



Citation: *AB v Canada Employment Insurance Commission*, 2022 SST 429

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: A. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 24, 2022
(GE-22-261)

Tribunal member: Charlotte McQuade

Decision date: May 30, 2022

File number: AD-22-166

Decision

[1] I am refusing permission (leave) to appeal. The appeal will not proceed.

Overview

[2] A. B. is the Claimant. She was paid EI regular benefits from October 4, 2020, at a weekly benefit rate of \$573.00. In September 2021, the Canada Employment Insurance Commission (Commission) recalculated the Claimant's weekly benefit rate to be \$595.00 for the period from February 28, 2021, to September 18, 2021. The Claimant was paid \$638.00, reflecting the increased rate for that period.

[3] However, after the Claimant's benefits ended, the Commission decided it had increased the Claimant's weekly benefit rate by mistake. So, on November 22, 2021, the Commission sent the Claimant a letter asking her to pay back the \$638.00.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. She did not dispute that her correct weekly benefit rate was \$573.00. However, she argued it was not fair she had to repay the overpayment when it arose from the Commission's error. She also argued that the Commission should have caught the error before her EI benefits ended, rather than seven months later when she no longer was in receipt of EI benefits.

[5] The General Division agreed that the Claimant's weekly benefit rate was \$573.00. The General Division also decided the Claimant was liable to repay the overpayment, and it had no authority to write off the overpayment or to direct the Commission to do so. The Claimant disagrees with the General Division's decision.

[6] The Claimant is now asking for permission to appeal this decision. She repeats the arguments she made to the General Division but does not identify any reviewable errors made by the General Division.

[7] I am refusing permission to appeal because I am satisfied the Claimant's appeal has no reasonable chance of success. This means the Claimant's appeal ends here.

Issue

[8] Is it arguable that the General Division made a reviewable error?

Analysis

[9] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[10] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.¹ The law says that I can only consider certain types of errors.² A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.³

[11] This is a low bar. Meeting the test for leave to be granted does not mean the appeal will necessarily succeed.

It is not arguable that the General Division made a reviewable error

[12] It is not arguable that the General Division made a reviewable error when it decided that the Claimant's weekly benefit rate was \$573.00. It is also not arguable that the General Division made a reviewable error when it decided that the Claimant was liable to repay the \$638.00 in benefits she had been overpaid and the Tribunal could not write-off that overpayment or direct the Commission to do so.

[13] The Claimant received EI benefits from October 4, 2020, to September 2021 at a weekly benefit rate of \$573.00. In September 2021, the Commission mistakenly changed the Claimant's weekly benefit rate to \$595.00. The Commission paid the

¹ Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.

² Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal. These errors are that the General Division breached natural justice, made an error of jurisdiction, made an error of law or based its decision on an important error of fact.

³ See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.

Claimant \$638.00, based on the difference between the two benefit rates for the period from February 28, 2021, to September 18, 2021 (\$22.00 × 29 weeks). After the Claimant's EI benefits had ended, the Commission realized it had made a mistake and corrected the benefit rate to be \$573.00. On November 22, 2021, the Commission sent the Claimant a letter advising her she had been overpaid.

[14] At the hearing before the General Division, the Claimant did not dispute the Commission's calculation of her weekly benefit rate to be \$573.00. Rather, her position was that it was unfair she should have to repay the \$638.00 when it resulted from the Commission's error. She also argued that the Commission should have caught its error before her benefits ended, not seven months later when she no longer was in receipt of EI benefits.

[15] The General Division decided that the Claimant's weekly benefit rate was \$573.00, as initially calculated by the Commission, and the law required that the Claimant repay the overpayment even though it arose because of the Commission's mistake.⁴

[16] The General Division also decided that the law said the Tribunal had no authority to write off the overpayment or direct the Commission to do so.⁵

[17] The Claimant used the appeal form to the General Division, rather than the Application to the Appeal Division to seek permission to appeal to the Appeal Division. She did not identify any specific errors that the General Division made. Rather, she repeated the arguments she made before the General Division.

⁴ The General Division relied on section 43(b) of the *Employment Insurance Act* (EI Act) in making this decision.

⁵ The General Division relied on sections 112.1 and 113 of the EI Act.

[18] Since the Claimant used the incorrect form to file her Application to the Appeal Division, I was uncertain whether she understood that an appeal to the Appeal Division is different from an appeal to the General Division. An appeal to the Appeal Division is not a place where claimants can re-argue their case. As above, there are only specific reasons for which the Appeal Division can give permission to appeal.

[19] I therefore asked that the Tribunal send the Claimant a letter explaining those reasons and asking her to explain in detail why she was appealing the General Division's decision. The Claimant sent back a letter again repeating the arguments she had made before the General Division.⁶

[20] Since the Claimant has not identified any reviewable error, I have reviewed the General Division decision and the file. I see no reviewable error made by the General Division.

