Citation: *WC v Canada Employment Insurance Commission*, 2022 SST 1539

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	W. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 7, 2022 (GE-22-1722)

Tribunal member:	Janet Lew
Decision date:	December 29, 2022
File number:	AD-22-842

Decision

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

Overview

[2] The Applicant, W. C. (Claimant), is appealing the General Division decision dated November 7, 2022.[1]

[3] The General Division determined that the Claimant did not have enough hours of insurable employment to qualify for Employment Insurance benefits. The General Division based its decision on a ruling by the Canada Revenue Agency (CRA). The General Division found that it did not have any jurisdiction to change CRA's ruling.

[4] The Claimant argues that the General Division made procedural, jurisdictional, legal, and factual errors.

[5] Before the Claimant can move ahead with his appeal, I must decide whether the appeal has a reasonable chance of success.[2] Having a reasonable chance of success is the same thing as having an arguable case.[3] 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 not giving permission to the Claimant to move ahead with his appeal.

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[1] The General Division's decision of November 7, 2022 represents the second decision that the General Division issued. The General Division first issued a decision on February 7, 2022. The Claimant appealed this first decision to the Appeal Division. On May 16, 2022, the Appeal Division allowed the appeal, having found that the Claimant did not have a fair opportunity to present his case. The Appeal Division returned the matter to the General Division for a new hearing.
[2] Under section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success".
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division failed to exercise its jurisdiction and decide whether it could rely on a ruling by the Canada Revenue Agency?

b) Is there an arguable case that the General Division failed to exercise its jurisdiction and decide whether the Claimant had insurable hours of employment?

c) Is there an arguable case that the General Division prejudged the outcome without regard for the Claimant's case?

d) Is there an arguable case that the General Division did not give the Claimant a fair hearing?

e) Is there an arguable case that the General Division misinterpreted section 90.1 of the *Employment Insurance Act*?

f) Is there an arguable case that the General Division ignored the evidence regarding the Claimant's employment?

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.[4]

[9] 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

[4] See section 58(1) of the DESD Act. 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.

an error. If it decides that the General Division made an error, then it decides how to fix that error.

Background facts

[10] To qualify for Employment Insurance benefits, a claimant must have a minimum number of insurable hours in what is called their qualifying period.

[11] The Claimant states that he worked from January 1, 2020 to June 30, 2020. He claims that he cooked for his tenant. He produced a Record of Employment that shows that he had 140 insurable hours. He says that these hours should count towards qualifying him for Employment Insurance benefits.

[12] The Canada Employment Insurance Commission (Commission) disputed the employment relationship between the Claimant and his tenant. In short, it did not accept that the Claimant had 140 insurable hours in his qualifying period.

[13] The General Division asked the Commission to seek a ruling from CRA.[5] The General Division asked the Commission to request a ruling to establish whether the Claimant had been engaged in insurable employment and, if so, his number of insurable hours.

[14] The Commission confirmed that it asked CRA for an insurability ruling.[6] According to the Commission, CRA ruled as follows:

> We received a request for a ruling on the insurability and pensionability of [the Claimant's] employment with [X. S.] from January 1, 2020 to June 30, 2020. This request originates from Service Canada.
>
> Decision(s)
>
> We have ruled that, for the period under review, [the Claimant] was not an employee or a self-employed worker with [X. S.]. As a result, there was no insurable employment.

[5] See Social Security Tribunal letter addressed to the Commission, dated December 23, 2021, at GD 6-1.
[6] See Commission's Supplementary Representations, filed January 5, 2022, at GD8 8-1.

> Explanation
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> [The Claimant] was not an employee or a self-employed worker because [he] was not paid in exchange for the work.[7]

[15] The General Division used the CRA's ruling to decide the appeal. The General Division found that it had to follow CRA's ruling that the Claimant did not have any insurable hours of employment.

Is there an arguable case that the General Division failed to exercise its jurisdiction and decide whether it could rely on a ruling by the Canada Revenue Agency?

[16] The Claimant says the General Division should have considered whether it could rely on the ruling by CRA. The Claimant says that, if the General Division had done so, it would have decided that it should not have relied on the ruling because neither he nor the Commission had requested the ruling from CRA.

[17] In fact, the Commission had asked CRA for a ruling, after the General Division prompted it to do so. The CRA responded to the Commission's request.

[18] I am not satisfied that there is an arguable case that the General Division should have disregarded CRA's ruling, even if the General Division initiated the request. In any event, the *Employment Insurance Act* does not limit the circumstances when a ruling by the CRA applies, when determining a claimant's hours of insurable employment.

