



Citation: *DP v Canada Employment Insurance Commission*, 2022 SST 880

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: D. P.

Respondent: Canada Employment Insurance Commission
Representative: Melanie Allen

Decision under appeal: General Division decision dated March 11, 2022
(GE-22-542)

Tribunal member: Charlotte McQuade

Type of hearing: Teleconference
Hearing date: July 12, 2022
Hearing participants: Appellant

Decision date: September 6, 2022
File number: AD-22-199

Decision

[1] The appeal is allowed.

[2] The General Division did not follow a fair process when it did not provide the Claimant a chance to review and respond to the Canada Employment Insurance Commission's (Commission's) Supplementary Representations before making its decision.

[3] The matter is returned to the General Division for reconsideration.

Overview

[4] D. P. is the Claimant. He was laid off on February 25, 2020, and applied for Employment Insurance (EI) regular benefits on February 28, 2020. The Canada Employment Insurance Commission (Commission) started his benefit period on March 1, 2020, and decided he was entitled to 36 weeks of regular benefits.

[5] After all those benefits had been paid, the Claimant requested a reconsideration from the Commission, arguing his claim should have been established as EI Emergency Response Benefits (EI ERB) claim. He thought this would entitle him to additional weeks of benefits. The Commission decided the claim was properly established as a claim for EI regular benefits.

[6] The Claimant appealed the Commission's decision to the Tribunal. The General Division decided the Claimant's claim couldn't have been established as an EI ERB claim because for that to happen, his benefit period must have started on or after March 15, 2020. As well, the Claimant had asked for EI ERB after the deadline for doing so. The General Division also decided the Claimant could not be paid more than 36 weeks of EI regular benefits.

[7] The Claimant appealed the General Division's decision. He argues that the General Division made errors of law or jurisdiction and proceeded in an unfair way.

[8] The parties agree and I accept that the General Division failed to follow a fair process when it did not give the Claimant an opportunity to review and respond to the Commission's Supplementary Representations before making its decision.¹

[9] As the Claimant did not have a fair hearing, the record is not complete. So, I am returning the appeal to the General Division for reconsideration.

Preliminary matters

[10] The Claimant requested that I dismiss the Commission's submissions and grant his appeal along with all the remedies he is seeking for reason the Commission did not attend the Appeal Division hearing. He says this would happen in any other legal proceeding.

[11] I cannot grant the Claimant's request. I have no authority to compel the Commission to attend the hearing or dismiss the Commission's submissions and grant the Claimant's appeal simply because the Commission did not attend.

[12] There is no new evidence being provided at a hearing before the Appeal Division and the Commission, as is the case with any party, can choose to attend the Appeal Division hearing or not. The Commission is not required to make oral submissions, in addition to its written submissions.

[13] The Claimant's appeal can only be allowed if he can prove that the General Division committed a reviewable error.² The failure of the Commission to attend the hearing before the Appeal Division is not a reason under the law to allow the Claimant's appeal.

[14] Further, the Commission's failure to attend does not compromise the fairness of the hearing before the Appeal Division in any way. The onus is on the Claimant to prove

¹ These Supplementary Representations are found at GD6.

² See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). This section explains that the only reviewable errors the Appeal Division can consider are whether the General Division failed to observe a principle of natural justice, or acted beyond or refused to exercise its jurisdiction, or made an error of law, or 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.

that the General Division made a reviewable error. There is no onus on the Commission to disprove the Claimant's allegations that the General Division made a reviewable error.

Issues

[15] The issues in this appeal are:

- a) Did the General Division fail to follow a fair process by not dismissing the Commission's evidence and submissions and granting the Claimant's appeal for reason the Commission did not attend the General Division hearing?
- b) Did the General Division fail to follow a fair process by not providing the Claimant a chance to review and respond to the Commission's Supplementary Representations before it made its decision?
- c) Did the General Division make an error of law when it decided the Claimant's claim could not be established as an EI ERB claim?
- d) Did the General Division make an error of law when it decided the Claimant was only entitled to 36 weeks of EI regular benefits?
- e) Did the General Division make any error of jurisdiction?
- f) If the General Division made an error, so, how should the error be fixed?

