Citation: *BD v Canada Employment Insurance Commission*, 2024 SST 7

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	B. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 26, 2023 (GE-23-2282)

Tribunal member:	Pierre Lafontaine
Decision date:	January 3, 2024
File number:	AD-23-936

Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

Overview

[2] The Applicant (Claimant) applied for Employment Insurance (EI) regular benefits effective October 16, 2022. The Respondent (Commission) decided that he was entitled to 36 weeks of EI benefits. The Claimant disagreed and said that no one told him that he would only receive benefits for 36 weeks and that he should be entitled to 50 weeks of benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[3] The General Division found that the Claimant's regional rate of unemployment was 5.9% and that he had accumulated 1820 hours during his qualifying period. He was therefore entitled to 36 weeks of regular EI benefits under the law.

[4] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division made no error regarding the 36 weeks of benefits but that he raised a constitutional challenge before it. He was offered to adjourn to file a constitutional challenge, which he had never heard of before, or proceed without the constitutional challenge. The Claimant submits that sickness benefits were extended from 15 weeks to 26 weeks on December 18, 2022, which is unfair for those who applied for benefits within months of the policy change.

[5] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[6] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[7] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[8] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

> 1. The General Division hearing process was not fair in some way.
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> 2. 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.
>
> 3. The General Division based its decision on an important error of fact.
>
> 4. The General Division made an error of law when making its decision.

[9] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[10] Therefore, before I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[11] The Claimant submits that the General Division made nor error regarding the 36 weeks of benefits but that he raised a constitutional challenge before it. He was offered

during the hearing to adjourn to file a constitutional challenge, which he had never heard of before, or proceed without the constitutional challenge. The Claimant submits that sickness benefits were extended from 15 weeks to 26 weeks on December 18, 2022, which is unfair for those who applied for benefits within months of the policy change.

[12] The Claimant applied for regular EI benefits.[1] The evidence shows that he accumulated 1820 hours during his qualifying period from October 17, 2021, to October 15, 2022. The Claimant lives in the Toronto region, where the unemployment rate was 5.9% at the time he applied. The Claimant was entitled by law to 36 weeks of EI benefits.[2]

[13] The Claimant submits that he raised a constitutional challenge before the General Division. He was offered during the hearing to adjourn to prepare his Charter challenge, which he had never heard of before, or proceed without the constitutional challenge.

[14] To decide the present application, I proceeded to listen to the recording of the hearing before the General Division.

[15] The General Division noted that the Claimant had not previously raised constitutional arguments in his appeal documents. It advised the Claimant during the hearing that there was a process he needed to go through to raise constitutional arguments.[3] The General Division offered the Claimant an adjournment so he could try to argue those issues later.

[16] The General Division member repeated several times to the Claimant that it could not answer the question whether he would later be allowed to raise his constitutional arguments before the Appeal Division. The Claimant still decided to

[1] Not sickness benefits. See GD3-5.
[2] In accordance with section 12(2) of the *Employment Insurance Act* and Schedule 1.
[3] Starting at 16:20 of the recording of the General Division hearing.

continue his appeal before the General Division without presenting his constitutional challenge.[4]

[17] The general rule is that, except in cases of urgency, constitutional questions cannot be argued for the first time in the reviewing court if the administrative decision-maker under review had the power and the practical capability to decide them.[5]

[18] The Supreme Court of Canada has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them. Where, as here, an administrative decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time in appeal.[6]

[19] There is no doubt that the General Division had the power and the practical capability to decide a Charter challenge and I see no urgency in the present case, as interpreted by case law, that would justify a derogation to the general rule. Furthermore, the evidentiary record before the Appeal Division is simply insufficient to decide a Charter issue.

[20] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[21] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

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[4] From 20:49 to 22:00 of the recording of the General Division hearing.
[5] *Erasmo v Canada (Attorney General)*, 2015 FCA 129.
[6] *Okwuobi v Lester B. Pearson School Board; Casimir v Quebec (Attorney General)*; *Zorrilla v Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 38-40.

Conclusion

[22] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division