



Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 762

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

<b>Applicant:</b>	J. P.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	General Division decision dated July 4, 2022 (GE-22-1245)
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<b>Tribunal member:</b>	Janet Lew
<b>Decision date:</b>	August 15, 2022
<b>File number:</b>	AD-22-455

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

## Overview

[2] The Applicant, J. P. (Claimant), is appealing the General Division decision.

[3] The General Division found that the Claimant was unavailable for work because she was in school full-time. She was therefore disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made procedural and jurisdictional errors. In particular, she argues that the entire process was unfair because she ended up with an overpayment<sup>1</sup> through no error on her part. She also suggests that the General Division should have waived the overpayment, given the circumstances.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.<sup>2</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>3</sup> If the appeal does not have a reasonable chance of success, this ends the matter.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing the Claimant permission to move ahead with her appeal.

## Issues

[7] The issues are as follows:

- a) Is there an arguable case that the General Division made a procedural error?

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<sup>1</sup> The Claimant states that she has paid the overpayment, but it is causing her financial difficulties.

<sup>2</sup> Under section 58(1) of the *Department of Employment and Social Development Act*, I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."

<sup>3</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- b) Is there an arguable case that the General Division failed to waive the Claimant's overpayment?

## **Analysis**

[8] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error<sup>4</sup>.

[9] For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[10] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

### **Is there an arguable case that the General Division made a procedural error?**

[11] The Claimant argues that there were procedural errors.

[12] The Claimant notes that the Respondent, the Canada Employment Insurance Commission (Commission), chose to review her claim after approving it. The Commission then denied her claim, based on the same information that she had provided throughout the process.

[13] The Claimant suggests that the Commission should have reviewed her claim first to determine whether she was entitled to any benefits, before paying her. That way, she would not have accumulated an overpayment.

[14] The Commission's processing of the Claimant's application does not represent a procedural error on the part of the General Division. Procedural errors typically involve

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<sup>4</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

something unfair about the process at the General Division. This could include, for instance, not giving claimants adequate notice of any hearings, failing to disclose documents in a timely manner, or depriving claimants of a fair opportunity to present their appeals. There is no suggestion from the Claimant that the process at the General Division was somehow unfair in any way.

[15] The Claimant is arguing that the process at the claims stage was unfair. But, even if that were so, it is not the type of issue that allows the Appeal Division to intervene in the General Division's decision. The General Division simply was not involved in the handling of the claim at that early stage.

[16] Even if the General Division (or Appeal Division) could or could have examined the fairness of the process at the claims stage, the *Employment Insurance Act* lets the Commission pay benefits first before verifying a claimant's entitlement to those benefits.

[17] Section 153.161 of the *Employment Insurance Act* reads:

### **Availability**

**153.161 (1) Course, program of instruction or non-referred training**--For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

**(2) Verification**—The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[18] This was a temporary measure that was brought in during the pandemic.<sup>5</sup> The measure allowed claimants to access benefits during the pandemic, before the Commission verified a claimant's entitlement to those benefits.

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<sup>5</sup> The measures were in place between September 27, 2020 and September 25, 2021. The Claimant applied for benefits within this timeframe, so the measures applied to her.

[19] I am not satisfied that the Claimant has an arguable case that the General Division acted unfairly or, for that matter, that the Commission failed to verify her entitlement to benefits before paying her.

**Is there an arguable case that the General Division failed to waive the Claimant's overpayment?**

[20] The Claimant argues that the Commission made an error and the General Division should have waived the overpayment.

[21] The Claimant notes that the General Division member wrote that he did not have any authority to waive the overpayment. She also notes that the member wrote, "Overpayments that occur when the Commission does not make a decision on a claim within a reasonable period of time may result in a portion of the overpayment being written off."<sup>6</sup>

[22] The Claimant argues that the Commission made an error by paying benefits in the first place, and then by taking a long time to review her claim. She received benefits over five months. She did not have any reason to suspect the Commission would eventually decide she was not entitled to receive those benefits.

[23] While there may have been some delay involved in reviewing her claim, this does not mean that the Commission made an error in paying her benefits in the first place. As noted above, the *Employment Insurance Act* specifically provided for this operational approach during the pandemic.

[24] The General Division was correct to recognize that it does not have any authority to waive any portion of the overpayment, no matter what the circumstances might have been. I am not satisfied that the Claimant has an arguable case that the General Division failed to waive the overpayment. The General Division simply does not have this power.

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<sup>6</sup> See General Division decision, at para 43.

[25] I note that the General Division set out options for the Claimant. But, as the Claimant has repaid the overpayment, those options may no longer be relevant or available. There is no outstanding debt for the Commission to waive or forgive. And, as there is no outstanding debt, there is no basis for Canada Revenue Agency to agree to a repayment plan.

## **Conclusion**

[26] Permission to appeal is refused. This means that the appeal will not proceed.

Janet Lew  
Member, Appeal Division