Citation: *DP v Canada Employment Insurance Commission*, 2023 SST 180

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | D. P. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated December 9, 2022 (GE-22-3019) |

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| **Tribunal member:** | Melanie Petrunia |
| **Decision date:** | February 18, 2023 |
| **File number:** | AD-22-950 |

## Decision

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

## Overview

[2] The Applicant, D. P. (Claimant), stopped working and applied for employment insurance (EI) benefits on February 28, 2020. His benefit period was effective March 1, 2020.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was entitled to 36 weeks of regular EI benefits. When these benefits ended, the Claimant requested a reconsideration and said that his claim should have been established as an Employment Insurance Emergency Response Benefit (EI-ERB).

[4] The Commission decided that he was properly paid 36 weeks of regular benefits based on when he applied for benefits, the unemployment rate and the insurable hours in his qualifying period.

[5] 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.

[6] 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.

## Preliminary matters

[7] After filing his request for leave to appeal, the Claimant sent in a new Record of Employment (ROE).[1] He says that this was not considered by the Commission and shows that he had more insurable hours.

[8] I have not considered the additional ROE. This ROE is for the period from February 20 to 24, 2019. The hours reflected on the ROE are outside of the Claimant`s qualifying period, which is from March 3, 2019 to February 29, 2020. The ROE is new evidence that was not before the General Division, and it is irrelevant to the issue because it reflects hours outside of the Claimant's qualifying period.

## Issues

[9] Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

## I am not giving the Claimant permission to appeal

[10] 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?[2]

[11] 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).[3]

[12] 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;

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[1] ADN1A-2
[2] 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.
[3] DESD Act, s 58(2).

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;[4] or

d) made an error in law.[5]

[13] 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 argue his case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.[6]

## – History of the Claimant's appeal

[14] The Claimant had an earlier unsuccessful appeal to at the General Division.[7] He appealed this decision to the Appeal Division and his appeal was allowed. The Appeal Division decided that the matter had to be returned to the General Division for a new hearing.[8]

[15] The Appeal Division found that the Claimant wasn't given a chance to review and respond to the Commission's representations at the first hearing. Because of this, it found that the General Division didn't follow a fair process. The Appeal Division decided to send the Claimant's matter back to the General Division for a new hearing.

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[4] 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.
[5] This paraphrases the grounds of appeal.
[6] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[7] See AD1-A for General Division decision in file GE-22-542, dated March 11, 2022.
[8] See Appeal Division decision in file AD-22-199 dated May 4, 2022.

– **No arguable case that the General Division erred**

[16] The Claimant argues that his appeal should have been allowed at the General Division when the matter was returned for a new hearing. He says that it was not supposed to go back for a new appeal. He argues that he should have been granted the relief that he requested when the Appeal Division found that the earlier hearing was procedurally unfair.[9]

[17] The Claimant argues that the Commission did not attend the hearing and answer his questions. He says that is an unfair practice. The Claimant also argues that he should be entitled to extra weeks of benefits under the EI-ERB because he believed that his claim would be transitioned to a claim for the EI-ERB.[10]

[18] The Claimant argues that he was coerced by Service Canada agents to apply for benefits right away. He says that he requested information from Commission about his past application periods, but they did not provide it and weren't present at the hearing.[11]

[19] The Claimant says that the Commission did not provide him with any more ROEs or attend the hearing to answer to his ROE inquiries. He claims that he stated at the hearing before the General Division that he did not know if he had more insurable hours and has no way of confirming his ROEs.[12]

[20] The Claimant states that he requested extended EI benefits and a monetary payment because of the hardship, stress, and unfair practices he has experienced. He questions why the Appeal Division is unable to award damages. He says that he has overpaid EI premiums, and this is government extortion. He also argues that he told the General Division that the Commission didn't provide evidence about the reasons for his layoff. He says he lost his job because of Covid.[13]

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[9] See ADN1-1 at paras 1 and 2.
[10] See ADN1-1 at paras 4 and 5.
[11] See ADN1-2 at para 6.
[12] See ADN1-2 at paras 7-9.
[13] See ADN1-2 at paras 10-13.

[21] The Claimant argues that the General Division made the same errors of law that the member at his first hearing made. He says that the Appeals Division had confirmed that these errors were unfair practices.

[22] The Appeal Division found that the General Division failed to provide a fair process. This was because the Commission had filed supplementary submissions that the Claimant did not receive in advance of the hearing. The Claimant did not have an opportunity to review these submissions.[14] It was for this reason that the Appeal Division sent the matter back to the General Division for a new hearing.

