



Citation: *RS v Canada Employment Insurance Commission*, 2022 SST 46

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: R. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 8, 2021
(GE-21-2046)

Tribunal member: Janet Lew

Decision date: February 3, 2022

File number: AD-22-17

Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

Overview

[2] The Applicant, R. S. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was not entitled to receive the Employment Insurance fishing benefits that he received starting on April 25, 2021. The General Division found that he had to repay these benefits.

[3] The Claimant argues that the General Division failed to follow rules of procedural fairness. The Claimant says that he asked the General Division for information, but it failed to give it to him. In other words, he did not have all of the facts that he says were necessary for his appeal. He does not otherwise claim that the General Division made any legal or factual errors.

[4] I have to decide whether the appeal has a reasonable chance of success.¹ Having a reasonable chance of success is the same thing as having an arguable case.²

Issue

[5] Is there an arguable case that the General Division failed to follow the rules of procedural fairness?

¹ Under section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), I have to refuse permission if I am satisfied, “that the appeal has no reasonable chance of success.”

² See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[6] The Appeal Division must grant permission to appeal unless the appeal “has no reasonable chance of success.” A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.³

[7] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If the Appeal Division decides that the General Division made an error, it then decides how to fix that error.

Factual background

[8] The Claimant made two Employment Insurance claims:

- i. October 2020⁴ – he received Employment Insurance fishing benefits for the period from October 11, 2020 to April 24, 2021
- ii. May 2021⁵ – he received eight weeks of Employment Insurance fishing benefits for this second claim.

[9] The Claimant made the second claim because the Respondent, the Canada Employment Insurance Commission (Commission), told him that he qualified for an extension of benefits.

[10] Later, the Commission determined that the Claimant was not entitled to an extension of benefits. It found that he did not have enough earnings from fishing to start a new claim. The Commission also told the Claimant that it had used the temporary legislative measures on his previous claim, so he could not use it again a second time.⁶

³ See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that had been made in a perverse or capricious manner, or without regard for the evidence before it.

⁴ See Claimant’s first application filed on October 14, 2020, at GD3-3 to GD3-16.

⁵ See Claimant’s second application filed on May 11, 2021, at GD3-19 to GD3-31.

⁶ See Commission’s letter dated July 20, 2021, at GD3-33 to GD3-34 (and at GD3-39 to GD3-40).

[11] The Claimant responded. He asked the Commission to explain why it had denied his claim. He said he had the required earnings and did not have to rely on the temporary legislative measures.⁷

[12] The Claimant's employer prepared a record of Employment dated October 23, 2020. It showed that the Claimant had earnings of over \$15,000.⁸

Is there an arguable case that the General Division failed to follow the rules of procedural fairness?

[13] The Claimant argues that the General Division failed to provide him with the information that he needed for his appeal.

– The Claimant's first question to the Commission

[14] In his Notice of Appeal to the General Division, the Claimant raised the same question he previously asked the Commission. He asked why the Commission had denied his claim when it had accepted it in the first place.

[15] The Claimant argued in his Notice of Appeal that he had the required earnings to qualify for Employment Insurance benefits for a second claim. He also says that the Commission should have avoided used the temporary legislative measures when he qualified for benefits the first time, as he had the required earnings. He asked why his October 2020 claim had been "tampered with and contaminated."⁹

[16] The Claimant suggests, in other words, that perhaps the Commission could have used the temporary measures for his second claim to qualify him for benefits.

[17] The Claimant was entitled to know why the Commission had denied his second claim. The Claimant found that the Commission's explanation in its July 20, 2021 letter¹⁰ raised more questions than it answered.

⁷ See Claimant's undated letter, received by Service Canada on August 5, 2021, at GD3-38.

⁸ See Record of Employment, at GD3-17.

⁹ See Claimant's Notice of Appeal – Employment Insurance- General Division, at GD2-6.

¹⁰ See Commission's letter dated July 20, 2021, at GD3-33 to GD3-34 (and at GD3-39 to GD3-40).

[18] The Commission responded to the Claimant's question in its representations to the General Division.¹¹ The Commission filed its representations with the Social Security Tribunal on November 4, 2021. The Tribunal promptly emailed a copy of the Commission's representations to the Claimant that same day.

[19] The General Division hearing took place on December 1, 2021. So, the Claimant had the Commission's arguments for little more than three weeks. He does not allege that he did not have a copy of the Commission's arguments or that he did not get it in time to prepare for the hearing.

[20] The Commission set out in its representations what it considered were the relevant facts and the applicable law. It then explained how it determined that the Claimant did not qualify for benefits after April 25, 2021.

[21] The Commission explained that the Claimant needed to have \$2,500 in earnings in the qualifying period. Although the Claimant had earned \$15,000 from fishing, the Commission explained that he could not rely on those earnings for a second claim. Those earnings had been used to establish his first claim. The Commission explained that the temporary measures could be used once only for a summer fishing claim, and once only for a winter fishing claim.

[22] Although the Claimant disagreed with the Commission's position, the Commission set out its position and explained why it had denied the Claimant's second claim. Hence, the Claimant had to have been aware of the case he had to meet. I am not satisfied that there is an arguable case that the General Division failed to ensure that the Claimant received the information that he needed for his appeal.

– **The Claimant's second question to the Commission**

[23] In an email dated November 9, 2021, the Claimant raised another question. He said that he needed an answer that no one from either Service Canada or the

¹¹ See Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4.

Department of Employment and Social Development had been able to answer. He asked:

If I had attended a Service Canada Centre personally, rather than using the Automated Claims Internet Process for my Employment Insurance Claim Application, would I have had the opportunity to prepare my Claim from my actual earnings, instead of the Temporary Measure?

