Citation: *SH v Canada Employment Insurance Commission*, 2022 SST 507

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 29, 2022 (GE-22-513)

Tribunal member:	Charlotte McQuade
Decision date:	June 13, 2022
File number:	AD-22-244

Decision

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

Overview

[2] S. H. is the Claimant. She is a member of a union. The union went on strike on May 1, 2021, when the Claimant was on vacation. The Claimant was to return to work on May 17, 2021, but could not do so because of the strike. The strike ended on May 19, 2021, and the Claimant returned to full-time work on May 25, 2021.

[3] The Canada Employment Insurance Commission (Commission) decided the Claimant could not be paid benefits from May 3, 2021, to June 18, 2021, for reason she was unable to resume work because of a work stoppage due to a labour dispute.[1] The work stoppage did not end until June 19, 2021, when the employer returned to 85% production. The Commission's decision resulted in an overpayment of the Employment Insurance (EI) regular benefits the Claimant received while off work.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant was participating in a labour dispute that caused the work stoppage and so was disentitled to benefits from May 3, 2021, to June 18, 2021.

[5] The Claimant disagrees with the General Division's decision and is now asking to appeal to the Appeal Division. However, the Claimant needs permission for her appeal to move forward. She argues that the General Division didn't follow procedural fairness.

[6] I am satisfied that the Claimant's appeal has no reasonable chance of success so I am refusing permission to appeal. This means the Claimant's appeal cannot proceed.

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[1] See section 36(1) of the *Employment Insurance Act* (EI Act), which says a disentitlement can be imposed for this reason.

Issue

[7] The Claimant is raising one issue: Is it arguable that the General Division didn't follow procedural fairness?

Analysis

[8] 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.

[9] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[2] The law says that I can only consider certain types of errors.[3] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[4]

[10] 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 failed to provide procedural fairness

[11] It is not arguable that General Division failed to provide procedural fairness.

[12] The Claimant says in her Application to the Appeal Division that the General Division didn't follow procedural fairness but she did not explain what was unfair about the General Division proceeding.

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[2] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[3] 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.
[4] See *Osaj v Canada (Attorney General),* 2016 FC 115, which describes what a "reasonable chance of success" means.

[13] The Claimant's argument appears to be about the unfairness of the Commission's collection proceedings rather than procedural unfairness on the part of the General Division. Specifically, the Claimant says that money was taken from her 2021 tax refund, which she does not find fair. She says she should have a monthly instalment plan.[5]

[14] The Tribunal sent the Claimant a letter asking her to explain her arguments in detail. The Claimant did not respond to that letter.

[15] The fairness of the Commission's collection procedures is not something the Appeal Division can consider. This is because the Appeal Division's task is to decide whether the General Division might have made a reviewable error, not whether the result was unfair or whether the Commission has acted unfairly.

[16] The Claimant has not pointed to any procedural unfairness on the part of the General Division and my review of the record and audio tape from the hearing reveals no evidence of any procedural unfairness. So, it is not arguable that the General Division failed to provide procedural fairness.

It is not arguable that the General Division made any other reviewable errors

[17] It is not arguable that the General Division made an error of law, or an important error of fact or an error of jurisdiction.

– It is not arguable that the General Division made an error of law

[18] It is not arguable that the General Division made an error of law when it decided the Claimant was disentitled to EI regular benefits from May 3, 2021, to June 18, 2021.

[19] The law says that a person who loses or is unable to resume employment because of a work stoppage attributable to a labour dispute where they are employed is not entitled to benefits.[6] There is an exception to this if the person can prove they are

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[5] AD1-4.
[6] See section 36(1) of the *Employment Insurance Act* (EI Act).

not participating in, financing or directly interested in the labour dispute that caused the work stoppage.[7]

[20] The disentitlement ends when the work stoppage terminates or the person becomes regularly employed somewhere else.[8]

[21] The law says that a work stoppage terminates when both the workforce and the employer's production reach 85% of their normal level.[9]

[22] The disentitlement can be suspended during any period when the person is otherwise entitled to special benefits (for example, sickness or maternity or parental benefits) or benefits while taking Commission-approved training. It can also be suspended if, before the work stoppage, the person had anticipated being absent from their employment because of a reason entitling them to special benefits or training course benefits and had begun making arrangements in relation to that absence.[10]

[23] The General Division applied this law. It did not misinterpret or misapply the law.

