Citation: *UP v Canada Employment Insurance Commission*, 2022 SST 738

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	U. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 5, 2022 (GE-22-1143)

Tribunal member:	Charlotte McQuade
Decision date:	August 9, 2022
File number:	AD-22-433

Decision

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

Overview

[2] U. P. is the Claimant. The Claimant left Canada on October 6, 2019, to visit his seriously ill mother-in-law in India. He tried multiple times to return to Canada but was unable to do so until February 1, 2022, due to pandemic-related restrictions in Canada and India.

[3] The Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to Employment Insurance (EI) regular benefits from October 7, 2019, as he had not met an allowable exception for being outside Canada. The Claimant appealed the Commission's decision to the Tribunal's General Division.

[4] The General Division decided the Claimant met an allowable exception for being outside Canada from October 7, 2019, to October 13, 2019, but not after that. So, the Claimant was disentitled to benefits from October 14, 2019, to the end of his benefit period. The General Division also decided that Claimant could not be paid benefits even after his return to Canada since his benefit period had ended by then.

[5] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission to appeal for the file to move forward.

[6] The Claimant argues that the General Division made an error of jurisdiction when it said he was asking for benefits for his entire benefit period instead of from March 21, 2020, when he tried to return to Canada but could not do so because of restrictions.

[7] I sympathize with the Claimant's situation. However, I must refuse leave to appeal, as I am satisfied that the Claimant's appeal has no reasonable chance of success.

Preliminary Issue – new evidence

[8] I can't consider the airplane ticket documents or the news release concerning travel restrictions the Claimant provided with his Application to the Appeal Division.

[9] New evidence is evidence the General Division did not have before it made its decision.

[10] The Appeal Division generally does not accept new evidence about the issues that the General Division decided. This is because the Appeal Division isn't rehearing the case. Instead, the Appeal Division decides whether the General Division made certain errors, and decides how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[11] I have reviewed the record before the General Division. Neither the airplane ticket documents nor the news release was before the General Division when it made its decision. So, it is new evidence. There are only a few limited exceptions that allow me to consider new evidence.[1] None of these exceptions applies to the Claimant's new evidence. So, I can't consider the Claimant's new evidence when making my decision.

Issues

a) Is it arguable that the General Division made an error of jurisdiction when it stated that the Claimant was asking for benefits for his entire benefit period instead of from March 21, 2020?

b) Is it arguable the General Division made any other reviewable error?

[1] The Federal Court of Appeal has said in a case called *Shamra v Canada (AG)*, 2018 FCA 48, on a judicial review, the only exceptions where the Court can accept new evidence is where the new evidence provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. As the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.

Analysis

[12] 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.

[13] 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]

[14] 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 an error of jurisdiction

[15] The General Division did not make an error of jurisdiction when it stated the Claimant was asking for benefits for his entire benefit period.

[16] The Claimant says that the General Division made an error of jurisdiction when it said he was asking for benefits for his entire benefit period.[5] He says he is only asking for benefits from March 21, 2022, as he booked his flight to Canada on March 20, 2020, but was unable to return due to travel restrictions. I understand the Claimant to mean he was asking for benefits from March 21, 2020, and the reference to 2022 is just a typographic error.

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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.
[5] The General Division stated this in paragraph 9 of its decision.

[17] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.

[18] The General Division did not make an error of jurisdiction.

[19] On October 19, 2019, the Commission decided that the Claimant could not be paid benefits from October 7, 2019, indefinitely because he was outside Canada. It also decided the Claimant could not be paid benefits from October 7, 2019, indefinitely because he had not proven his availability for work while outside Canada.

[20] The Claimant requested a reconsideration of these decisions. The Commission made a reconsideration decision on March 4, 2022, confirming both of its initial decisions. The Claimant appealed that reconsideration decision to the Tribunal.

[21] The law gives the Tribunal the authority to decide the issues arising from the reconsideration decision under appeal.[6] Since the Commission had disentitled the Claimant from October 7, 2019, for an indefinite period, the General Division had to decide whether that disentitlement could be lifted at any point from October 7, 2019.

[22] The General Division considered whether the Claimant was entitled to benefits from October 7, 2019, to the end of his benefit period. The General Division concluded the Claimant was only entitled to benefits from October 7, 2019, to October 13, 2019, as this was the only period throughout the benefit period that he met an allowable exception for being outside Canada.

[23] Even if the General Division misunderstood that the Claimant only wanted benefits from March 21, 2020, instead of his entire benefit period, this is not an error of jurisdiction or any other kind of reviewable error that would have affected the outcome. This is because the General Division considered whether the disentitlement could be lifted at any point during the benefit period, which would have included the period from March 21, 2020, to the end of the benefit period.

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[6] See section 112 and section 113 of the *Employment Insurance Act* (EI Act).

[24] The General Division decided the issues it had to decide. I see nothing in the General Division decision that suggests the General Division decided something it did not have the authority to decide. So, there is no arguable case that the General Division made an error of jurisdiction.

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

[25] It is not arguable that the General Division made an error of law, or based its decision on an important error of fact or breached procedural fairness.

