Citation: *MW v Canada Employment Insurance Commission*, 2022 SST 338

Social Security Tribunal of Canada
Appeal Division

Decision

Applicant:	M. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division interlocutory decision dated February 21, 2022 (GE-21-2165)

Tribunal member:	Shirley Netten
Decision date:	May 2, 2022
File number:	AD-22-141

Decision

[1] The application is dismissed as premature.

Overview

[2] The Claimant, M. W., has an ongoing appeal at the General Division about his entitlement to Employment Insurance (EI) benefits. The Claimant wants to appeal an interlocutory decision made by the General Division, without waiting for the conclusion of his appeal at the General Division.

[3] This application raises the issue of whether, or when, the Appeal Division should hear an appeal of an interlocutory decision. I have decided that, absent exceptional circumstances, the Appeal Division shouldn't hear appeals of interlocutory decisions until the General Division process has run its course. There are no exceptional circumstances in this case, and so I have dismissed the application as premature.

Issue

[4] This application raises the following questions:

- Should the Appeal Division hear appeals of interlocutory decisions while the General Division proceedings are ongoing?
- Is the Claimant's application premature?

Analysis

[5] An interlocutory decision is a decision made in the course of a proceeding. It doesn't dispose of the appeal on a final basis. The interlocutory decision that the Claimant wants to appeal said that the General Division member would not remove herself from hearing his appeal.

The Appeal Division should only hear appeals of interlocutory decisions right away in exceptional circumstances

[6] I recognize that the General Division told the Claimant that he could ask to appeal the interlocutory decision to the Appeal Division.[1] However, in most cases the Appeal Division has said that there can be no appeal of an interlocutory decision while the General Division proceedings are continuing, unless there are exceptional circumstances.[2] This follows the approach taken by the Federal Courts.[3]

[7] There are a few cases where the Appeal Division has proceeded, saying that this rule applies only to courts and not tribunals, and the Appeal Division has jurisdiction to hear appeals of interlocutory decisions.[4] I agree that the rule against reviewing interlocutory decisions comes from the courts, and I agree that the Appeal Division has the jurisdiction to hear such appeals. Nevertheless, I find that unless there are exceptional circumstances, the Appeal Division should not consider appeals of interlocutory decisions while the General Division proceedings are continuing.

– This is a question of timing, not jurisdiction

[8] I agree with the Claimant that the Appeal Division has jurisdiction to hear appeals of "any decision" from the General Division, and that this can include an interlocutory decision.[5] Without such jurisdiction, the Appeal Division wouldn't be able to hear appeals of interlocutory decisions in any circumstances at all.

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[1] I see this in the letter of February 23, 2022, sent to the parties with the interlocutory decision. The Claimant says that it is the General Division member who wants the Appeal Division to address this matter, but I have not seen anything to this effect. In any case, it isn't up to the General Division to decide how matters proceed at the Appeal Division.
[2] For example: *The Estate of MB v Minister of Employment and Social Development*, 2020 SST 32; *LR v Minister of Employment and Social Development*, 2019 SST 523; *JN v Minister of Employment and Social Development*, 2019 SST 522; *RP v Canada Employment Insurance Commission*, 2017 CanLII 55651; *EC v Minister of Employment and Social Development*, 2017 CanLII 64267, *WF v Canada Employment Insurance Commission*, 2016 SSTADEI 53.
[3] See for example *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, *Szczecka v Canada (Minister of Employment and Immigration*, 1993 CanLII 9425 (FCA), *Herbert v Canada (Attorney General)*, 2022 FCA 11, *Sioux Valley Dakota Nation v Tacan*, 2020 FC 874.
[4] For example: *RP v Minister of Employment and Social Development*, 2020 SST 1002; *RM v Minister of Employment and Social Development*, 2020 SST 743; *Minister of Employment and Social Development v PF*, 2017 CanLII 55643.
[5] See section 55 of the *Department of Employment and Social Development Act*.