[21] The General Division applied the correct law to decide the Claimant's weekly benefit rate.

[22] The Claimant's benefit period for regular benefits began on October 4, 2020. The law says the weekly benefit rate is 55% of a person's weekly insurable earnings up to an allowable maximum. ⁷The maximum weekly benefit rate when the Claimant applied for benefits was \$573.00.⁸

[23] The weekly insurable earnings are determined by using the total insurable earnings in a person's best weeks of earnings in their qualifying period divided by the number of best weeks.

[24] The number of best weeks, whether consecutive or not, ranges from 14 to 22 weeks depending on the person's regional rate of unemployment in their ordinary place of residence at the beginning of their benefit period.⁹

⁶ AD01B

⁷ Subsection 14(1) of the EI Act.

⁸ Section 17 of the EI Act.

⁹ Subsection 14(4) of the EI Act.

[25] Due to the pandemic, temporary amendments to the EI Act provided that for those persons whose benefit period began on or after September 27, 2020, their weekly insurable earnings were deemed to be the greater of the above calculation and \$909.00.¹⁰

[26] At the General Division, the Claimant did not dispute the Commission's calculation of her weekly insurable earnings to be \$1,042.00.

[27] The Claimant's weekly benefit rate was \$573.00 (.55 x \$1042.00), as determined by the General Division.¹¹

[28] The Commission told the General Division that it had recalculated the Claimant's claim on September 24, 2021, and mistakenly increased her weekly benefit rate to \$595.00. The Claimant was paid \$638.00 representing the difference in the weekly rates for the period from February 28, 2021, to September 18, 2021. The Claimant did not dispute before the General Division that she received \$638.00 or that she had been overpaid by that amount.

[29] As the General Division decided, the law says that the Claimant is liable to repay an amount paid by the Commission to her as benefits, to which she was not entitled.¹²

[30] This is the case even where the overpayment arose because of the Commission's mistake.¹³

[31] The law is clear that neither the General Division nor the Appeal Division of the Tribunal has the authority to write off an overpayment or to review a decision by the Commission to refuse to write off an overpayment.¹⁴ The General Division had no choice but to conclude that it could not write-off the Claimant's overpayment or direct the Commission to write off the overpayment.

¹⁰ See subsection 153.192 (1) of the EI Act which was no longer in effect as of September 25, 2021.

¹¹ See paragraph 10 of the General Division decision.

¹² See section 43(b) of the EI Act.

¹³ See *Lanuzo v Canada (Attorney General)*, 2005 FCA 324.

¹⁴ See sections 112.1 and 113 of the EI Act.

[32] There is no arguable case that the Commission acted outside the allowed time to reconsider the Claimant's claim. The Commission's reconsideration of the claim occurred within the allowable thirty-six months after benefits have been paid.¹⁵ In that regard, the overpayment related to benefits paid to the Claimant from February 28, 2021, to September 18, 2021. The Claimant was sent two notices of debt totalling \$638.00 on October 25, 2021, and October 30, 2021. ¹⁶She was sent a letter advising of the reconsideration of her claim and the explanation for the overpayment on November 22, 2021.¹⁷

[33] I have reviewed the entire file, the audio tape from the General Division hearing and the General Division decision.¹⁸ There is no arguable case that the General Division made an important error of fact. I can only consider important errors of fact, which might have affected the outcome of the decision.¹⁹ The evidence supports the General Division's decision. I didn't find any evidence that the General Division might have ignored or misinterpreted.

[34] The Claimant hasn't said that the General Division proceeding was unfair in any way and I see no evidence of that. The Claimant has not raised any issue of jurisdiction and I see no indication of such an error.

[35] The Claimant has a large overpayment, through no fault of her own. She has been asked to pay money back, after her EI benefits ended, which puts her in a difficult financial situation. While I sympathize with the Claimant, she has not shown that the General Division arguably made any errors of procedural fairness, jurisdiction, fact or law. As a result, there is no reasonable chance of success and I must refuse permission to appeal.

¹⁵ See section 52(1) of the EI Act.

¹⁶ GD3-60 to GD3-62.

¹⁷ GD3-64.

¹⁸ The case of *Karadeolian v Canada (Attorney General)*, 2016 FC 615 recommends doing such a review.

¹⁹ I have paraphrased for plain language. Section 58(1)(c) of the DESD Act says that only kind of error of fact I can consider is where "the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it."

[36] As the General Division pointed out, if the Claimant has made a request for a write-off of the overpayment from the Commission and the Commission has refused such a write-off, the Claimant could pursue the matter at Federal Court.

Conclusion

[37] I am refusing permission to appeal. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division