



Citation: *Estate of DS v Canada Employment Insurance Commission*, 2024 SST 27

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: Estate of D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 11, 2023
(GE-23-1442)

Tribunal member: Stephen Bergen

Decision date: January 9, 2024

File number: AD-23-998

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant is the Estate of D. S. (the Estate). I will refer to the late D. S. as the Claimant because the appeal concerns her claim for Employment Insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), paid the Claimant benefits under the Employment Insurance Emergency Response Benefits program (EI-ERB). Under this program, claimants were entitled to a \$500.00 weekly benefit if they met the requirements. To get support to claimant's quickly, the law authorized the Commission to immediately prepay benefits.¹ The Commission advanced claimants \$2,000.00 of the EI-ERB benefits to which they would be eligible in later weeks. The Commission expected to recover the advance by withholding payment of the EI-ERB benefit in some of those weeks.

[4] The Claimant received this \$2,000.00 advance. However, she returned to work and stopped claiming the EI-ERB benefit before the Commission had a chance to recover the advance. As a result, the Commission sent the Claimant a Notice of Debt to recover it.

[5] When the Claimant filed her request for reconsideration, she disagreed that she should have to repay the \$2,000.00 advance. She argued that she applied for EI and received CERB instead. She stated that the overpayment was the government's mistake, and she could not afford to repay it.²

[6] Before the Commission could make a decision on the reconsideration request, the Claimant passed away. The Commission decided that it was not changing its

¹ See 153.7(1.1) of the *Employment Insurance Act* (EI Act).

² See GD3-80.

decision and sent the decision to the Estate representative. The Estate appealed to the General Division of the Social Security Tribunal (Tribunal), but the General Division dismissed the appeal. The Estate is now seeking leave to appeal to the Appeal Division.

[7] I am refusing leave to appeal because the Estate has no reasonable chance of success in this appeal. It has not made out an arguable case that the General Division made an error of procedural fairness or an error of law, or an important error of fact.

Issues

[8] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) Should I extend the time for filing the application?
- c) Is there an arguable case that the General Division made an error of procedural fairness?
- d) Is there an arguable case that the General Division made an error of law?
- e) Is there an arguable case that the General Division made an important error of fact?

Analysis

The application was late

[9] In its Notice of Appeal to the General Division, the Estate provided a mailing address, but did not authorize the Tribunal to communicate with the Estate by email. The General Division issued its decision on September 11, 2023, and mailed it to the Estate the same day.

[10] Where the Tribunal sends a document to a party by regular mail, its Rules state that it considers the recipient to have received the document ten days after the day it

was sent.³ The Rules also allow that a party can show that this rule should not apply to them.⁴

[11] In the Estate's application to the Appeal Division, its representative could not say when he received the General Division decision. There is no evidence in the Tribunal file of the date the Estate received the decision.

[12] The Estate has not shown that the document delivery rule should not apply, which means that it does apply. The Estate must be presumed to have received the decision ten days after the day it was sent. It was sent on September 11, 2023, so the Estate is deemed to have received the written decision on September 21, 2023.

[13] The deadline to appeal a decision of the General Division to the Appeal Division is 30 days from the date that it is communicated in writing. The deadline would be October 21, 2023.

[14] The Appeal Division did not receive the Estate's application until November 2, 2023.

[15] The appeal is late.

I am extending the time for filing the application

[16] When deciding whether to grant an extension of time, I must consider whether the Estate has a reasonable explanation for why the application is late.⁵

[17] The Estate's representative explained that he had contacted his Member of Provincial Parliament and sought legal advice from the Kinna-aweya legal clinic in his home city. He says that both were too busy to help him right away.

³ It says this in section 22(1) of the *Social Security Tribunal Rules of Procedure* (Rules).

⁴ It says this in section 22(4) of the Rules.

⁵ It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure*.

[18] I accept that the Estate has a reasonable explanation for the delay. The delay was only 12 days and was due in part to the Estate's representative having difficulty obtaining advice in a timely manner.

I am not giving the Estate permission to appeal

General Principles

[19] For the Estate's application for leave to appeal to succeed, its reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[20] I may consider only the following errors:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.⁶

[21] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an "arguable case."⁷

Error of procedural fairness

[22] One of the grounds of appeal selected by the Estate's representative was the one concerned with procedural fairness.

