



Citation: *BM v Canada Employment Insurance Commission*, 2024 SST 200

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: B. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 14, 2024
(GE-23-1679)

Tribunal member: Stephen Bergen

Decision date: March 1, 2024

File number: AD-24-123

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] B. M. is the Applicant. I will call him the Claimant because this application concerns his claim for the Employment Insurance Emergency Response Benefit (EI-ERB).

[3] The Claimant stopped working on March 13, 2020. He did not apply for the EI-ERB benefit immediately because he thought he would be going back to work soon. He finally applied on April 24, 2020, and the Respondent, the Canada Employment Insurance Commission (Commission), started his claim as of April 19, 2020. April 19 was the Sunday of the week that he applied.

[4] Claimants who qualified under the EI-ERB program were entitled to a \$500.00 weekly benefit. To get support to claimant's quickly, the law authorized the Commission to immediately prepay some of those benefits.¹ The Commission advanced claimants \$2000.00 (equivalent to four weeks of the EI-ERB benefit), expecting to recover it later by withholding payment of the EI-ERB benefit in certain weeks.

[5] The Commission withheld a total of three weeks of benefits from the Claimant. In this way, it recovered \$1500.00 of the advance. The Claimant did not receive the ERB benefit long enough for the Commission to recover the final \$500.00 so the Commission decided that he had been overpaid. It asked the Claimant to pay back the \$500.00.

[6] The Claimant asked the Commission to reconsider the recovery of the debt and also demanded payment of all the benefits he could have claimed from the time he stopped work. The Commission would not change its decision that he had been overpaid by \$500.00. However, it acknowledged that he would have been entitled to additional benefits if he had claimed them. It agreed to offset one week of benefits

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

against the overpayment, to reduce what he owed to zero. However, it refused to pay him for additional weeks in which he might have been entitled to benefits if he had claim them.

[7] Because the Commission would not change its decision, the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal, and he is now asking the Appeal Division for permission to appeal the General Division decision.

[8] I am refusing permission to appeal. The Claimant has not made out an arguable case that the General Division made any error that I may consider.

Issues

[9] Is there an arguable case that

- a) a reasonable person would reasonably view the General Division's actions as demonstrating bias?
- b) the General Division failed to exercise equitable jurisdiction?
- c) the General Division made an error of jurisdiction by considering whether the Commission could antedate his claim rather than deciding the proper date for his initial claim for benefits?
- d) the General Division made an error of law in how it interpreted the Commission's discretion, or in how it applied the EI Act?
- e) the General Division made an error of law by failing to provide adequate reasons?
- f) the General Division made an important error of fact by failing to understand evidence that the Claimant did not get as much EI-ERB as he was entitled to?

I am not giving the Claimant permission to appeal

General Principles

[10] For the Claimant's application for leave to appeal to succeed, his 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.

[11] 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.²

[12] 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."³

Bias (procedural fairness error)

[13] There is no arguable case that the General Division's conduct could be perceived as biased or partial.

[14] The test for bias is what an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. The burden of proof lies on the party alleging a perception of bias, and that the threshold to prove it is high.⁴

[15] The Claimant alleged that the General Division member was biased and not impartial. But he did not otherwise elaborate on the nature of his concern. He has not

² 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).

³ See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

⁴ See the Supreme Court of Canada decision: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

pointed to anything the member said or did that would cause a reasonable person, informed as to all the relevant circumstances, to believe that the General Division member was biased against the Claimant. He may not agree with the General Division's decision but that does not mean that the member was biased or that a reasonable person would perceive the General Division member to be biased.

Equitable Jurisdiction

[16] The General Division said that it did not have the power to decide a case "in equity."

[17] The Claimant responded with a dictionary definition of "equity." He argued that equity includes such attributes as fairness and justice. I presume the Claimant is arguing that the General Division made an error because it must act fairly and justly.

[18] There is no arguable case that the General Division made an error of jurisdiction by not taking deciding the Claimant's case in equity.

[19] The General Division explained what she meant by equity. She said that she, "cannot change or disregard a clear section of the Act for the simple reason that [she might be] of the opinion that the Appellant deserves it in some ways." The General Division was using "equity" as a term of art (with a precise and special legal meaning). In some adjudicative bodies, such as superior courts, principles of justice may prevail over strict legal rules. These bodies have what is called "equitable jurisdiction." The Social Security Tribunal has only those powers granted to it by statute.⁵ It is not empowered by statute to grant equitable relief. In Employment Insurance matters, it may only grant benefits in accordance with the *Employment Insurance Act* and its associated Regulations.

[20] This is the sense in which the General Division does not have the power to decide a case in equity. The Claimant misunderstood the General Division.

⁵ The Social Security Tribunal was created by the DESDA.

Jurisdiction to consider antedate

[21] There is no arguable case that the General Division made an error of jurisdiction by considering his antedate rather than the date of his “initial application”.

[22] I am not sure what point the Claimant is making about his “initial claim for benefits.” The General Division takes its jurisdiction from the issues in the Commission’s reconsideration decision. The reconsideration decision described the issue as one of “antedate.”

