



Citation: *NB v Canada Employment Insurance Commission*, 2023 SST 1828

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: N. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 10, 2023
(GE-23-1437)

Tribunal member: Janet Lew

Decision date: December 22, 2023

File number: AD-23-982

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, N. B. (Claimant), is seeking leave to appeal the General Division decision of October 10, 2023.

[3] The General Division found that the Claimant received a salary continuance for several months after he had been laid off from his employment. The General Division found that the salary continuance constituted earnings and that the Respondent, the Canada Employment Insurance Commission (Commission), had properly allocated (assigned) those earnings to the correct weeks. The allocation resulted in an overpayment of Employment Insurance benefits that the Claimant is expected to repay.

[4] The Claimant does not dispute that he received a salary continuance. However, he challenges the General Division's findings that he should have to repay any benefits. He says that he received poor or inadequate advice from the Commission (via Service Canada). An agent told him to apply for Employment Insurance benefits although they knew that he was receiving a salary continuance. He suggests the General Division made legal and jurisdictional errors by not waiving or reducing the amount of the overpayment. The Claimant also wants to review the amount of the overpayment that he is being asked to repay.

[5] 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

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

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

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with his appeal.

Issues

[7] The issues are as follows:

- a) Is there an arguable case that the General Division member made a legal error that the Claimant has to repay the overpayment?
- b) Is there an arguable case that the General Division member failed to exercise its jurisdiction about the overpayment?
- c) Is there an arguable case that the General Division overlooked any important evidence?
- d) Is there an arguable case that the General Division made an error about the amount of the overpayment that he is being asked to repay?

I am not giving the Claimant permission to appeal

[8] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.³

[9] 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.⁴

³ See section 58(1) of the DESD Act.

⁴ See section 58(1)(c) of the DESD Act.

The Claimant does not have an arguable case that the General Division made a legal error that the Claimant had to repay the overpayment

[10] The Claimant does not have an arguable case that the General Division made a legal error that he has to repay the overpayment. The Claimant received a salary continuance after he was laid off from work. The salary continuance represented earnings that had to be offset against the Employment Insurance benefits that he had received. He had applied for benefits, reportedly on the advice of a Service Canada agent. This led to an overpayment of benefits.

[11] The Claimant's arguments hinge on the fact that he did not do anything wrong. He says that a Service Canada agent gave him poor advice. The agent recommended that he apply for Employment Insurance benefits, despite the fact that he had disclosed the fact that he was receiving a salary continuance. He relied on that advice. If the agent had not told him to apply for benefits, he would not have applied nor received any Employment Insurance benefits and there would have been no overpayment to repay.

[12] However, it does not matter why the overpayment arose. A claimant is liable to repay benefits from the Commission to which they are not entitled to receive.⁵ Although the agent may have given the Claimant poor advice, ultimately he received benefits that he was not entitled to get. The overpayment remains a debt that the Claimant is expected to repay.⁶

[13] I am not satisfied that there is an arguable case that the General Division made a legal error when it found that the Claimant has to repay the overpayment.

The Claimant does not have an arguable case that the General Division failed to exercise its jurisdiction about the overpayment

[14] The Claimant does not have an arguable case that the General Division made a jurisdictional error about the overpayment. The Claimant suggests the General Division should have waived or reduced the amount of the overpayment simply. However, the

⁵ See section 43 of the *Employment Insurance Act*, which sets out the liability for overpayments.

⁶ See *Robinson v Canada (Attorney General)*, 2013 FCA 255.

General Division does not have any jurisdiction to relieve or reduce the amount of any overpayment. Only the Minister holds this power.⁷ I am not satisfied that there is an arguable case that the General Division failed to waive or reduce the overpayment.

The Claimant does not have an arguable case that the General Division overlooked any important evidence

[15] The Claimant does not have an arguable case that the General Division overlooked some of the evidence.

[16] The Claimant argues that the General Division should have considered the fact that he had received poor advice from an agent. However, this evidence was not relevant to the earnings and allocation issues.

[17] The Claimant had received a salary continuance, so the General Division had to determine whether the salary continuance qualified as earnings under the *Employment Insurance Act*. If so, then the General Division had to decide whether the earnings were subject to allocation. The fact that the Claimant may have received poor or insufficient advice from the Commission had no bearing on these two issues.

