



Citation: *AM v Canada Employment Insurance Commission*, 2024 SST 813

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: A. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 2, 2024
(GE-24-570)

Tribunal member: Stephen Bergen

Decision date: **July 15, 2024**

File number: AD-24-321

Decision

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

Overview

[2] A. M. is the Applicant. I will call him the Claimant because this application is about his claim for Employment Insurance (EI) benefits.

[3] The Claimant and his wife had a baby on May 1, 2023. The Claimant applied for 15 weeks of the standard benefit. However, his wife had earlier applied for the extended benefit.

[4] The Commission paid the Claimant 15 weeks at the standard rate, but then realized that his wife had applied for extended benefits. It declared an overpayment because the Claimant should only have received benefits at the extended rate.

[5] The Claimant asked the Commission to reconsider. He said he had done everything he could to get guidance from the Commission and followed the advice he was given. It was not his fault if he selected the wrong benefit or that he was paid at the wrong rate.

[6] The Claimant would not change its decision so the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed his claim.

[7] Now, the Claimant is asking the Appeal Division for permission to appeal.

[8] I am refusing permission to appeal. The Claimant has not made out an arguable case that the General Division acted unfairly or made an important error of fact.

Issues

[9] The issues in this application are as follows:

- a) Is there an arguable case that the General Division acted in a way that was procedurally unfair?
- b) Is there an arguable case that the General Division made an important error of fact?

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.¹

[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."²

¹ 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).

² See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

Error of procedural fairness

[13] The Claimant argued that the General Division did not follow procedural fairness. He says that the member stated in the hearing that a member from Employment Insurance should have been part of the hearing.

[14] There is no arguable case that the General Division made an error of procedural fairness.

– What does procedural fairness mean?

[15] 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.

[16] 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. This is procedural fairness.

– The General Division did not act in a way that was procedurally unfair

[17] The Claimant has not said that he did not have 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 the hearing did not give him a fair chance to present his case or to respond to the Commission's case. He has not complained that the General Division member was biased or that the member had already prejudged the matter.

[18] Whatever the General Division member told the Claimant about whether the Commission made an error or whether the Commission should have been part of the hearing, the fact is that the General Division may proceed whether or not the Commission participates. The Commission is not required to attend hearings of the General Division, and the General Division has no power to compel it to attend.

[19] In fact, the Commission usually relies on its written submissions and on the evidence in the reconsideration file (which is disclosed to the Claimant). It rarely appears at the General Division hearings to expand on its arguments or provide additional evidence.

[20] In any event, the attendance of a representative of the Commission could not have helped the Claimant succeed in his appeal. Perhaps the Commission could have provided more information on what it told the Claimant or his wife. If it provided incorrect information, it might have explained how it happened and why. However, none of this could have changed the fact that the Claimant's wife selected the extended benefit, that this election bound the Claimant to the same choice, and that the Claimant was overpaid benefits as a result. The Commission has 36 months to reconsider its decisions to pay benefits, even where it had all the information to make the correct decision in the first place and the Claimant has not misled it in any way.³

Important error of fact

[21] The Claimant argued that the General Division failed to properly consider that he was following the directions of a Commission agent when he applied for parental benefits.

[22] There is no arguable case that the General Division made an error of fact by not considering the evidence of the Claimant's dealings with the Commission.

[23] First, it does not look like the General Division ignored or misunderstood the Claimant's testimony. It summarized the Claimant's testimony that both he and his wife spoke to agents of the Commission on a number of occasions, and that he was never told he was bound by his wife's choice of benefit. It understood that the Commission did not highlight the discrepancy between the Claimant's election and that of his wife until November 2023.⁴ The General Division accepted the Claimant's evidence on these points.

³ See section 52(1) of the *Employment Insurance Act*.

⁴ See paras 18-12 of the General Division decision.

[24] More importantly, the General Division can only make an important error of fact if it has **based its decision** on a finding of fact that overlooks or misunderstands relevant evidence, or on a finding that does not rationally follow from the evidence.⁵

[25] The General Division actually accepted that the Commission did not tell the Claimant that he needed to select that same parental benefit as his wife, and that it did not highlight how his choice of benefit was in conflict with the election his wife had made. However, its decision did not depend on that finding.

[26] The General Division decision was based on the law. Whatever the Commission or its agents may have told the Claimant, the Claimant could only receive the benefits authorized by law. He was not entitled to standard parental benefit because his wife had elected the extended benefit, and because they had already begun to receive parental benefits.⁶

[27] Section 23(1.1) of the *Employment Insurance Act* (EI Act) says that a parental benefits claimant must elect between standard and extended benefits. Section 23(1.2) of the EI Act says that the election is irrevocable once the Commission has paid any parental benefit. A series of Federal Court of Appeal decisions have confirmed that the rule against revoking an election is absolute. The courts have said the rule applies, even in decisions where the claimant's election resulted from misleading information from the Commission.⁷

[28] Therefore, the law says that the first parent must elect the kind of parental benefit and that the claimant cannot revoke their election.

⁵ See Section 58(1)(c) of the *Employment Insurance Act* describes the error more precisely. It says that it is where, "the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

⁶ See Section 23(1.2) and (1.3) of the *Employment Insurance Act*.

⁷ *Canada (Attorney General) v Pettinger*, 2023 FCA 51; *Canada (Attorney General) v Johnson*, 2023 FCA 49; *Canada (Attorney General) v Jeffers*, 2023 FCA 52.

[29] Section 23(1.3) of the EI Act states clearly that the first parent's election (which cannot be changed) is binding on the other parent if the other parent claims parental benefits for the same child.

[30] The law states that the Claimant is bound by his wife's election. That means he received benefits to which he was not entitled. He was overpaid. Section 45 says he must repay any overpayment. Section 47 says that the overpayment is a debt to the Crown. This remains true regardless of what he was or was not told by the Commission.

[31] The Claimant's appeal has no reasonable chance of success.

Conclusion

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

Stephen Bergen
Member, Appeal Division