[23] A claimant would normally receive the EI-ERB benefit for each week for which they filed a claim report, beginning with the first week that he applied. If they later ask the Commission to receive benefits for some earlier period, they are effectively asking the Commission to antedate. Antedating is when the Commission treats a claim as though it were made at an early date than it was actually made.

[24] In June 2022, the Claimant asked to receive EI-ERB benefits for additional weeks. He asked to receive benefits for the period between March 15, 2020 (immediately after he stopped working) and when he first claimed the EI-ERB.

[25] The Commission considered whether it could antedate to give the Claimant benefits for the additional weeks. However, it decided it could not pay him for those earlier weeks because the Claimant had not asked for those benefits until after December 2, 2020.⁶

[26] There is no arguable case that the General Division should have considered when the Claimant’s initial claim began, rather than whether his EI-ERB claim should be antedated.

Interpretation of Commission’s “discretion” and the Employment Insurance Act (error of law)

[27] There is no arguable case that the General Division misinterpreted the law. The law clearly states that a claimant may not make a claim for the EI-ERB benefit after

⁶ See GD3-31.

December 2, 2020. The General Division correctly said that it had no power to disregard or change that deadline.

[28] There is also no arguable case that the General Division misinterpreted or misapplied the law by not considering the Claimant's "initial claim" for benefits.

[29] The concept of an "initial claim for benefits" is associated with the establishment of a benefit period. These terms apply to the application process for regular benefits (in normal times). They did not apply to the EI-ERB benefit.

[30] The law says that a claimant may make a "claim" for the EI-ERB benefit for any two-week period (while the program was in effect). The Claimant's difficulty with accessing benefits for additional weeks had nothing to do with whether he made a claim or an "initial claim." It had nothing to do with whether he was retrospectively asking for benefits for individual two-week periods or asking to have his claim "antedated". The problem was that – after December 2, 2020, he had no legal right to claim benefits for those weeks.

[31] When the Commission agreed to offset one week against the amount he owed, it was making a discretionary decision.

[32] The Commission recognized that the changing Covid benefit programs were confusing claimants. It understood that a large number of claimants did not formally claim all the benefits to which they were entitled. Because of this, the Commission developed a policy to provide some limited relief to claimants. The policy was directed to claimants who were being asked to repay their advance.

[33] The Commission's policy allows it to use additional weeks of unpaid entitlement for the to reduce or eliminate the overpayment from the advance. It applies to claimants who would have been entitled to benefits for particular weeks if they had claimed them. If the Commission is satisfied that they would have applied for the benefits if they had not been confused by the process, it uses its policy to deem the claimant to have applied for the benefits at an earlier date when they could legally have claimed them.

[34] The Commission applies its policy to **reduce the overpayment** on a discretionary basis. The intent of the Commission's policy is to allow it to reconsider overpayments related to the repayment of the advance. To this purpose, it deems certain claimants to have applied for benefits prior to December 2, 2020.

[35] However, nothing in the law compels the Commission to consider claims made after December 2, 2020, to have been made earlier. The law does not require it to reduce anyone's overpayment because they would have been entitled to additional weeks of EI-ERB if they had claimed them.

[36] In the Claimant's case, he only had an outstanding overpayment of \$500.00. The Commission applied its policy to offset one week of his unpaid entitlement, which reduced his overpayment to zero.

[37] The Commission's policy does not change the law. The law still says that no claim can be made after December 2, 2020.⁷ The Claimant did not make his claim (or asked for an antedate) for additional weeks of EI-ERB benefits until after December 2, 2020.

[38] The General Division followed the law. It does not have any discretion to ignore the law.

Adequate reasons (error of law)

[39] There is no arguable case that the General Division's reasons are so inadequate that they constitute an error of law.

[40] The General Division explained the EI-ERB program, the law supporting the recovery of the advance payment, and the law concerning application for additional weeks of benefits after December 2, 2020.

[41] It explained that it could not find the Claimant entitled to additional weeks because of the December 2, 2020, deadline for claiming the EI-ERB.

⁷ See section 153.8(2) of the EI Act.

Extent of Claimant's entitlement

[42] There is no arguable case that the General Division made an important error of fact when it ignored the actions of a Commission agent.

[43] The Claimant referred to a statement in the General Division decision where it said, "The agent should have made sure that he got as much benefit as he was entitled to."

[44] To be clear, the statement cited by the Claimant was not a General Division finding or a statement of conclusion. The General Division was only restating the Claimant's argument.

[45] The General Division makes an important error of fact where it "**bases its decision**" on a finding that ignores or misunderstands relevant evidence, or a finding that does not follow rationally from the evidence.

[46] The Commission may not have given the Claimant complete information or proactive coaching from the Commission about how to maximize his claim for EI-ERB benefits. However, the General Division did not need to consider, or refer to any evidence of this, because it was not relevant to its findings or its decision. The General Division decision was based on the undisputed fact that the Claimant did not claim additional weeks of benefits until after December 2, 2020.

Conclusion

[47] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division