Analysis

[16] The Claimant was laid off on February 25, 2020, and applied for Employment Insurance (EI) regular benefits on February 28, 2020. The Commission started his benefit period on March 1, 2020.

[17] The Commission decided, based on a rate of unemployment of 7.5% for the region where the Claimant lived in the week of March 1, 2020, when his claim began,

and based on the 1688 insurable hours the Claimant had in his qualifying period, that, according to the law, he was entitled to 36 weeks of regular benefits.³

[18] After the 36 weeks of benefits ended, on December 14, 2021, the Claimant requested a reconsideration from the Commission, arguing his claim should have been established as EI ERB claim. The Commission decided that the claim was properly established as a claim for EI regular benefits and the Claimant could not be paid more than 36 weeks of benefits. The Claimant appealed the Commission's decision to the Tribunal.

[19] The General Division decided the Claimant's claim couldn't have been established as an EI ERB claim for two reasons. First, to be entitled to EI ERB benefits, the Claimant must have been a person who could have had a benefit period for regular benefits established on or after March 15, 2020, and the Claimant's benefit period started before that.⁴

[20] Second, the Claimant had claimed EI ERB after the December 2, 2020, deadline for doing so.⁵

[21] The General Division also decided that the Claimant was entitled to 36 weeks of EI regular benefits based on the rate of unemployment of 7.5% for the week preceding the week the benefit period starts, and the 1688 insurable hours the Claimant earned in his qualifying period.

[22] The Claimant argues that the General Division made an error of law or jurisdiction by using the rate of unemployment for the week preceding the week his benefit period started. He says he usually applies for EI benefits two to four weeks after being laid off but this time the Commission told him to apply early. So, he maintains that

³ Section 12(2) of the *Employment Insurance Act* (EI Act) says that the maximum number of weeks for which EI regular benefits may be paid in a benefit period is calculated based on the number of insurable employment hours accumulated in the qualifying period and the applicable regional rate of unemployment. See also GD4-9 for the table in Schedule I to the EI Act, which sets out the how many weeks of benefits a claimant is entitled to, having regard to their number of insurable hours and the regional rate of unemployment.

⁴ See paragraph 13 of the General Division decision.

⁵ See paragraph 16 of the General Division decision.

the rate of unemployment applicable to two to four weeks after he filed his claim should be used.

[23] The Claimant also argues the General Division made an error of law or error of jurisdiction because it did not consider:

- that he was laid off due to Covid-19. The government was giving assistance due to the pandemic yet he was not given any of this assistance.
- that he overpaid EI and Canada Pension Plan premiums for years and when he completed his taxes seven years later, he was denied a refund of those overpayments due to missing a limitation period.
- he has paid into EI for years, has not collected EI on a regular basis, and when he needs it, can't collect it.

[24] The Claimant also argues that the General Division breached procedural fairness in two ways:

- by not dismissing the Commission's evidence and submissions and allowing his appeal for reason the Commission did not attend the hearing.
- by not allowing him an opportunity to review and respond to the Commission's Supplementary Representations before making its decision.⁶

[25] I will consider the Claimant's procedural fairness arguments first.

Commission's failure to attend General Division hearing

[26] The General Division did not fail to follow a fair process by not dismissing the Commission's evidence and submissions and allowing the Claimant's appeal simply because the Commission didn't attend the hearing.

⁶ See GD6.

[27] The Claimant argues in any other legal proceeding, if a party doesn't show up, their evidence and submissions are dismissed. He maintains his hearing was not fair because he could not ask the Commission questions about their documentation.

[28] The Claimant says, if the Commission had attended, he could have asked them about the fact he was coerced into applying for benefits earlier than he normally would have. He also would have asked what the regional rate of unemployment was four weeks after he applied. As well, he would have asked what extensions were given with respect to weeks of benefits due to the pandemic.

[29] The right to a fair hearing before the Tribunal includes certain procedural protections such as the right to an unbiased decision maker and the right of a party to know the case against him or her and to be given an opportunity to respond to it.