Is there an arguable case that the General Division failed to exercise its jurisdiction and decide the Claimant's number of hours of insurable employment?

[19] The Claimant argues that the General Division failed to exercise its jurisdiction when it decided not to examine whether the hours he worked qualified as insurable hours. The General Division found that it had to follow CRA's ruling about whether he

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[7] See GD 9-2.

had any insurable hours of employment. The General Division found that, “Only the CRA has the right to decide how many insurable hours someone has worked”.[8]

[20] The Claimant argues that the General Division must have had the jurisdiction to decide how many insurable hours he worked. Otherwise, if the General Division could not change CRA’s ruling, he questions why the Appeal Division allowed his appeal and returned the matter to the General Division for a redetermination.[9]

[21] On May 16, 2022, I allowed the Claimant’s appeal of the General Division’s decision of February 8, 2022. The General Division gave notice to the Claimant that it intended to summarily dismiss his appeal.

[22] The General Division gave the Claimant until February 28, 2022, to provide written submissions on why it should not summarily dismiss his appeal. However, the General Division issued its decision on February 8, 2022, before the Claimant had an opportunity to file any submissions.

[23] It was clear that the General Division failed to give the Claimant a fair opportunity to argue why his case had a reasonable chance of success and should not be summarily dismissed. The General Division issued its decision 20 days before the deadline it gave to the Claimant to file submissions.

[24] It was on this basis, that the Claimant did not have a fair chance to respond to the General Division’s notice of intention to summarily dismiss, that I allowed the appeal and returned the matter to a different member of the General Division for a redetermination.

[25] In returning the matter to the General Division, I left it open for the General Division to decide how to proceed with the appeal. Indeed, the member could have opted to summarily dismiss the matter if it:

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[8] See General Division decision at para 25.
[9] See Appeal Division decision dated May 16, 2022.

(1) had given sufficient notice to the Claimant of its intention to summarily dismiss the matter,

(2) had given him a fair opportunity to make submissions as to why the matter should not be summarily dismissed, and

(3) was satisfied that the appeal did not have a reasonable chance of success.

[26] The General Division opted to hold a hearing. The General Division dismissed the Claimant's appeal. In dismissing the Claimant's appeal, the General Division cited section 90.1 of the *Employment Insurance Act*. That section reads:

> **Determination of questions**
>
> **90.1** If a question specified in section 90 arises in the consideration of a claim for benefits, a ruling must be made by an authorized officer of the Canada Revenue Agency, as set out in that section.

[27] Section 90 refers to requests for rulings made to the Canada Revenue Agency. CRA can make rulings on whether an employment is insurable, the amount of any insurable earnings, how many hours an insured person has had in insurable employment, how long an insurable employment lasts, including the dates on which it begins and ends, and who the employer of an insured person is, among other things.

[28] The Federal Court of Appeal has consistently held that questions about a claimant's hours of insurable employment must be determined by CRA and that neither the Board of Referees nor an Umpire (the predecessors to the General Division and the Appeal Division) have any jurisdiction to determine this question.

[29] As the Court of Appeal found in *Didiodato*,[10] the Board and the Umpire exceeded their jurisdiction when they determined Ms. Didiodato's number of hours of insurable employment.

[30] The General Division properly determined that it did not have any jurisdiction to decide the number of hours of insurable employment that the Claimant had. That jurisdiction resided exclusively with an officer authorized by the CRA.

[31] In essence, the Claimant is challenging CRA's ruling. However, neither the General Division nor the Appeal Division has any jurisdiction to review such rulings. Appeals of CRA rulings properly lie with the Minister of National Revenue.[11] If the Claimant disagreed with the CRA ruling, he should have exercised his right of appeal to the Minister of National Revenue, not to the General Division or to the Appeal Division.

[32] I am not satisfied that the Claimant has an arguable case that the General Division failed to exercise its jurisdiction by declining to decide the Claimant's number of hours of insurable employment.

Is there an arguable case that the General Division prejudged the outcome without regard for the Claimant's case?

[33] The Claimant argues that the General Division prejudged his case without regard for his evidence or his arguments. He says that the member did not carefully listen to what he had to say. He says that if the member had listened to him, she would have accepted that the work he did was legitimate and that he had enough hours to qualify for Employment Insurance benefits.

[34] As proof that the General Division prejudged his case, the Claimant points to the fact that the General Division member told him at the beginning of the hearing that she did not have jurisdiction to hear his case. He says she also advised that he had to go to the CRA to dispute the CRA ruling.

