Citation: *P v Canada Employment Insurance Commission*, 2023 SST 712

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Standing to Seek Leave to Appeal Decision

Applicant:	P
Respondent: **Representative:**	Canada Employment Insurance Commission
Added Party: **Representative:**	A. G.

Decision under appeal:	General Division decision dated September 22, 2022 (GE-22-1271)

Tribunal member:	Stephen Bergen
Decision date:	June 5, 2023
File number:	AD-23-229

Decision

[1] The Applicant does not have standing to appeal, so I must refuse leave to appeal. The appeal will not proceed.

Overview

[2] The Applicant in this case is P, who was the employer of A. G., the Claimant. I will refer to the Applicant as the Employer and to A. G. as the Claimant.

[3] The Employer is asking for leave to appeal a decision of the General Division of the Social Security Tribunal (Tribunal).

[4] The Employer does not dispute the Claimant's entitlement to benefits. It wishes to appeal the decision document because it believes the decision is defamatory. The Employer argues that the General Division acted unfairly by accepting the Claimant's evidence without conducting an investigation.

Preliminary matters

Is the appeal late?

[5] The appeal is not late, so I do not need to consider whether to grant an extension of time.

[6] The General Division decision is dated September 22, 2022. The Employer first notified the Appeal Division of its intention to appeal the General Division decision on February 3, 2023, more than 4 months after the decision.

[7] According to the *Social Security Tribunal Rules of Procedure* (SST Rules), an appellant must file their application to the Appeal Division within 30 days of the date the decision is communicated in writing to them.[1]

[1] See *Social Security Tribunal Rules of Procedure, section 26(2). See also section 57 of the Department of Employment and Social Development Act* (DESDA).

[8] The SST Rules also say that the Appeal Division may presume that a party has received the decision 10 days after the day that the General Division sent it by regular mail or; the next business day, if it was sent electronically.[2]

[9] However, I cannot find that the Employer received the decision in accordance with the presumption. The General Division did not send the Employer the decision because it only sends its decisions to parties to its proceedings. The Employer had not participated in the General Division process and the General Division had not added the Employer as a party.

[10] Furthermore, the Employer could give the exact date when it actually received the decision. It says the Claimant sent a copy to its general mailbox and that it received the decision on January 27, 2023. The Claimant notes that it has been many months since the decision was issued, and says that the Employer knew about the case and should have checked. However, the Claimant does not say anything about when the Employer received the decision.

[11] The Canada Employment Insurance Commission (Commission) accepts January 27, 2023, as the date that the decision was communicated to the Employer.

[12] I accept that the decision was communicated in writing to the Employer on January 27, 2023. The Employer applied to appeal the decision within a few days and well within the 30-day deadline.

Does the Employer have Standing to Appeal?

[13] The Employer does not have standing to appeal.

– Employer's reason for seeking leave to appeal the General Division decision

[14] The employer gave three reasons for why it believes it should be granted standing to appeal the General Division decision.

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[2] See *SST Rules,* section 22.

a) The Claimant used the General Division decision to advance his claim at the Labour Relations Board

b) The Tribunal told the Employer that the General Division decision would not affect any other governing body.

c) The Employer believes it has been defamed by the recitation of the Claimant's testimony in the General Division decision and/or by the General Division member's findings of fact.

– **Test for "standing"**

[15] The law says that "a decision of the General Division may be appealed to the Appeal Division by any person who is "the subject of the decision."[3] That means I must find that the Employer is the subject of the General Division decision before I can even decide whether to grant leave to appeal.

[16] The Appeal Division has considered the meaning of "subject of the decision" before. A similar case involved an employer who was concerned with how an adverse General Division decision might affect the course of other active civil and administrative proceedings.[4] The employer had requested to be added as a party at the General Division, but the General Division found that it did not have a "direct interest" in the proceedings. It refused to add the employer in a preliminary decision. When the General Division issued its decision, the employer tried to appeal the General Division decision.

[17] According to the definition of "party" in the SST Rules, applicants who were parties before the General Division are also parties at the Appeal Division. In *X*, the Appeal Division determined that parties at the General Division qualify as "the subject of the decision," and have standing to appeal to the Appeal Division.[5]

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[3] See Section 55 of the DESDA.
[4] *X v Canada Employment Insurance Commission and SS* - 2020 SST 845
[5] Ibid. at par 85.

The employer was not a party at the General Division

[18] The General Division wrote the Employer on April 29, 2023, to explain that it could request to be added, but would have to show that it had a direct interest in the decision. The General Division gave the Employer an initial deadline of May 9, 2022, to decide if it wanted to be an added party.

[19] The Employer responded to the first letter by email on May 9, 2022, which was the deadline. It said that it had only just received the Tribunal's letter. It noted that the Claimant had a case open with the Ontario Labour Relations Board (OLRB) and that it was unsure how the Employment Insurance (EI) appeal would affect the OLRB matter. On the same day, the Employer spoke to registry staff at the Tribunal to indicate that it would need to seek legal advice before responding.

[20] The General Division gave the employer two more extensions to the deadline, so that it could decide if it wanted to ask to be added as a party. In its last extension, it gave the employer until June 24, 2022. The subject line of the letter read: "Final Deadline for Potential Added Party Response."