[24] The following facts were not in dispute before the General Division: The Claimant was a member of a union. The union started strike action on May 1, 2021, at the Claimant's workplace. The strike concerned the amount of wages, benefits and pensions. The Claimant was on vacation at the time. She was supposed to return to work on May 17, 2021, but couldn't because of the strike. The strike ended on May 19, 2021. The Claimant returned to work on May 25, 2021, but 85% of the striking employees had not returned to work until June 8, 2021, and the employer's production reached 85% of their normal level on June 18, 2021.

[25] The Commission decided the Claimant was disentitled to benefits from May 3, 2021, to June 18, 2021, because she was unable to resume work because of a work

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[7] See section 36(4) of the EI Act.
[8] See section 36(1) of EI Act.
[9] See section 53(1) of the *Employment Insurance Regulations* (EI Regulations) which says this.
[10] See section 36(3) of the EI Act.

stoppage due to a labour dispute. This created an overpayment of the amount of the EI benefits the Claimant received during this period.

[26] The Claimant argued before the General Division that she did not know she was not entitled to benefits while on strike. She maintained the law was unfair for not supporting striking workers. She also argued that she had paid into the EI system and paid her taxes over the years and she could not afford to repay the overpayment.

[27] The General Division decided the Claimant was subject to a disentitlement from May 3, 2021, to June 18, 2021, as she was off work due to a work stoppage at the factory where she worked. Although the Claimant returned to work on May 25, 2021, the General Division decided that the work stoppage did not end until June 18, 2021, until the employer reached 85% of normal production.

[28] The General Division considered whether the Claimant might benefit from an exemption from disentitlement but decided she could not because she had a direct interest in the labour dispute as the dispute concerned wages.[11] The General Division also considered whether the disentitlement could be suspended but found that it could not because the Claimant was not otherwise entitled to special benefits or benefits for Commission approved training.[12]

[29] I see no arguable case that the General Division erred in law. The law does not permit payment of EI regular benefits in the circumstances in which the Claimant was unable to resume work.[13]

[30] The General Division considered the Claimant's argument that she had contributed to the EI system for many years and that the law was unfair because it did not provide support for striking workers. The General Division also considered the Claimant's position that she was unaware that she could not be paid EI regular benefits during a strike as well as her argument that she was unable to afford to repay the

[11] See section 36(4) of the EI Act, which says the disentitlement does not apply if a claimant is not participating in, financing or directly interested in the labour dispute that caused the work stoppage.
[12] See section 36(3) of the EI Act, which explains the criteria for suspending a disentitlement.
[13] See section 36(1) of the EI Act.

overpayment. The General Division decided that despite the Claimant's sympathetic circumstances, it could not rewrite the law or step outside the law.

[31] The General Division had to reach this conclusion. Only the legislature can amend the law. Neither the General Division nor the Appeal Division can step outside the law in the interests of compassion.[14]

– It is not arguable that the General Division made an important error of fact

[32] The Claimant has not argued that the General Division made an important error of fact.

[33] However, I have reviewed the documentary file, and listened to the audio tape from the General Division hearing. The evidence supports the General Division's decision. I did not find evidence that the General Division might have ignored or misinterpreted.[15]

– It is not arguable that the General Division made an error of jurisdiction

[34] The Claimant has not argued that the General Division made an error of jurisdiction and I see no indication that such an error occurred. The General Division decided the issue it had to decide and did not decide anything it did not have the authority to decide.

[35] The Claimant has not identified any reviewable errors upon which her appeal has a reasonable chance of success. So, I must refuse the Claimant permission to appeal.

Conclusion

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

Charlotte McQuade
Member, Appeal Division

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[14] See *Canada (Attorney General) v Levesque*, 2001 FCA 304; and *Pannu v Canada (Attorney General)*, 2004 FCA 90.
[15] The case of *Karadeolian v Canada (Attorney General)*, 2016 FC 615 recommends doing such a review.