[9] This is similar to the Federal Courts. They have jurisdiction to decide applications for judicial review, without qualification as to the type of decision.[6] Having that broad jurisdiction hasn't stopped the Federal Courts from establishing a rule against premature judicial review of interlocutory decisions.

[10] The question is not whether the Appeal Division can hear an appeal of an interlocutory decision. Rather, the question is whether the Appeal Division should hear that appeal right away, before the General Division proceedings have finished. The alternative is for the party to raise their objections to any interlocutory decisions together with their appeal of the final decision.

– The courts' approach is not binding, but persuasive

[11] The courts' decisions about what they should do with interlocutory decisions are not binding about what we should do here. But it is open to the Appeal Division to take a similar approach to the courts, when a party seeks to appeal an interlocutory decision. The Supreme Court of Canada has confirmed that tribunals control their own procedures as "masters in their own house."[7]

[12] The Federal Courts won't review an interlocutory tribunal decision until the administrative process has run its course, unless there are exceptional circumstances. I find the Federal Court of Appeal's rationale to be persuasive:

> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway…Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience …[8]

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[6] See sections 18.1 and 28 of the *Federal Courts Act*.
[7] *Prassad v Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC)
[8] This quote is from *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, at paragraph 32.

[13] For the same reasons, it makes sense for the Appeal Division to take this approach: absent exceptional circumstances, parties can't proceed to the Appeal Division on interlocutory matters until the General Division process has run its course.

[14] This is the approach that I will take. It encourages promptness and efficiency. It allows the General Division to address the appeal as a whole before the Appeal Division gets involved. Then, the Appeal Division can see the whole picture, and not just pieces of it.

The Claimant's application is premature

[15] Having decided that the Appeal Division should only hear appeals of interlocutory decisions right away if there are exceptional circumstances, I have to consider whether there are exceptional circumstances in this case. If not, the application is premature.

– There are no exceptional circumstances

[16] The courts have said, and I agree, that concerns about bias generally don't constitute exceptional circumstances.[9] Dealing with this application now would not be the more efficient or fair approach. It is apparent that the Claimant already has other concerns about the General Division proceedings, yet bringing each concern to the Appeal Division separately would fragment and delay the proceedings. And, if the Claimant ultimately succeeds at the General Division, the Claimant wouldn't need to come to the Appeal Division at all.

[17] It is also to the Claimant's advantage for the Appeal Division to consider his concerns following the conclusion of the General Division proceedings (if the result is unfavourable). This is because the Appeal Division will then be able to consider all of the General Division member's findings, and their impact on the result. The Claimant can make a broader range of arguments at that time.

[18] For example, in his current application the Claimant explains why the General Division member should insist that the Commission provide the complete file for his

[9] See for example, *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, *Air Canada v Lorenz,* 1999 CanLII 9373.

appeal, and he explains how the member was biased, unprofessional and unfair. But the Appeal Division would not necessarily decide the question of bias, and could not decide the question of the missing file documentation, at this point. The question on the appeal of the interlocutory decision would be limited to whether the General Division made certain errors in her decision not to remove herself. In contrast, once he receives his final decision from the General Division, the Claimant can directly argue that the member was biased, or that he couldn't fairly present his case because of the missing information from the Commission's file.[10]

Conclusion

[19] Absent exceptional circumstances, the Appeal Division shouldn't hear appeals of interlocutory decisions until the General Division process has run its course. There are no exceptional circumstances in this case. The application is dismissed as premature.

[20] It remains open to the Claimant to seek permission to appeal the General Division's final decision, once issued.

Shirley Netten
Member, Appeal Division

[10] At this point, the General Division doesn't appear to have decided whether the Commission ought to have included the missing part of the Claimant's application in its materials. The Claimant can make a request for a ruling about this. The test is whether the document is "relevant to the decision being appealed." See sections 4 and 30 of the *Social Security Tribunal Regulations*.