: “For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday”.

[14] To support his position, the Claimant references the entire contents of his amended Notice of Appeal submitted on May 21, 2020 (GD19-1 to GD19-75). He further submits that the

⁸ *R. S. v Minister of Employment and Social Development*, 2017 CanLII 84970.

⁹ *Canada (Attorney General) v Stewart*, 2018 FC 768.

¹⁰ *Langlois v Canada (Attorney General)*, 2018 FC 1108.

¹¹ *Law v Canada (Minister of Employment and Immigration)* [1999] 1. S.C.R. 497.

¹² Section 113 of the *Employment Insurance Act*.

process followed by the investigator and the Commission included specific acts and omissions that offend the above referenced Charter sections in paragraph 11 (GD19-75). The Claimant also argues that Section 125(14) of the *Employment Insurance Act* it is a penal process and while he was not criminally prosecuted, he could have gone to jail as a result of the Commission`s investigation. He submits that there was a risk of significant harm and reputational damage.

The Commission`s response

[15] In response to the Claimant`s Amended Notice of Appeal and section 20 notice, the Commission first submitted that the legal and factual issues were unclear and not sufficiently precise to allow them to understand the arguments or respond by the original deadline (GD3-20 to GD3-28).¹³ At that time, they argued there were jurisdictional issues¹⁴ and that section 125(14) of the *Employment Insurance Act* was not relevant because the Claimant was not criminally charged and this was not a criminal matter.

[16] The Commission then provided their submissions on the sufficiency of the Claimant`s section 20 notice (GD30-1 to GD30-463). They argued that the Claimant has failed to explain how the legislative provisions breached or infringed his *Charter* rights. Specifically, they argue that the Claimant has failed to meet the requirements of section 20 because he has identified inapplicable provisions and has not outlined a constitutional argument in his submissions (GD19-1 to GD19-75; GD27-1 to GD27-3).

[17] The Commission argues that section 125(14) of the *Employment Insurance Act* is not applicable and should be struck from the section 20 notice because the Commission did not prosecute the Claimant for a criminal offence. They also submit that he has identified section 32 of the *Employment Insurance Regulations* as discriminatory but has failed to show a distinction based on an enumerated or analogous ground, which is required under subsection 15(1) of the *Charter*.

¹³ The deadline was extended to July 6, 2020 at the request of the Claimant (GD18-1 to GD18-3).

¹⁴ The jurisdictional issues were addressed by the General Division interlocutory decision dated on July 9, 2020 and the subsequent Appeal Division decision on September 9, 2020 (GD23-1 to GD23-4).

[18] The Commission further argues that the Claimant's references to a "presumption of unavailability" is not present in *Employment Insurance Act* and the Claimant has not identified the specific provision he is challenging.

[19] The Commission submits that the constitutional portion of the appeal should be dismissed and the matter should proceed as an ordinary appeal.

Has the Claimant complied with paragraph 20(1)(a) of the Social Security Tribunal Regulations?

[20] No, I find that the Claimant's section 20 notice does not comply with the requirements for the following reasons.¹⁵

[21] I reviewed the Claimant's section 20 notice and submissions (GD19-1 to GD19-75; GD27-1 to GD27-3).

[22] I acknowledge that the Claimant has identified two provisions that he is challenging. He is challenging section 125(14) of the *Employment Insurance Act* and section 32 of the *Employment Insurance Regulations*.

[23] The Claimant submits that the Commission's investigation could have resulted in both a fine and imprisonment under section 135(b) of the *Employment Insurance Act*. He argues that the Commission agent should have advised the Claimant of his right to counsel under the *Charter* since the investigation could have resulted in jail or a regulatory penalty (GD19-20). He submits that it is a penal process and for that reason, it engages his *Charter* rights in sections 7 and 11.

[24] The Claimant relies on a Supreme Court of Canada case¹⁶ to support that imprisonment is always a true penal consequence and a provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed (GD19-20).

¹⁵ Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*.

¹⁶ *Guindon v Canada*, 2015 SCC 41.

[25] The Claimant further notes that the Commission has made a finding of misrepresentation and imposed a disentitlement to employment insurance benefits for five years, or his first two qualified claims. He argues that the Commission's scope of duty is broad which requires a high level of fairness, even if it was not a penal proceeding.

[26] I was persuaded by the Commission's submissions on this issue. I agree that subsection 125(14) of the *Employment Insurance Act* is not applicable in this case. The Claimant was not prosecuted for an offence because there was no information or complaint laid by the police or by any person acting for the Commission.¹⁷ The *Employment Insurance Act* allows the Commission to prosecute in some cases, but it was not applicable in this case. The outcome of the Commission's investigation led them to impose a disentitlement and disqualification to employment insurance benefits and warning for misrepresentation.