[26] The General Division stated and applied the correct law.

[27] Claimants who are not in Canada are not entitled to benefits unless they meet an allowed exception.[7]

[28] The allowed reasons for being outside Canada are subject to the availability requirements of the *Employment Insurance Act* (EI Act). This means that in order to avoid disentitlement, a claimant must be outside Canada for an allowed reason and meet the availability criteria.[8]

[29] The General Division decided that the Claimant was not disentitled from benefits from October 7, 2019, to October 13, 2019, as he met an allowable exception. This was because he was outside Canada for an allowed reason, to visit a member of his immediate family who was seriously ill, and he had shown he met the availability requirements for this seven-day period.[9]

[30] The General Division understood that the Claimant tried three times to return to Canada but could not do so because of travel restrictions. The General Division also understood that in March 2020, Canada imposed travel restrictions and when they were

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[7] See section 37(b) of the EI Act. The allowable exceptions are set out in section 55 of the *Employment Insurance Regulations* (EI Regulations).
[8] See section 55(1) of the EI Regulations. See also *Canada (Attorney General) v Elyoumni*, 2013 FCA 151. See section 18(1) of the EI Act, which explains the availability requirements for regular benefits.
[9] This exception is explained in section 55(1)(d) of the EI Regulations.

lifted on November 21, 2020, India had imposed restrictions that prevented the Claimant's return.[10]

[31] However, the General Division decided that being unable to return to Canada because of pandemic restrictions was not one of the allowable exceptions in the law for being outside Canada. There was no evidence that the Claimant qualified for any other exceptions from October 14, 2019, to the end of his benefit period. So, the General Division decided the Claimant remained disentitled from October 14, 2019, to the end of the benefit period.

[32] The General Division had no choice but to come to this conclusion, there being no evidence that the Claimant met an allowable exception from October 14, 2019, to the end of his benefit period. Persons outside Canada are not entitled to regular EI benefits unless they meet an allowable exception.[11]

[33] Unfortunately, as the General Division pointed out, being stranded outside Canada due to government travel restrictions is not one of the allowable exceptions in the law.

[34] The General Division also correctly concluded that, despite its sympathy for the Claimant, it had no discretion to step outside the law and could not refuse to apply the law.[12]

[35] The Claimant argued before the General Division that he should have been paid benefits when he returned to Canada on February 1, 2022. However, the General Division decided that was not possible.

[36] The General Division pointed out that length of a benefit period varies for each person but the maximum length is 52 weeks unless an extension is granted.[13] However,

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[10] See paragraph 43 of the General Division decision.
[11] See section 37(b) of the EI Act.
[12] The General Division relied on *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141. This case is binding on the Tribunal and says that a decision maker cannot refuse to apply the law on grounds of equity.
[13] See section 10(2) of the EI Act. See section 10(10) to section 10(15) of the EI Act for these circumstances.

even after extensions, the law says a benefit period can only last a maximum of 104 weeks. The General Division explained that this means that no benefits are payable to any claimant more than 104 weeks after their claim is established.

[37] The General Division decided that the Claimant's benefit period began on October 6, 2019, but it did not know when it ended as the Commission had not provided this information to it.

[38] The General Division stated that there was no evidence that the Claimant qualified for any extensions to his benefit period and it made no findings about whether he qualified for any extensions.

[39] However, the General Division reasoned that, even if the Claimant's benefit period had been extended to the 104-week maximum, the Claimant's benefit period would have ended 104 weeks after it started. Since the Claimant returned to Canada 121 weeks after the start of his benefit period, he could not be paid benefits as the benefit period had already ended by that point.

[40] The General Division enquired with the Claimant whether he had made any new claim after returning to Canada and he confirmed he had not.[14] So, the General Division could only consider the Claimant's entitlement in the existing benefit period.

[41] The General Division had no choice but to conclude the Claimant could not be paid benefits in the existing benefit period upon his return on February 1, 2022. There was no dispute that the Claimant's benefit period began on October 6, 2019.

[42] The Claimant returned to Canada on February 1, 2022, after his benefit period would have ended, even if he had been given all possible extensions. As the General Division stated, the maximum length of a benefit period, even after extensions, is 104

[14] I heard this on the audio tape from the General Division hearing at approximately 00:21:10.

weeks. [15]No benefits could be paid to the Claimant after the benefit period ended, as benefits are only payable during the benefit period.[16]

[43] I have reviewed the entire written record and listened to the recording of the hearing. I am satisfied that the General Division did not misunderstand or ignore evidence that could have an impact on the outcome of this appeal.[17] The General Division based its decision on the evidence before it. It addressed the Claimant's arguments and provided clear reasons for its decision.

[44] The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness.

[45] The Claimant has not raised an arguable case that the General Division committed any reviewable errors.

[46] I am satisfied this appeal has no reasonable chance of success so I must refuse the Claimant permission to appeal.

Conclusion

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

Charlotte McQuade
Member, Appeal Division

[15] See section 10(14) of the EI Act.
[16] See section 9 of the EI Act.
[17] In *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615, the Federal Court recommends doing such a review.