[30] However, procedural fairness does not include an obligation on the Commission to attend the hearing. The Commission is a party to the appeal and can choose whether to attend the hearing or not.

[31] The General Division has no authority to require a party, including the Commission, to attend a hearing. If a party does not attend a hearing, the General Division can proceed with the hearing, as long as the member is satisfied that the missing party received notice of the hearing.⁷

[32] The Commission's "Reconsideration file" contains evidence. For example, it includes the Claimant's application for benefits and his Record of Employment, and information relied on to determine the regional rate of unemployment in the area the Claimant resides.⁸

[33] Even though no one from the Commission testified directly about the evidence in the Reconsideration file and the Claimant did not have the opportunity to cross-examine the Commission on its evidence, the Tribunal is still entitled to consider this evidence. This is because the General Division does not operate under the same strict rules of

⁷ See section 12(1) of the *Social Security Tribunal Regulations*.

⁸ See GD3.

evidence as criminal or civil courts. The General Division can accept documentary evidence even if no one is present to testify about those documents.⁹

[34] There was no breach of procedural fairness, therefore, because the General Division considered the Commission's evidence.

[35] The General Division also did not breach procedural fairness by failing to dismiss the Commission's submissions.¹⁰ Submissions are not evidence but rather argument about the issues under appeal.

[36] There is no procedural requirement that requires the Commission, or any party, to make their submissions orally, as well as in writing.

[37] However, I have decided that the General Division failed to follow a fair process in another way.

No opportunity provided to review and respond to Commission's Supplementary Representations

[38] The Claimant argues the General Division did not follow a fair process because he was not allowed an opportunity to review and respond to the Commission's Supplementary Representations before the General Division made its decision.

[39] The Commission agrees that the General Division did not follow a fair process because the General Division did not provide the Claimant with a reasonable period, following receipt of the Supplementary Representations to submit any supplementary submissions of his own, if needed.¹¹

[40] I accept that the General Division did not follow a fair process.

[41] One of the issues under appeal was whether the Claimant was entitled to more than 36 weeks of EI regular benefits.

⁹ See *Caron v Canada (Attorney General)*, 2003 FCA 254. See also *Dumlu v. Canada (Attorney General)*, 2021 FCA 195 (CanLII).

¹⁰ See GD4 and GD6.

¹¹ See AD2-3.

[42] The number of weeks of benefits a claimant is entitled to is calculated by reference to the regional rate of unemployment that applies to a claimant and the number of hours of insurable employment the claimant has in their qualifying period.¹²

[43] The Commission had used the regional rate of unemployment for the week the Claimant's benefit period was to start to calculate the number of weeks of benefits he was entitled to.

[44] At the General Division's request, the Commission provided Supplementary Representations to the General Division with evidence concerning the regional rate of unemployment for the week preceding the week of the start of the Claimant's benefit period. The Commission's Supplementary Representations included information that said the regional rate of unemployment for the week preceding the week of the start of the benefit period was the same 7.5% rate as for the week the benefit period started. The Supplementary Representations also contained an explanation of how the rate was calculated and argument that the Claimant was still only entitled to 36 weeks of benefits.¹³

[45] The Commission provided the Supplementary Representations to the Tribunal on time by the March 9, 2022, deadline.¹⁴ However, the Tribunal did not send a copy of the Supplementary Representations to the Claimant prior to the hearing.

[46] During the hearing, the Claimant asked the General Division member whether the Commission had responded to the information the member had requested. The member briefly discussed the content of the Supplementary Representations, explaining the rate of unemployment provided for the week preceding the week of the start of the benefit period was the same as the rate for the week the benefit period started so the Commission's position remained the same that he was entitled to 36 weeks of benefits.¹⁵

¹² See section 12(2) of the EI Act.

¹³ See GD6.

¹⁴ See GD5.

¹⁵ This is what I heard from the audio recording of the General Division hearing at approximately 0:17.13.

[47] The Claimant was not provided with a copy of those Supplementary Representations during the hearing for review. The General Division did provide the Supplementary Representations to the Claimant on the day after the hearing, but did not give him a chance to respond, prior to making its decision.