[24] In fact, the Commission responded to this second question before the General Division hearing took place. The Commission provided an explanation in its Supplementary Representations.¹² The Commission told the Claimant that it did not matter whether he applied in person or online. The Commission explained that applying either way would have triggered use of the temporary measures.

[25] While the Claimant may not agree with the Commission's response, I am not satisfied that the Claimant has an arguable case that he did not have all of the information from the Commission that he needed for his appeal.

– **Fairness of the process**

[26] The Claimant also seems to suggest that the process at the General Division was not fair and that the member was neither impartial nor independent.

[27] In particular, he says that the process was unfair because his questions have gone unanswered by the Commission and then by the General Division too. More importantly, he says that if the process had been truly fair, the General Division would have allowed his appeal.

[28] Fairness in the context of proceedings typically has to do with whether parties have adequate notice of hearings, have a full opportunity to present their case, and with whether the proceedings are fair and free of bias or the reasonable apprehension of

¹² See Commission's Supplementary Representations to the Social Security Tribunal-Employment Insurance Section, dated November 16, 2021, at GD8-1.

bias. Fairness relates to issues of procedural fairness, rather than to whether an outcome is fair.

[29] Here, the Claimant alleges that the member was not impartial nor independent. But, other than saying that he disagrees with the outcome, he has not pointed to any conduct or any behaviour of the member. For instance, there is nothing to suggest that the member “cut him” off during the hearing and did not give him a chance to present his case.

[30] The Claimant also says that the General Division did not answer his questions. The Claimant is entitled to a decision that adequately explains how and why the member came to the conclusion that they did. I will focus on whether the General Division gave sufficient reasons that would have allowed the Claimant to understand how the member came to its decision.

- **Fishing benefits under the *Employment Insurance (Fishing) Regulations***

[31] Much like the Commission had done, the General Division first looked to see whether the Claimant qualified for benefits under the *Employment Insurance (Fishing) Regulations*. Under the Fishing Regulations, the Claimant had to have earned a certain level of earnings within his qualifying period.¹³

[32] This meant the General Division had to figure out what the qualifying period was for the Claimant. The qualifying period is calculated differently, depending upon whether a summer fishing or a winter fishing claim is involved.

[33] So, the General Division had to look at whether the Claimant had applied for a winter or a summer fishing claim. The application form explained that a winter fishing claim meant that a fisher fished during the winter months and claimed benefits during the summer months.

¹³ See section 8(9)(a) of the *Employment Insurance (Fishing) Regulations*.

[34] Even though the Claimant had ticked off “summer fishing” claim on his application form, the General Division concluded that, if the Claimant wanted benefits to start and end when he did, he had to apply for a winter fishing claim.

[35] The General Division then looked at when the qualifying period begins and ends for a winter fishing claim. It concluded that the Claimant’s qualifying period ran from October 11, 2020, to April 24, 2021. The General Division examined whether the Claimant had any earnings during this timeframe.

[36] The Claimant did not have any earnings during this period. Therefore, the Claimant did not qualify for benefits under the *Employment Insurance (Fishing) Regulations*.

[37] I do not see any error in either the General Division’s explanation or its calculation of the Claimant’s qualifying period. There was no evidence of any earnings during this qualifying period, so the General Division correctly concluded that the Claimant did not qualify for benefits under the Fishing Regulations.

- **Fishing benefits under the temporary measures**

[38] As the Claimant did not qualify for benefits under the Fishing Regulations, the General Division looked to see whether the Claimant qualified for benefits under the temporary measures.¹⁴ The temporary measures were introduced in response to the pandemic. Claimants who do not qualify for fishing benefits under the Fishing Regulations may qualify for benefits under the temporary measures.

[39] The General Division questioned why the Commission described the Claimant’s claim as a second summer claim when in fact it was a winter fishing claim. For this reason, the General Division member did not fully accept the Commission’s explanation for rejecting the Claimant’s second application.

¹⁴ See sections 153.1922 and 153.1923(1)(b) under Part VIII.5 of the Temporary Measures to Facilitate Access to Benefits, of the *Employment Insurance Act*.

[40] The General Division agreed that the Claimant could not rely on the temporary measures to qualify for benefits. But, it was not because he had used the temporary measures for a previous summer fishing claim. (A claimant can benefit from the temporary measures once for a summer fishing claim and once for a winter fishing claim.¹⁵)

[41] The General Division found that the temporary measures could be used only if a claimant received benefits in previous seasons.¹⁶ The General Division found that the Claimant had never made a winter fishing claim before. It also found that he had never received any benefits during the summer months in previous seasons.

[42] Because the Claimant had not made a winter fishing claim before, he did not establish any benefit periods for a winter fishing claim in either 2020 or 2019. The General Division found that this meant the Claimant could not get benefits for a winter fishing claim under the temporary measures.

- **Summary**

[43] The Claimant says that the General Division failed to respond to his questions or explain why he was not entitled to receive fishing benefits for his second claim. In fact, the General Division explained why the Claimant was not entitled to benefits. Its analysis was methodical and, more importantly, the outcome was correct in law.

[44] The General Division did not misinterpret or misapply either the Fishing Regulations or the temporary measures when it looked at whether the Claimant was entitled to receive fishing benefits after April 25, 2021.

[45] I am not satisfied that the Claimant has an arguable case that the General Division failed to follow rules of procedural fairness or that the process was somehow unfair.

¹⁵ See General Division decision, at para 30.

¹⁶ These periods are defined by section 153.1923(1)(b) of the *Employment Insurance Act*. These periods (i) begin on March 29, 2020, and end on December 19, 2020, and (ii) begin on March 31, 2019 and end on December 31, 2019.

Conclusion

[46] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division