[27] The *Supreme Court of Canada* case¹⁸ referenced by the Claimant dealt with a monetary penalty issued under the *Income Tax Act*. In that case, a lawyer involved in a donation program issued 135 tax receipts. She wrote and endorsed a legal opinion that she knew was flawed and misleading. The Minister of National Revenue disallowed the 135 tax receipts and this resulted in a significant administrative fine of \$546,747.00 issued against her.

[28] The court considered a procedural issue relating to notice of the *Charter* argument, which I note is not applicable in this case. However, the court also looked at the substantive issue of whether the administrative monetary penalty was a true penal consequence and if it afforded the protections under section 11 of the *Charter*. They provided an analysis to determine whether the proceeding was "criminal in nature" and if true penal consequences flowed.

[29] The court analyzed a few factors, including whether the amount of the penalty was in line with the nature of the misconduct and if the amount reflects the necessity of serving a regulatory purpose. In that case, the court decided that the penalty issued was meant to deter non-compliance and while they acknowledged the amount of the penalty was high at \$546,747.00, it was still not a true penal consequence. Ultimately, the court determined that the penalty was not

¹⁷ Subsection 125(1) of the *Employment Insurance Act*.

¹⁸ *Guindon v Canada*, 2015 SCC 41.

criminal in nature, which meant that it did not trigger the procedural safeguards guaranteed under section 11 of the *Charter*. This meant that the monetary penalty was upheld.

[30] I find that the Claimant has not outlined a constitutional argument on this issue. The *Employment Insurance Act* provides for a possibility of imprisonment, however the Commission did not, at any point, attempt to prosecute him for an offence. The Claimant was disentitled and disqualified from receiving employment insurance benefits for alleged conduct that he voluntarily left his employment without just cause, for being unavailable for work and misrepresentation leading to a warning.

[31] I was not persuaded that it was a penal process affording *Charter* protection simply because the *Employment Insurance Act* provides for the possibility of imprisonment. He has not demonstrated how he meets the criminal in nature test in order to have the protections offered under section 11 of the *Charter*. The Claimant has not made a clear link to a Charter argument and indirect generalized references are not enough.

[32] I acknowledge an administrative monetary penalty can attract section 11 *Charter* protection if it is interpreted as penal. In this case, there was no monetary penalty issued against the Claimant for his alleged conduct because the penalty for misrepresentation was reduced to a warning. However, I do acknowledge that there was an overpayment issued to the Claimant since the Commission determined that he was retroactively disentitled and disqualified to employment insurance benefits that he had already received.

[33] The Claimant has not explained how a finding of misrepresentation leading to a warning could seriously harm his future employment prospects. He argues that severe consequences have been imposed because he is disentitled to employment insurance benefits for five years, or his first two qualified claims (GD19-20). However, this is incorrect because the Commission overturned their decision on the issue violation and ruled in his favour. A copy of that decision is included in the file (GD31-2).

[34] The Claimant has failed to demonstrate or explain how his rights to life, liberty or security of the person has been breached or infringed under section 7 of the *Charter*. He submits that section 32 of the *Employment Insurance Regulations* potentially denies him liberty and security of the person, but does not outline or explain how.

[35] The Claimant has failed to show how section 32 of the *Employment Insurance Regulations* is discriminatory. 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. He must identify at least some facts and explanation in his submissions that would provide an outline of an argument that his section 15 Charter rights have been violated, he has not done so.

[36] The Claimant argues that there is a differential treatment for people who have different work schedules and what the law considers “working days”. Section 32 of the *Employment Insurance Regulations* identifies that Saturday and Sunday are not considered regular “working days” when dealing with the issue of availability for work.¹⁹ The Claimant does not identify a distinction on an enumerated or analogous ground in his submissions, yet he acknowledges his awareness of this requirement when he refers to another example, such as religion. I note that religion as an enumerated ground is not being argued in this case.

[37] The Claimant submits that his eligibility to future benefits is affected, however the courts have already determined depriving an individual of a financial benefit does not breach of section 15 of the *Charter*.²⁰

[38] The Claimant has identified that he is challenging section 125(14) of the *Employment Insurance Act* and section 32 of the *Employment Insurance Regulations*. However, he refers to a “presumption of unavailability” but he does not identify the specific provision he is challenging. I find that he has not identified the legislation or provision he is challenging and not laid a foundation for this argument. Given the volume of submissions, I cannot infer which provision he might be challenging.

¹⁹ There are some exceptions when a claimant has an established history.

²⁰ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703.

[39] I find that the Claimant's section 20 notice and submissions do not outline or make a clear link to explain how his Charter rights were breached or infringed. I note that the Claimant was already previously invited to amend his section 20 notice and submissions, but did not do so. Therefore, I have proceeded to render a decision on the materials he submitted (GD25).

CONCLUSION

[40] The Claimant cannot proceed with his constitutional arguments, however he can present his evidence and other arguments at a regular merit hearing. The parties will be contacted regarding next steps.

Solange Losier
Member, General Division