[21] On June 15, 2022, the Employer called to inform the Tribunal that it did not want to be added as a party at the General Division. The Employer said that it had been waiting for a ruling from another Tribunal (presumably the OLRB). It added that this other ruling was not favourable to the Claimant, and that it understood that the EI appeal would not conflict with the other ruling.[6]

[22] The Employer made no further request to be added as a party, and the General Division did not add the Employer a party to the proceeding. The General Division hearing began on August 16, 2022, and completed on September 22, 2022, without the participation of the Employer.

[6] The OLRB released its decision on June 2, 2022. See AD1D-22.

The Employer is not the "subject of the decision"

[23] There may be circumstances when an applicant may be the subject of the decision even though it was not a party at the General Division.

[24] According to the Appeal Division in *X*, the applicant must first demonstrate the same "direct interest" that the Tribunal requires from an applicant who wants to be added to an existing appeal. In other words, they would have to show that the decision affected their legal rights, imposed legal obligations on them, or somehow prejudiced their interests.[7]

[25] However, *X* said that having a direct interest is not enough. For the applicant to qualify as the subject of the decision, their "direct interest" must concern their own legal rights or legal obligations **arising from the General Division decision**.[8]

[26] The "subject *matter*" of the decision must concern the applicant and the subject matter of the decision depends on the purpose of the General Division decision. That means I need to consider the legislation that governs the rights or obligations affected by the decision.

[27] In this case, the governing legislation is the *Employment Insurance Act* (EI Act). For an applicant to have standing to appeal, the Employer must show that the General Division decision may affect its entitlement or its liability **under the EI Act**.[9]

– **Application of test**

Use of General Division decision in another proceeding

[28] The Employer argued that it is the subject of the decision because the Claimant used the General Division decision in his OLRB claim.

[29] The Claimant filed a dispute or complaint with the OLRB. The OLRB decided that complaint in favour of the Employer on June 2, 2022. The Claimant asked for a

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[7] *Forest Ethics Advocacy Association* v *Canada (National Energy Board)*, 2013 FCA 236.
[8] *Supra* note 1, para 116.
[9] *Ibid.*

reconsideration which the OLRB denied on July 11, 2022. He asked for a second reconsideration which the OLRB considered, even though this was outside its usual practice. However, the OLRB ultimately denied this reconsideration as well, on October 17, 2022, after the General Division decision was issued. The Claimant applied to the OLRB again in the spring of 2023. This time the Claimant included a copy of the General Division decision in its application, as the employer confirms.[10]

[30] The Employer has not demonstrated how the General Division decision resulted in either actual or potential prejudice to the OLRB matter. The General Division decision made no difference in the OLRB proceedings. As the Employer acknowledges, the OLRB confirmed on April 13, 2023, that it would not reopen its decision.[11]

[31] At the time when the Employer was considering if it should ask to be added to the General Division appeal, it might have been able to show that it had a direct interest. It's possible that the General Division decision could have affected its interests in the collateral OLRB proceeding. However, that would not have meant that the employer was "the subject of the decision," with standing to bring an appeal to the Appeal Division. The collateral interest is not an entitlement or liability under the EI Act.

Advice from Tribunal

[32] The Employer argued that it did not participate at the General Division because the Tribunal said that the General Division decision would not affect any other proceeding.

[33] The Employer seems to be arguing that it should be granted standing as though it were a party at the General Division. It implies that it would have been a party at the General Division if only the Tribunal had given it correct advice.

[34] The Tribunal has no record that a Tribunal officer ever told the Employer how the decision would affect other proceedings. However, the Tribunal's records show that the Employer intended to seek legal advice before deciding whether to participate.

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[10] See AD3-1
[11] See AD8-24.

Regardless of whether the Employer obtained this advice, it seems that the Employer was not content to rely on what, if anything, the Tribunal officer said.

[35] I am not satisfied that the Tribunal discouraged the Employer from its request to be added, that the Employer relied on advice from the Tribunal to decide if it wanted to be added, or that the Claimant's use of the General Division decision affected any other proceeding.

[36] Furthermore, I cannot presume that the General Division would have added the Employer as a party at its request. The Employer would have had to satisfy the General Division that it had a direct interest in the decision.

[37] I am not going to grant standing to the Employer because it regrets that it did no task to be added as a party at the General Division.

The decision is defamatory

[38] The Employer also believes it is the "subject of the decision" because it considers the Claimant's testimony, as summarized in the decision, to be defamatory. It wrote as follows: "We are appealing the decision, not to revert what [the Claimant] has received from the SST, but to appeal the published document that defames our organization."

[39] I acknowledge that the Claimant's testimony - as it appears in the General Division decision - may be offensive to the Employer. He may also disagree with the General Division's findings and conclusion. However, the Employer had an opportunity to head off the potential prejudice of the decision, by showing the General Division how its interests were likely to be prejudiced if it could not participate. If the General Division had added the Employer as a party, it would have had standing to appeal the decision.

[40] The fact that the public record of the Claimant's testimony offends the Employer does not make the Employer the subject of the decision. This would mean that almost anyone who did not like what a witness said about them (at least if they figured prominently in the witness' testimony) could be granted standing.

Conclusion on Standing

[41] The Employer does not have standing to appeal to the Appeal Division.

[42] Because I am not allowing the Employer to appeal, there is no need for me to consider whether I should grant leave to appeal.

Stephen Bergen
Member, Appeal Division