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[10] *Canada (Attorney General) v Didiodato*, 2002 FCA 345.
[11] See section 91 of the *Employment Insurance Act*.

[35] The Claimant stated that his appeal at the General Division was to prove the validity of his Record of Employment and the hours he worked. He had filed numerous records, including banking records and handwritten payment notes,[12] to show that he was employed and had earnings between January 1, 2020, and June 30, 2022.

[36] Short of a successful appeal to the Minister of National Revenue (or the Tax Court of Canada), as the General Division recognized, there was no evidence or any arguments from the Claimant that would have allowed it to change CRA's ruling. It had to accept CRA's rulings that the Claimant did not have the insurable earnings that he claimed he had.

Is there an arguable case that the General Division did not give the Claimant a fair hearing?

[37] The Claimant argues that the General Division did not give him a fair hearing. In particular, he says (1) that the interpretation was flawed and inadequate and (2) the General Division member did not let him call his witness to give evidence.

[38] The Claimant points to some of the issues involving interpretation. The Claimant notes that, at one point, he had to stop using the interpreter. He found he had to directly speak with the member in English with a heavy Chinese accent.[13] The Claimant relied on the interpreter, in part, to challenge CRA's ruling. He also relied on the interpreter to argue that the Commission had failed to ask CRA for a ruling.

[39] The Claimant brought his witness X. S. to each of the hearings before the General Division. The Claimant says the General Division did not allow him to call his witness, so she did not give evidence. The Claimant had hoped to rely on the witness's evidence to establish that he had enough insurable hours of employment.

[40] If the Claimant had had a reasonable chance of success at the General Division, I might have found that he had an arguable case on this point. However, as I have said

[12] See, Claimant's banking records, at RGD2-2, and [X.S.] handwritten payment notes, at RGD 2-3.
[13] See Claimant's submissions, filed November 28, 2022, at ADN 1B-6.

above, the Claimant cannot use the appeal at the General Division (or the Appeal Division) to mount what is called a collateral attack against the CRA ruling.

[41] The Supreme Court of Canada defined a "collateral attack" as an "attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment".[14]

[42] As the Federal Court said in another case, "[t] rule against collateral attack prevents parties from questioning an order made by a court of competent jurisdiction in any other proceeding except through the appeal process applicable to the order".[15]

[43] There may well have been shortcomings in the interpretation and in some of the procedural matters at the General Division. However, because the Claimant relied on the interpreter and witness to mount a "collateral attack" (by trying to help establish that he had enough hours of insurable employment), I find that ultimately the Claimant does not have an arguable case. Collateral attacks are not permitted in these circumstances.

Is there an arguable case that the General Division misinterpreted section 90.1 of the *Employment Insurance Act*?

[44] The Claimant argues that the General Division misinterpreted section 90.1 of the *Employment Insurance Act*. He says the section allows the Commission to ask CRA for a ruling at any time, "on its OWN initiative, but rather than "passively WAIT" for the [Social Security] Tribunal ORDERING it to request the CRA for the determination".[16] He suggests that the Commission should not be allowed to ask CRA for a ruling once the Social Security Tribunal is involved.

[45] Section 90(2) of the *Employment Insurance Act* lets the Commission ask for a ruling "at any time". Section 90.1 applies when a question in section 90(1) arises in the consideration of a claim for benefits. When a question arises, then CRA must make a ruling.

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[14] See *Wilson v The queen*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594 at 599.
[15] See *Strickland v Canada (Attorney General)*, 2013 FC 475 at para 43.
[16] See Claimant's submissions, filed November 28, 2022, at ADN 1B-5.

[46] Sections 90 and 90.1 of the *Employment Insurance Act* do not impose any restrictions on when the Commission may ask for a ruling. The Claimant has not referred me to any authorities to support his arguments that the Commission has to take the first steps to request a ruling from CRA. I am not satisfied that there is an arguable case on this point.

Is there an arguable case that the General Division ignored the evidence regarding the Claimant's employment?

[47] The Claimant argues that the General Division ignored the evidence regarding his employment. He says that if it had considered this evidence, it would have accepted that he had enough hours of insurable employment to qualify for Employment Insurance benefits.

[48] This argument is intertwined with the Claimant's argument that the General Division prejudged the outcome. As I indicated above, the General Division had to accept CRA's ruling on the Claimant's insurable hours. So, it did not matter whatever evidence the Claimant introduced because it would not have changed CRA's ruling.

Conclusion

[49] I am not satisfied that the appeal has a reasonable chance of success. Therefore, permission to appeal is refused. This means that the appeal will not proceed.

Janet Lew
Member, Appeal Division