Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 881

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 9, 2023 (GE-22-2194)

Tribunal member:	Candace R. Salmon
Decision date:	June 30, 2023
File number:	AD-23-140

Decision

[1] I am refusing leave (permission) to appeal because the Claimant doesn't have an arguable case. The appeal will not proceed.

Overview

[2] A. M. is the Claimant. He established a claim for Employment Insurance (EI) Emergency Response Benefits (ERB). He was paid EI ERB until the benefit program ended, and his claim was changed to EI regular benefits.

[3] The Claimant's regular benefits started on October 4, 2020, and ended on March 6, 2021, because he returned to work. He later lost his job and applied to renew his claim for benefits. The claim was renewed, and he received EI regular benefits from June 17, 2021, until October 2, 2021, when his claim ended.

[4] The Claimant qualified for a new benefit period starting on October 3, 2021. He received 27 weeks of regular benefits, between October 3, 2021, and April 16, 2022. He believes he should have received 50 weeks of EI benefits on his October 3, 2021, claim, instead of 27 weeks.

[5] He appealed the Canada Employment Insurance Commission (Commission) decision to pay him 27 weeks of benefits to the Tribunal's General Division. The General Division dismissed the appeal.

[6] The Claimant wants to appeal the General Division decision to the Appeal Division. He needs permission for his appeal to move forward.

[7] I am refusing permission to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[8] The issues in this appeal are:

- Is there an arguable case that the General Division did not provide a fair process?

- Is there an arguable case that the General Division failed to exercise its jurisdiction when it refused to consider all the issues identified by the Claimant?

- Is there an arguable case that the General Division made an error of fact about the employment rate in the Claimant's region?

- Is there an arguable case that the General Division made an error of law about the one-time credit of 300 hours?

- Is there an arguable case that the General Division made an error of law by not following previous Tribunal decisions?

The test for getting permission to appeal

[9] An appeal can only proceed if the Appeal Division gives permission to appeal.[1] I must be satisfied that the appeal has a reasonable chance of success.[2] This means that there must be some arguable ground upon which the appeal might succeed.[3]

[10] To meet this legal test, the Claimant must establish that the General Division may have made an error recognized by the law.[4] If the Claimant's arguments do not

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[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) says that I must refuse leave to appeal if I find the "appeal has no reasonable chance of success." This means that I must refuse permission for the appeal to move forward if I find there isn't an arguable case (*Fancy v Canada (Attorney General)*, 2010 FCA 63 at paragraphs 2 and 3).
[2] See section 58(2) of the DESD Act.
[3] See, for example, *Osaj v Canada (Attorney General)*, 2016 FC 115.
[4] The relevant errors, known as "grounds of appeal," are listed under section 58(1) of the DESD Act. These errors are also explained on the Application to the Appeal Division. See page AD1-3.

show an error that has a reasonable chance of success on appeal, I must refuse permission to appeal.[5]

There is no arguable case that the General Division failed to ensure a fair process

[11] The Claimant says that the General Division didn't follow the rules of procedural fairness.[6] He alleges that the General Division was biased against him, because it preferred the Commission's statements to his.

[12] Bias is a serious allegation. It is concerned with a decision maker who does not approach their decision-making with an open mind. The law says that such an allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[7]

[13] The burden of establishing bias lies with the party alleging its existence, and the threshold for finding bias is high. The legal test for establishing bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the General Division member, consciously or unconsciously, would not decide the case in a fair manner.[8]

[14] The Claimant says that the General Division was biased because the Member relied on the Commission's evidence and held it in a "higher regard" than his. The record doesn't support this as accurate. The General Division addressed the Claimant's evidence and submissions in its decision. It found that the Claimant didn't present any evidence to convince the Member that the employment rate was incorrect or that he was entitled to additional weeks of benefits.[9]

[15] The General Division's job is to weigh the evidence and decide what to rely on when making a decision. Part of that process means one party's evidence will often be preferred over another party's evidence, depending on the strength or weight the

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[5] This is the legal test described in section 58(2) of the DESD Act.
[6] See page AD1-3.
[7] See *Arthur v Canada (Attorney General)*, 2001 FCA 223.
[8] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).
[9] See General Division decision at paragraph 24.

decision maker gives to the evidence. Following this process and deciding which evidence to prefer is part of the General Division's job, not a failure to provide a fair process. The Claimant didn't provide any evidence of bias, other than to argue that the General Division preferred the Commission's evidence.

[16] There is no arguable case that the General Division was biased against the Claimant because preferring the Commission's evidence does not support that the General Division was predisposed against the Claimant.

[17] The Claimant also submits that his right to be heard was breached. He said that the Commission and General Division could have asked him why he believed the employment rate data was inaccurate. He says that since neither inquired, he was not allowed to fully present his concerns and have his views considered.

[18] This isn't supported by the record. I listened to the hearing recording, which was approximately one hour and twenty minutes in length. The Claimant was given multiple opportunities to explain his positions. During the hearing, he explained his position on the employment rate.[10]

[19] There is no arguable case that the General Division was procedurally unfair because the Claimant was given a full and fair opportunity to provide his evidence and make his submissions.

There is no arguable case that the General Division failed to exercise its jurisdiction when it refused to consider all the issues identified by the Claimant

[20] The Claimant submits that the General Division made an error of jurisdiction. An error of jurisdiction means that the General Division didn't decide an issue that it had to decide or decided an issue that it didn't have the authority to decide.

[10] General Division hearing recording, at 29:45.

[21] The Claimant says that the General Division focused on just one issue: the number of weeks of EI benefits to which he was entitled. He says that the Commission, and then the General Division, ignored the many other issues he highlighted.

