



Citation: *AR v Canada Employment Insurance Commission*, 2022 SST 223

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. R.

Respondent: Canada Employment Insurance Commission
Representative: Angèle Fricker

Decision under appeal: General Division decision dated April 28, 2021
(GE-21-324)

Tribunal member: Janet Lew

Type of hearing: On the Record

Decision date: April 6, 2022

File number: AD-21-196

Decision

[1] The appeal is allowed. I am returning this matter to the General Division for a redetermination on the Charter issue.

Overview

[2] This is an appeal of the General Division decision. The General Division determined that it could not extend the qualifying period for the Appellant, A. R. (Claimant), beyond 104 weeks. Because of this, the Claimant did not have enough hours of insurable employment in her qualifying period to qualify for Employment Insurance benefits.

[3] The qualifying period is the period in which a claimant has to accumulate sufficient insurable hours to establish a claim for Employment Insurance benefits. Section 8(2) of the *Employment Insurance Act* allows for an extension of the qualifying period in certain circumstances. This includes where a person is incapable of work because of a prescribed illness or injury.

[4] Under section 8(7) of the *Employment Insurance Act*, the maximum length of the qualifying period is 104 weeks.

[5] The Claimant seeks to extend the qualifying period beyond 104 weeks. That way, she would have additional insurable hours within her qualifying period. She argues that the maximum extension of the qualifying period under section 8(7) of the *Employment Insurance Act* is discriminatory and violates her equality rights as a disabled person under section 15 of the *Canadian Charter of Rights and Freedoms*.

[6] The Respondent, the Canada Employment Insurance Commission (Commission), notes that the General Division acknowledged the Claimant's argument

about the Charter, “but did not provide guidance to the [C]laimant regarding the process to pursue a challenge related to the *Charter of Rights and Freedoms*.”¹

[7] The Commission does not oppose having this matter returned to the General Division for a redetermination on the *Charter* issue, if the Claimant is committed to pursuing her Charter argument.

Issue

[8] The issue in this appeal is whether the General Division failed to consider the Claimant’s argument that the *Employment Insurance Act* is discriminatory and violates her equality rights under the Charter.

Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Did the General Division fail to consider the Claimant’s argument that the *Employment Insurance Act* is discriminatory and violates her equality rights under the Charter?

[10] The Claimant argues that the maximum extension of the qualifying period under section 8(7) of the *Employment Insurance Act* is discriminatory and violates her equality rights as a disabled person under section 15 of the *Canadian Charter of Rights and Freedoms*. The Claimant argues that the General Division failed to consider this particular argument.

[11] In her Notice of Appeal to the General Division, the Claimant argued that the “intended or accomplished differential treatment of persons or social groups for reasons of certain generalized traits which includes physical differences or limitations” had to be

¹ See Representations of the Commission to the Social Security Tribunal—Appeal Division, filed January 18, 2022, at AD2.

² See section 58(1) of the *Department of Employment and Social Development Act*.

considered.³ This language mimics the language used in analyses of constitutional issues.

[12] The General Division acknowledged the Claimant's discrimination-based argument. The General Division recognized the Claimant's argument that she felt that the Commission was discriminating against her. The General Division member wrote that she was, however, "unable to rewrite the law or interpret it differently than its plain meaning."⁴

[13] Apart from this, the General Division did not address the substance of the Claimant's argument that the *Employment Insurance Act* violates her equality rights under the Charter. It may be that the General Division member felt it unnecessary to do so as the Claimant had not raised any specific Charter issues. On top of that, the Claimant had not fulfilled the notice requirements under section 20(1)(a) of the *Social Security Tribunal Regulations*.

[14] Even so, the General Division should have provided some guidance to the Claimant regarding the process to pursue a challenge related to the Charter. That way, if the Claimant then fulfilled the procedural requirements, the General Division could have properly dealt with the substance of the Claimant's argument regarding the Charter.

Remedy

[15] The General Division should have addressed the Claimant's argument regarding the Charter.

[16] How can I fix the General Division's error? I have two basic choices.⁵ I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.⁶

³ See Claimant's Notice of Appeal, at GD2-9.

⁴ See General Division decision, at para 21.

⁵ Section 59 of the *Department of Employment and Social Development Act*.

⁶ *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

[17] There is some discretion for me to decide constitutional issues for the first time on appeal to the Appeal Division. But, taking into account the state of the record, fairness to all parties, the importance of having the issue resolved, its suitability for decision and the broader interests of the administration of justice,⁷ I see no basis to do so. There is no justification to proceed to a hearing of this appeal at the Appeal Division, as the issues are more appropriately to be dealt with for the first time at the General Division.

[18] In the interest of natural justice, the Commission does not oppose the matter being returned to the General Division for redetermination on the Charter issue, if the Claimant is committed to pursuing her constitutional argument.

[19] It is clear from the Claimant's recent submissions⁸ that she wishes to continue to argue that section 8(7) of the *Employment Insurance Act* is discriminatory and violates her equality rights as a disabled person under section 15 of the *Canadian Charter of Rights and Freedoms*.

[20] I am satisfied that it is in the interest of justice to return this matter to the General Division for a redetermination. However, the Claimant will need to make fulsome arguments. As well, she will need to serve notice on the persons referred to in section 57(1) of the *Federal Courts Act* and file a copy of the notice of proof of service with the Social Security Tribunal.

Conclusion

[21] The appeal is allowed. I am returning this matter to the General Division for a redetermination on the Charter issue. The General Division may need to provide some procedural guidance and direction to the Claimant.

Janet Lew
Member, Appeal Division

⁷ See *Guindon v Canada*, 2015 SCC 41 at para 20.

⁸ See Claimant's submissions, at AD6.