



Citation: *JD v Canada Employment Insurance Commission*, 2023 SST 1216

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: J. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated June 14, 2023
(GE-23-388)

Tribunal member: Janet Lew

Decision date: September 6, 2023

File number: AD-23-684

Decision

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

Overview

[2] The Applicant, J. D. (Claimant), is seeking leave (permission) to appeal the General Division decision.

[3] The General Division found that the Claimant was late when he asked the Respondent, the Canada Employment Insurance Commission (Commission), to reconsider its decision of December 10, 2020. He made his request on July 11, 2022, more than 1.5 years after he received the General Division decision.

[4] The General Division also found that the Commission exercised its discretion judicially when it refused to extend the time to let the Claimant ask for a reconsideration.

[5] The Claimant does not challenge the General Division's findings that he was late and that the Commission exercised its discretion judicially. However, he argues that the General Division overlooked some of the evidence. In particular, he says that it failed to consider the fact that the Commission should have declined his application for Employment Insurance benefits in the first place.

[6] The Claimant says the Commission should have recommended that he apply for the Canada Emergency Response Benefit (CERB). Instead, the Commission paid him Employment Insurance (EI) benefits and then later determined that he was not entitled to receive EI benefits. He did not have sufficient hours of insurable hours to qualify for benefits. He suggests that if the Commission had referred him to the CERB program instead, he would have withdrawn his application for EI benefits. If he had done that, he would not have received benefits to which he was not entitled, and he would not have to repay benefits that he did not get.

[7] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an

arguable case.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

Issues

[8] The issues are as follows:

- a) Is there an arguable case that the General Division overlooked any of the evidence?
- b) Is there an arguable case that the General Division made a legal error when it considered how the Commission decided the Claimant's request for an extension of time?

I am not giving the Claimant permission to appeal

[9] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or a certain type of factual error.³

[10] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Is there an arguable case that the General Division overlooked any of the evidence?

[11] The Claimant argues that the General Division overlooked the fact that the Commission did not recommend that he apply for CERB instead of EI benefits.

[12] However, the issue of the availability of or entitlement to CERB is irrelevant to the issue of whether the Claimant was late when he asked the Commission to reconsider its

¹ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if I am satisfied, "that the appeal has no reasonable chance of success."

³ See section 58(1) of the DESD Act.

decision of December 10, 2020. It is also irrelevant to the question issue of whether the Commission acted appropriately when it considered whether to extend the time for the Claimant to ask for a reconsideration.

[13] Even if the General Division had considered the fact that the Commission did not redirect the Claimant to the CERB program, there would have been no basis upon which the General Division could have found the Claimant entitled to receive either EI benefits or the CERB. That issue simply was not before the General Division, so it would not have been able to decide whether he was entitled to receive them. Besides, the General Division does not have any jurisdiction to decide matters relating to CERB (as distinct from Employment Insurance—ERB).

[14] The Claimant's appeal to the General Division involved the Commission's decision of December 10, 2020. So, the General Division had to address the issues that arose out of that particular decision. The decision did not deal with the Claimant's entitlement to benefits. Rather, the issue was whether the Commission was justified when it refused the Claimant's request to extend the time to make a request for reconsideration.

[15] Thus, at most, having found that the Claimant was late, the General Division could only decide whether the Commission had appropriately followed the law when it considered the Claimant's reconsideration request.

[16] I am not satisfied that the Claimant has an arguable case that the General Division overlooked some of the evidence.

Is there an arguable case that the General Division made a legal error when it considered how the Commission decided the Claimant's request for an extension of time?

[17] The Claimant has not raised this point, but I need to consider whether there is an arguable case over whether the General Division correctly applied the law when it considered the Commission's decision.

[18] The General Division cited section 112(1) of the *Employment Insurance Act*, as well as the *Reconsideration Request Regulations*. Section 112(1) of the *Employment Insurance Act* lets a claimant ask the Commission to reconsider its decision at any time within

- (a) 30 days after the day on which a decision is communicated to them or
- (b) Any further time that the Commission may allow.

[19] The Claimant was more than 30 days after the day on which the Commission's decision had been communicated to him. So, he could only make his reconsideration request if the Commission allowed it.

[20] The *Reconsideration Request Regulations* sets out the factors that the Commission has to consider before it may allow a longer period to make a request for reconsideration of a decision.

[21] Under section 1.(1) of the *Reconsideration Request Regulations*, the Commission has to be satisfied that there is a reasonable explanation for requesting a longer period and that the person has demonstrated a continuing intention to request a reconsideration.

[22] Under section 1.(2) of the *Reconsideration Request Regulations*, if the request for reconsideration is made after the 365-day period after the day on which the decision was communicated to the person, the Commission must also be satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused by the Commission by allowing a longer period to make the request.

[23] The Claimant made his request more than 365 days after the decision had been communicated to him. So, the Commission had to apply both section 1.(1) and (2) of the *Reconsideration Request Regulations* when it considered the Claimant's request for a reconsideration.

[24] Hence, the General Division also had to necessarily examine whether the Commission had considered these factors when it exercised its discretion. While the

General Division cited the *Reconsideration Request Regulations*, I do not see any indication that it examined whether the Commission had considered each of the factors. The General Division simply did not identify any specific factors, other than possibly whether the Claimant had an explanation for his delay.

[25] It is unclear from the Commission's letter of December 10, 2020, whether it considered each of the factors under section 1.(1) and (2) of the *Reconsideration Request Regulations*. It appears to have limited its own analysis as to whether the Claimant had a reasonable explanation for requesting a longer period.

[26] Similarly, the General Division does not appear to have considered nor applied the *Reconsideration Request Regulations*.

[27] Despite these shortcomings in the General Division's analysis, I am not granting leave. I am not granting leave because the Commission would have had to have been satisfied that the request for reconsideration had a reasonable chance of success, under section 1.(2) of the *Reconsideration Request Regulations*. The Commission had to be satisfied that the request had a reasonable chance of success before it could allow a longer period to make a request for reconsideration.

[28] I do not see any evidence to suggest that the request for reconsideration had a reasonable chance of success. To qualify for EI benefits, the Claimant needed to have had at least 420 hours of insurable employment in his qualifying period. According to the Commission, the Claimant did not have any hours of insurable employment within his qualifying period.⁴ The Claimant has not presented any evidence to suggest that he had any insurable hours.

[29] Without any evidence that the request for reconsideration had a reasonable chance of success, the Commission could not have given the Claimant a longer period to make a request for reconsideration.

⁴ See Commission's letter dated December 10, 2020, at GD 3-12.

[30] The Federal Court has endorsed this approach to dealing with applications for leave to appeal.⁵ The Court has said that “where there is no evidence, a tribunal need not consider every possible exception or ground for relief.” Here, it was clear that there was no evidence that the Claimant’s reconsideration request had a reasonable chance of success. So, without such evidence, the Commission would have been unable to allow a longer period to make the reconsideration request.

[31] I am not satisfied that the appeal has a reasonable chance of success, even if it is unclear whether the General Division properly applied the *Reconsideration Request Regulations*.

The Claimant’s options

[32] The General Division set out the Claimant’s options and contact information regarding any overpayment. Any Notice of Debt that he may have or will receive will also have this information.

[33] If the Claimant has not already done so, I would encourage him to contact the Canada Revenue Agency about repayment options, or to write to the Commission about having the debt written off or reduced if he is experiencing any financial hardship.

Conclusion

[34] I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

⁵ *Hines v Canada (Attorney General)*, 2016 FC 112 at para 44.