[22] The *Employment Insurance Act* (EI Act) says that a person who is the subject of a Commission decision can ask the Commission to reconsider it. So long as the request meets the requirements, the Commission must reconsider its decision. When it issues a reconsideration decision, the Claimant can appeal the decision to the Tribunal's General Division. This is the basis for the General Division's jurisdiction—it comes from the Commission's reconsideration decision.[11]

[23] This means there is no jurisdiction issue in limiting the appeal to the issue on the reconsideration letter, because that is the legal issue before the Tribunal. The law says that the General Division may adjudicate a "decision of the … Commission" and may confirm, rescind, or vary the decision, but it can only act where the Commission has made a decision.[12] There is no arguable case that the General Division failed to exercise its jurisdiction by refusing to consider other issues.

There is no arguable case that the General Division made an error of fact about the employment rate in the Claimant's region

[24] The Claimant argues that the General Division based its decision on important mistakes about the facts of his case. I can't intervene just because the General Division made a mistake about a minor fact. The law only allows me to intervene if the General Division, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[13] A perverse or capricious finding of fact is one where the finding contradicts or isn't supported by the evidence.[14] This involves considering the following questions:

- Does the evidence squarely contradict one of the General Division's key findings?

[11] See *Employment Insurance Act*, sections 112 and 113.
[12] See DESD Act, section 54(1).
[13] See section 58(1) of the DESD Act.
[14] See *Garvey v Canada (Attorney General)*, 2018 FCA 118 at paragraph 6.

- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[25] None of the Claimant's allegations meet the criteria above in a way that would allow me to intervene in his case. In his submission to the Appeal Division, he reviewed the unemployment rate trends. He said that the Statistics Canada data may be incorrect, because it, "is generally accepted and widely reported that unemployment increased during the COVID-19 pandemic."[15] He says that it is, "self-evident when you look at the data, the data is not correct." He didn't provide any evidence beyond his opinion that this must be the case.

[26] The General Division based its decision about the employment rate on evidence provided by the Commission.[16] The Claimant did not provide the General Division with any conflicting or contradictory evidence. Therefore, there is no arguable case that the General Division made an error of fact about the employment rate.

There is no arguable case that the General Division made an error of law about the one-time credit of 300 hours

[27] The Claimant says the General Division made a legal mistake because it refused to apply the one-time credit of 300 hours to his October 2021 claim. He says the "courts have spoken" on this and found the Commission's argument that the "credit is applied to the first claim regardless of whether it is needed" was not accepted.[17]

[28] The General Division considered the one-time credit of 300 hours. It found that the credit could not be used for the October 2021 claim because it was used in the October 2020 claim. It couldn't be applied a second time. Further, the credit was only available for first claims, beginning between September 27, 2020, and September 25, 2021.[18]

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[15] See page AD1-9.
[16] See "Economic Region" and "Unemployment Rate for the EI Economic Regions" information at pages GD3-48 to GD3-52.
[17] See page AD1-10, point 2.
[18] See General Division decision at paragraph 24(2).

[29] The Claimant referred to specific decisions that he believed were in his favour.[19] I will address the decisions below. There is no arguable case that the General Division made a mistake when it refused to apply the 300-hour credit to the Claimant's October 2021 claim, because the credit wasn't available at the time the claim began.

There is no arguable case that the General Division made an error of law by not following previous decisions

[30] The Claimant says the "courts have spoken" and agree that the 300-hour credit doesn't have to apply to the first claim if the claimant already has enough hours or it isn't an advantage to them.[20] He suggests the Tribunal should have to follow this decision.

[31] The decision in question is *NK v Canada Employment Insurance Commission*.[21] This is a Tribunal decision. In *NK*, the General Division found the Commission was wrong to apply the 300-hour credit to the claimant's first claim because she already had enough hours to establish a benefit period. The General Division said the credit should remain available to help the claimant establish a later claim, when it was needed.[22]

[32] This decision was appealed and overturned.[23] Both parties agreed that the General Division made a legal mistake. The Appeal Division replaced the decision by finding that the 300-hour credit had to be applied to the first claim.[24]

[33] In addition, Tribunal members don't have to follow their colleagues' decisions. They are only required to follow decisions from superior courts, like the Federal Court and Federal Court of Appeal. The Claimant's arguments in this case don't refer to any binding decisions from the courts.

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[19] See page AD1-10, point 2.
[20] See page AD1-10, point 2.
[21] See *NK v Canada Employment Insurance Commission*, 2021 SST 602.
[22] See *NK v Canada Employment Insurance Commission*, 2021 SST 602 at paragraphs 41 and 42.
[23] See *Canada Employment Insurance Commission v NK*, 2021 SST 601.
[24] See *Canada Employment Insurance Commission v NK*, 2021 SST 601 at paragraph 4.

[34] Therefore, there is no arguable case that that the General Division made an error of law by not following the rationale of previous decisions.

There's no arguable case that the General Division made a reviewable error

[35] The Tribunal must follow the law. An appeal to the Appeal Division is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the *Department of Employment and Social Development Act* .

[36] I recognize the Claimant disagrees with the General Division decision. However, that is not a ground of appeal.

[37] Aside from the Claimant's arguments, I reviewed the entire file, listened to the hearing recording, and examined the General Division decision. The General Division summarized the law and used evidence to support its decision. I didn't find relevant evidence that the General Division might have ignored or misinterpreted.[25]

Conclusion

[38] This appeal has no reasonable chance of success. For that reason, I'm refusing permission to appeal.

[39] This means that the appeal will not proceed.

Candace R. Salmon
Member, Appeal Division

[25] See *Karadeolian v Canada (Attorney General)*, 2016 FC 165 at paragraph 10.