[23] However, the Estate has not made out an arguable case that the General Division acted unfairly.

⁶ This is a plain-language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

⁷ See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

[24] Procedural fairness is concerned with the fairness of the process. It is not concerned with whether a party feels that the decision result is fair.

[25] Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker.

[26] The Estate's representative attended an in-person hearing at the General Division. He has not said that the General Division did not give the Estate a fair chance to prepare for the hearing or that he did not know what was going on in the hearing. He has not said that he did not have a fair chance to present the Estate's case or to respond to the Commission's case. He has not complained that the General Division member was biased or that he had already prejudged the matter.

[27] When I read the decision and review the appeal record, I do not see that the General Division did anything, or failed to do anything, that causes me to question the fairness of the process.

Error of law

[28] The Estate representative is not sure why the Claimant disagreed with the decision but says that he believes the General Division made an error of law.

[29] He mentions that section 153.1306 of the *Employment Insurance Act* allows that the Commission may write off overpayments where the debtor is deceased.

[30] There is no arguable case that the General Division erred in law when it stated that it had no authority to write off the debt. While the Commission has a discretionary power to write off the debt, the General Division does not. Nor does it have the authority to consider an appeal of a Commission refusal to write off the debt. As noted by the General Division, it would be prudent for the Estate to make a formal request that the Commission write off the debt, if it has not already done so.

[31] I note that the Claimant sought the reconsideration because she applied for regular EI and received "CERB" (which was actually the EI-ERB benefit).

[32] There is no arguable case that the General Division made any legal error or error of jurisdiction by considering only whether she should have to repay the EI-ERB.

[33] The General Division is only authorized to consider those issues set out in the Commission's reconsideration decision.⁸ The Commission's reconsideration decision was dated May 4, 2023. The reconsideration decision identifies the issue as the "Employment Insurance Emergency Response Benefit Overpayment." It says that the Commission is "maintaining" (not changing) its decision on this issue.

[34] There is no reason to believe that the subject of the reconsideration decision was anything other than the repayment of the \$2,000.00 that was advanced under the EI-ERB provisions. The Claimant's request for reconsideration references the "CERB" benefit repayment." She discussed the repayment issue with the Commission on July 6, 2022, after receiving the notice of debt on July 5, 2022. When the Estate spoke to the Commission on May 4, 2023, about the reconsideration request, the discussion centered on the repayment of the EI-ERB advance and the overpayment.

[35] The Claimant may not have received the regular EI benefit that she applied for but there is no arguable case that the General Division made any legal or factual error related to the nature of the benefits paid to her. It was correct that the Commission had no choice but to treat applications for regular and sickness benefits as applications for the EI -ERB between March 15, 2020, and September 26, 2020.

Error of fact

[36] The Estate's representative says that the General Division made an error of fact in not considering the evidence of "Charlene", a Service Canada worker.⁹

[37] The Estate's representative did not elaborate. However, I recognize that the Estate's representative is the late Claimant's husband and not a lawyer or professional advocate. He may not have clearly understood how to identify potential errors in the General Division decision. As a result, I have followed the lead of the courts and

⁸ See section 113 of the EI Act.

⁹ See AD1C-2.

reviewed the record to see if the General Division made an important error of fact by misunderstanding or ignoring relevant evidence.¹⁰

[38] In particular, I have reviewed Charlene's notes in the Commission file. Charlene is the agent that followed up on the Claimant's request for reconsideration. She explained to the Estate's representative why the Claimant was obliged to repay the advance.

[39] The agent also sought information from both the Estate and from the employer to see if the Commission might be able to offset any part of the paid advance against other weeks of unclaimed benefits (to which the Claimant might have been entitled if she had filed claims). The agent ruled out this possibility with the earnings information she receive from the employer.

[40] I see nothing in any of the agent's notes, or in the Commission file generally, that suggests an arguable case that the General Division ignored anything relevant.

[41] Unfortunately for the Estate, I have not found any instance in which the General Division may have mishandled the evidence.

[42] There is no arguable case that the General Division made an important error of fact.

Conclusion

[43] I have granted an extension of time is granted. However, I have refused permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division

¹⁰ See the decision in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.