[48] The Commission's Supplementary Representations contained relevant information about the rate of unemployment for the week preceding the week the benefit period began, information about how that rate was calculated and submissions about how many weeks of benefits the Claimant was entitled to.

[49] The principles of "natural justice" are concerned with procedural fairness. One of those principles is that a party has the right to know the entire case they have to meet and have a reasonable opportunity to respond.

[50] The General Division member gave the Claimant a brief oral explanation of the content of the Supplementary Submissions. The General Division member may have, in good faith, concluded it was not necessary to also provide the Claimant with a copy of the Supplementary Representations, since the information about the regional rate of unemployment for the week preceding the week the benefit period started, would not have changed the outcome about the number of weeks of benefits the Claimant was entitled to.

[51] Respectfully, it was not for the General Division to speculate about what the Claimant would have said, if he had reviewed the Supplementary Representations, or to speculate whether that argument would have made a difference to the final outcome. The Claimant is entitled to know the entire case he has to meet and to be given a reasonable opportunity to respond.

[52] The failure to provide the Claimant with an opportunity to review and respond to the Commission's Supplementary Representations prior to the decision being rendered was a breach of procedural fairness.

[53] Because the General Division didn't follow a fair process, I can intervene in this case.¹⁶ As I have found that the General Division erred, I do not need to consider the rest of the Claimant's arguments.

Fixing the error

[54] To fix the General Division's error, I can give the decision that the General Division should have given or I can refer this matter back to the General Division for reconsideration.¹⁷

[55] The Commission submits that since the Claimant did not have the opportunity to fully present his case before the General Division, his case should be the subject of a new hearing. However, it also submits that if the Appeal Division decides that it could render the decision that the General Division should have rendered, that the General Division made no errors of facts or law when it decided that the Claimant was entitled to only 36 weeks of benefits.

[56] The Claimant says that, since the General Division made an error, the remedy for that error is that he should be awarded an additional 16 to 18 weeks of benefits, or a monetary settlement of \$50,000 to \$100,000 for financial hardship, undue stress and pain and suffering. Alternatively, he is asking for additional weeks of benefits and a monetary payment combined.¹⁸

[57] The Claimant says he doesn't want to have to go through another oral hearing. However, he says if I can't order the remedies he is asking for, he wants the matter returned to the General Division for reconsideration. He wants whoever is going to give him the most favourable outcome to give the decision.

[58] I understand the Claimant doesn't want to have to go through another hearing. Because the Claimant did not have a fair opportunity to respond to the Commission's Supplementary Representations and the record is not complete, unfortunately, I cannot

¹⁶ Section 58(1)(a) of the *Department of Employment and Social Development Act* (DESD Act) gives me this authority.

¹⁷Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

¹⁸ See AD6-9.

decide this matter myself. I need to send the appeal back to the General Division so it can reconsider the case.

[59] I recognize that the Commission's Supplementary Representations only relate to the issue of the number of weeks of regular benefits and don't address the issue concerning whether the Claimant's claim should have been established as one for EI ERB benefits. However, a breach of procedural fairness invalidates the entire decision.¹⁹ So, this means both issues have to be returned to the General Division for reconsideration.

[60] I have allowed this appeal because the General Division did not follow a fair process. This does not necessarily mean that, after reconsideration by the General Division, that the outcome on the issues under appeal will necessarily be different. The onus still remains on the Claimant before the General Division to prove that his claim should have been established as a claim for EI ERB benefits and, if not, that he was entitled to more than 36 weeks of EI regular benefits.

[61] In response to the Claimant's requests for a monetary settlement or damages for pain and suffering, neither the Appeal Division nor the General Division has the authority to order any type of monetary settlement or money in the form of damages.

Conclusion

[62] The appeal is allowed.

[63] The General Division didn't follow a fair process. The appeal is sent back to the General Division for reconsideration.

Charlotte McQuade
Member, Appeal Division

¹⁹ See *Clarke v. Canada (Citizenship and Immigration)*, 2018 FC 267 at paragraph 15.