Citation: *RP v Canada Employment Insurance Commission*, 2023 SST 304

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 23, 2022 (GE-22-1750)

Tribunal member:	Neil Nawaz
Decision date:	March 16, 2023
File number:	AD-23-115

Decision

[1] I am refusing the Claimant permission to appeal because he does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant is an American citizen who worked in Canada from September 3, 2019, to May 12, 2020. He applied for employment insurance (EI) benefits on September 7, 2021 — after his work permit had expired and after he had moved back to the United States.

[3] The Canada Employment Insurance Commission (Commission) determined that, as resident of the United States, the Claimant was entitled to no more than 14 weeks of EI benefits. The Claimant disagreed. He thought that he was entitled to more benefits. He felt that he was being discriminated against on the basis of his residence. He appealed the Commission's decision to this Tribunal's General Division.

[4] The General Division agreed with the Commission. It found that the Claimant had received what he was due under the terms of the *Employment Insurance Act* (EI Act). It also refused to hear his argument that the Commission had violated his equality rights under the *Canadian Charter of Rights and Freedoms* (Charter). It found that the Claimant's written submissions did not meet the requirements to have a hearing on a Charter issue.

[5] The Claimant is now seeking permission to appeal the General Division's decision. He alleges that the General Division made a legal error when it decided not to hear his Charter argument.

Issue

[6] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;

- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

[7] Before the Claimant can move ahead with his appeal, I have to decide whether it 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 Claimant doesn't have an arguable case, this matter ends now.

[8] I have to decide the following question: Is there was an arguable case that the General Division erred in refusing to hear the Claimant's Charter argument?

Analysis

[9] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

There is no arguable case that the General Division misapplied the EI Act

[10] The General Division found that the Claimant, as a resident of the United States, was entitled to 14 weeks of EI benefits. It based this finding on the following factors:

- EI claimants are not eligible to receive benefits outside Canada unless they fall under the conditions set out in section 55(6) of the EI Regulations;
- Since the Claimant did meet those conditions, he was permitted to receive EI benefits even though he was living in the United States;
- Section 55(7) determines the number weeks of benefits that an eligible non-resident EI claimant can receive;

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[1] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[2] See DESDA, section 58(2).
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- During his qualifying period, which began on February 23, 2020, the Claimant accumulated 759 hours of employment, giving him 14 weeks of EI benefits;
- Although Commission staff might have given the Claimant misleading advice about his EI entitlement, claimants are obliged take reasonable steps to learn about their rights under the EI Act.

[11] These findings are consistent with the law and appear to accurately reflect the evidence on file. The Claimant may find his EI entitlement unfair, but the General Division had no choice but to follow the letter of the law. It could not consider any of the extenuating circumstances that led the Claimant to apply for EI after he had left Canada. Nor could the General Division grant the Claimant additional benefits on purely compassionate grounds.

There is no arguable case that the General Division inappropriately barred the Claimant from raising a Charter issue

[12] The Claimant has always argued that, because he received less EI than he would have if he had remained in Canada, he was a victim of discrimination based on his place of residence. He alleges that the General Division unfairly and illegally prevented him from arguing that such differential treatment violated his equality rights. He argues that a "procedural formality" should not have stopped the General Division from considering the merits of his Charter claim.

[13] I don't see a reasonable chance of success for this argument.

[14] The *Social Security Tribunal Regulations* place conditions on claimants who wish to raise constitutional issues. The Regulations also give the Tribunal discretion to refuse to hear arguments that it deems inadequate.

[15] Section 20 of the Regulations reads as follows:

> 20(1) If the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the regulations

> made under any of those Acts is to be put at issue before the Tribunal, the party raising the issue must
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> (a) file a notice with the Tribunal that
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> (i) sets out the provision that is at issue, and
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> (ii) contains any submissions in support of the issue that is raised;
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> (b) at least 10 days before the date set for the hearing of the appeal or application, serve notice of that issue on the persons referred to in subsection 57(1) of the *Federal Courts Act* and file a copy of the notice and proof of service with the Tribunal.
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> 20(2) If the proof of service required by paragraph (1)(b) has not been filed in accordance with that paragraph, the Tribunal may, on its own initiative or on the request of a party, adjourn or postpone the hearing.
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> 20(3) If a notice is filed under paragraph (1)(a), the time limits for filing documents or submissions set out in these Regulations do not apply and the Tribunal may direct the parties to file documents or submissions within the time limits it establishes.[4]

[16] In his notice of appeal to the General Division, the Claimant argued that the rules used to calculate his weeks of EI benefits violated the Charter.[5] The presiding member reviewed the Claimant's submissions on this issue and found them to be lacking. She asked the Claimant to clarify what sections of the EI Act he thought were unconstitutional and what grounds of discrimination under section 15 of the Charter he intended to rely on. On several occasions, the member granted the Claimant adjournments to allow him more time to make his case.

[17] In the end, the member ruled that the Claimant's submissions did not meet the section 20(1) requirements to have a hearing on the Charter issue:

> The jurisprudence of courts of appeal, including the Supreme Court of Canada, has consistently held that residency is not an

[4] The *Social Security Tribunal Regulations* were revised on December 5, 2022. The Claimant's appeal is subject to the Regulations that were in effect until that date.
[5] See Claimant's notice of appeal to the General Division dated May 16, 2022.

> analogous ground of discrimination, mostly because it does not have the immutable character necessary to be recognized as such.[6]

[18] The member returned the appeal to the regular stream, and the General Division soon held a hearing on the remaining issues.

[19] The Federal Court has made it clear that, even after a claimant has filed a notice under section 20(1)(a) of the Regulations, the General Division is within its authority to demand additional submissions and to deny the claimant permission to pursue a Charter argument if it finds those submissions insufficient:

> Section 20 appears under the heading "Constitutional Issues" in the SSTRs which indicates that each provision is a part of the framework governing constitutional challenges. Section 20 envisions a two-step process: (1) the applicant files a notice under s. 20(1)(a) and (2) the GD can accept further submissions within its own timelines. The second step is distinct from the first.
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> Here the AD failed to consider this second step. It concluded that the GD did not have authority to require a record, because once a notice is filed under section 20(1)(a) with minimal submissions, the challenge is procedurally valid. But the AD did not consider s. 20(3), which gives discretion to the GD to change time limits and to "direct the parties" to file documents and submissions. **There is nothing limiting the GD's discretion in this regard** [emphasis added].[7]

[20] The Federal Court went on to find that the General Division can't consider a Charter claim properly if the submissions accompanying it lack "particularity."

[21] This approach is consistent with direction from the Supreme Court of Canada, which held that Charter issues cannot be decided in a factual vacuum.[8] For this reason, a special process was established to force claimants raising Charter issues to specify what legislation they want to challenge and how they intend to do so. Once these minimal requirements are met, then the General Division may demand a more detailed

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[6] See General Division's letter dated November 15, 2022.
[7] See *Canada (Attorney General) v Stewart*, 2018 FC 768, paragraphs 43–44.
[8] See *Mackay v Manitoba*, [1989] 2 SCR 357, paragraph 46.

document — referred to as a record — which includes evidence, submissions, and authorities that the claimant intends to rely on. If, as in this case, the Claimant fails to outline a coherent constitutional argument, then the General Division has the right to end the special process and return the appeal to the regular stream.

Conclusion

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

Neil Nawaz
Member, Appeal Division