[18] In any event, the General Division did note the Claimant's evidence that he had received advice from an agent. The General Division also concluded that the Claimant's reliance on the agent's advice was not relevant to the issues before it.

[19] I am not satisfied that there is an arguable case that the General Division overlooked the Claimant's evidence that he received poor advice from an agent.

⁷ See section 56 of the *Employment Insurance Regulations*.

The Claimant does not have an arguable case that the General Division made an error about the amount of the overpayment that he is being asked to repay

[20] The Claimant is asking for a review of the amount of the overpayment he is being asked to repay. He does not actually suggest that the General Division made any errors in calculating how the overpayment should be allocated.

[21] The issue about the amount of the overpayment did not come up before the General Division. And, the General Division did not make any findings about the total amount of the overpayment to be repaid, so the Claimant does not have an arguable case that the General Division made an error about the overpayment.

[22] The Commission noted that the Claimant's benefit period should have started on July 18, 2021, rather than on January 3, 2021. This was because the Claimant's employer continued to pay his salary until July 14, 2021. So, the Claimant should not have received benefits while he was continuing to receive a salary. The General Division noted that the Commission stated that it would recalculate the claim (including any benefits to which he may be entitled to receive) after the tribunal process ends.⁸

[23] The Commission provided a breakdown of the overpayment, in response to the Claimant's request.⁹ At a glance (other than for the week of July 25, 2021) the overpayment is the amount of Employment Insurance benefits that the Commission paid to the Claimant for the weeks from January 10, 2021 to July 25, 2021.¹⁰ It is unclear whether the Claimant disputes the Commission's breakdown, but if so, he can communicate that directly with the Commission.¹¹

⁸ See General Division decision, at paras 25 and 26.

⁹ See Commission's overpayment breakdown, at AD2.

¹⁰ For the week of July 25, 2021, the Commission's overpayment breakdown shows that the overpayment was \$237 for that week, which represents 50% of the benefits paid.

¹¹ See Claimant's Notice of Appeal filed with the General Division, at GD2. It does not appear that the Claimant raised this issue before.

The Claimant has another appeal

[24] The Claimant has another appeal under file number AD-23-739. It relates to the same underlying matter as this appeal. It relates to the Commission's reconsideration decision dated April 27, 2023.

[25] The Claimant should not have filed two duplicate appeals with the General Division. He is not entitled to get two General Division hearings and two decisions on the same issues involving the same parties.

[26] The Appeal Division granted leave in that appeal (AD-23-739) because the General Division had decided the wrong decision (GE-23-1439). The General Division had failed to consider the Commission's reconsideration decision of April 27, 2023.

[27] But, in appeal number GE-23-1437, the General Division considered the Commission's reconsideration decision of April 27, 2023. (It is the subject matter of this appeal at the Appeal Division, under AD-23-982.)

[28] As the General Division has already decided the appeal relating to the Commission's reconsideration of April 27, 2023 (in GE-23-1437), that makes the second appeal under file number AD-23-739 (GE-23-1439) redundant or moot. That will be dealt with in a separate matter.

[29] I mention this in the event the Claimant ultimately intends to seek an application for judicial review of this decision, relating to the earnings and allocation issues. Any application for judicial review would have to be specific to file number AD-23-982.

The Claimant's overpayment

[30] According to the Commission, the Claimant's benefit period should have started on July 18, 2021. I do not know the Claimant's circumstances after July 18, 2021. I do not know and it is not relevant to my enquiry whether he was available for work, as defined by the *Employment Insurance Act*, or whether he was actively looking for work after this date, or whether he worked or retired from the workforce. But, it may be that the Claimant is entitled to receiving Employment Insurance benefits within his benefit

period. And it may be that the Claimant can offset some of those benefits against the overpayment.

[31] But as far as the overpayment is concerned, the Claimant can consult the Notice of Debt for his options. As the Commission pointed out, if repayment causes him financial hardship, he can contact the Canada Revenue Agency (CRA) on the telephone number listed on the Notice of Debt. He can contact for any relief or to ask about any repayment arrangements. CRA could assess his financial situation and make recommendations to the Commission about writing off or reducing the overpayment.

Conclusion

[32] The appeal does not have 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