[23] In the Appeal Division decision, the member specifically states that the outcome after reconsideration by the General Division may not be different. It notes that the onus is still on the Claimant to prove that his claim should have been set up as a claim for EI-ERB or that he was entitled to more than 36 weeks of EI regular benefits.[15]

[24] There is no arguable case that the General Division erred by having a new hearing. This is what was decided by the Appeal Division. I do not agree with the Claimant that he should have been granted the relief that he requested by the General Division without a new hearing. The General Division also addressed this argument by the Claimant and found that the matter had been returned for a new hearing.[16]

[25] The General Division addressed the Claimant arguments that is unfair that the Commission did not attend the hearing. It found that the Tribunal has no authority to compel parties to attend a hearing.[17]

[26] The Appeal Division had also previously dealt with this argument by the Claimant and found that there was no breach of procedural fairness when the General Division considered the Commission's evidence and arguments even though they did not attend

[14] Appeal Division decision at para 52.
[15] Appeal Division decision at para 60.
[16] General Division decision at para 10.
[17] General Division decision at para 12.

the hearing.[18] There is no arguable case that the General Division erred in law or failed to provide a fair process.

[27] The General Division considered whether the Claimant's EI claim should have been established as an EI-ERB claim. It found that he applied for benefits on February 28, 2020, and his benefit period started on March 1, 2020. The General Division found that it was properly set up as an EI regular benefit claim and his benefit period cannot be changed to start at a later date.[19]

[28] The General Division addressed the Claimant's arguments that he was coerced by Service Canada agents to apply for benefits soon after he lost his job. It was not persuaded by the Claimant's arguments and found that the Claimant made a choice to go to a Service Canada centre and apply for benefits. The General Division found that he was not forced to apply when he did.[20]

[29] The General Division considered the Claimant's arguments and made a finding of fact based on the evidence before it. There is no arguable case that the General Division based its decision on an error of fact or made an error of law when it decided that the Claimant made a choice to apply for benefits when he did.

[30] The General Division's decision addresses the Claimant's ROEs. It found that he had a total of 1,688 hours of insurable employment during his qualifying period. This was based on the three ROEs that were part of the file. The Claimant wasn't sure if it was accurate but felt the number of hours was close.[21]

[31] The General Division considered the Claimant's position that he should be able to use hours accumulated outside of his qualifying period. It found that hours accumulated outside of the qualifying period could not be used. The General Division relied on a decision of the Federal Court of Appeal.[22]

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[18] Appeal Division decision at para 31.
[19] General Division decision at para 22.
[20] General Division decision at paras 26 to 28.
[21] General Division decision at paras 39 to 41.
[22] General Division decision at para 43.

[32] There is no arguable case that the General Division based its decision on an error of fact. It considered all of the ROEs that were before it when it determined the Claimant's insurable hours. There is no arguable case that the General Division made an error of law when it decided that it could not consider hours outside of the Claimant's qualifying period.

[33] The General Division also addressed the Claimant's arguments that he should be entitled to a monetary settlement or damages due to unfair practices. The General Division found that it does not have the authority to award damages.[23] There is no arguable case that the General Division made an error of law. The Appeal Division had also found that the Tribunal cannot order damages.

[34] The Claimant argued at the General Division that he often overpays EI premiums. Based on advice from an accountant, he did not file tax returns for a few years. The Claimant then learned that he could not recover overpaid EI premiums after 4 years. He argued that this was unfair.[24]

[35] The General Division acknowledged the Claimant's arguments but found that it was required to apply the EI Act and Regulations. It does not have the authority to refund overpaid premiums.[25] There is no arguable case that the General Division made an error of law when it made this determination.

[36] The Claimant's appeal was properly heard by the General Division at a new hearing, as directed by the Appeal Division. The Claimant is advancing the same arguments that he made at the General Division. These arguments were all fully considered and addressed by the General Division in its decision.

[37] Aside from the Claimant's arguments, I have also considered other grounds of appeal.

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[23] General Division decision at para 46.
[24] General Division decision at para 48.
[25] General Division decision at para 49.

[38] The Claimant has not pointed to any errors of jurisdiction on the part of the General Division, and I see no evidence of such errors. There is no arguable case that the General Division made any errors of law, based its decision on any important errors of fact or failed to provide a fair process.

[39] 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

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

Melanie Petrunia
Member, Appeal Division