



Citation: *JH v Canada Employment Insurance Commission*, 2022 SST 1258

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

# **Leave to Appeal Decision**

**Applicant:** J. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated September 1, 2022  
(GE-22-1522)

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**Tribunal member:** Melanie Petrunia

**Decision date:** November 13, 2022

**File number:** AD-22-718

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant, J. H. (Claimant), was laid off from his job. His employer paid him severance and vacation pay totalling \$109,558. An initial claim for employment insurance (EI) regular benefits was established effective October 4, 2020.

[3] The government introduced a number of temporary measures in response to the Covid-19 pandemic. One of those measures addressed the allocation of earnings.

[4] Ordinarily, the money received by the Claimant would have been allocated to weeks in his benefit period until they were exhausted, before EI benefits were paid. Because of the temporary measures, these amounts were not allocated and the Claimant received EI benefits in the same tax year as he received the severance and vacation pay.

[5] The Claimant requested reconsideration of the Commission's decision not to allocate the money he received. The Commission maintained its decision and the Claimant appealed to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Commission properly applied the law.

[6] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to move forward. The Claimant argues the General Division made an error of law.

[7] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

## Issues

[8] The issues are:

- a) Is there an arguable case that the General Division made an error of law?
- b) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

## Analysis

[9] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?<sup>1</sup>

[10] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the Department of Employment and Social Development Act (DESD Act).<sup>2</sup>

[11] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;<sup>3</sup> or
- d) made an error in law.<sup>4</sup>

[12] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could

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<sup>1</sup> This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

<sup>2</sup> DESD Act, s 58(2).

<sup>3</sup> The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as “willfully going contrary to the evidence” and defined capricious as “marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent” *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

<sup>4</sup> This paraphrases the grounds of appeal.

argue his case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.<sup>5</sup>

### **There is no arguable case that the General Division erred in law**

[13] In its decision, the General Division reviewed the relevant amendments to the *Employment Insurance Act* (EI Act) that were brought in to respond to the Covid-19 pandemic.<sup>6</sup> It explained that these provisions mean that monies received upon separation from a job are excluded from earnings that would normally have been allocated.<sup>7</sup>

[14] The amendment applies to claimants with a benefit period starting on or after September 27, 2020. The Claimant's benefit period started October 4, 2020. The General Division decided that the Commission properly applied the law by not allocating the monies received by the Claimant.<sup>8</sup> It found that the Commission did not have discretion not to apply the law.<sup>9</sup>

[15] The Claimant argues that the General Division made an error of law. He says that the law only allowed for interim measures to be introduced by the government if they mitigated the effects of Covid-19. By not allocating the severance money he received, the Claimant argues that the economic effects of the pandemic were exacerbated. He had to return a portion of the benefits he received and was taxed at a higher rate.<sup>10</sup>

[16] The Claimant's arguments do not have a reasonable chance of success. The Claimant made these arguments at the General Division as well, and they were considered.<sup>11</sup> The General Division found that the amendments to the legislation were

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<sup>5</sup> *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

<sup>6</sup> General Division decision at para 9, citing section 153.193 of the *Employment Insurance Act* (EI Act).

<sup>7</sup> General Division decision at para 9.

<sup>8</sup> General Division decision at para 5.

<sup>9</sup> General Division decision at para 19.

<sup>10</sup> AD1-5

<sup>11</sup> General Division decision at para 16.

clear and required the Commission not to allocate the Claimant's separation monies.<sup>12</sup> It found that the law did not allow the Commission to do what the Claimant wanted and allocate his earnings to delay his benefits to a time that was better for him, financially.<sup>13</sup>

[17] There is no arguable case that the General Division made an error of law in its decision. It properly considered and applied the relevant sections of the legislation.

[18] Aside from the Claimant's arguments, I have also considered other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any factual errors.

[19] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division

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<sup>12</sup> General Division decision at para 19.

<sup>13</sup> General Division decision at para 20.