Citation: *KD v Canada Employment Insurance Commission*, 2024 SST 1398

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	K. D.
Representative:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 4, 2024 (GE-22-105)

Tribunal member:	Solange Losier
Decision date:	November 14, 2024
File number:	AD-24-700

Decision

[1] An extension of time to apply to the Appeal Division is granted.

[2] Leave (permission) to appeal is refused. The appeal won't proceed.

Overview

[3] K. D. is the Claimant in this case. She applied for Employment Insurance regular benefits (benefits).

[4] The Canada Employment Insurance Commission (Commission) retroactively decided that she wasn't entitled to get benefits because she hadn't proven her availability for work.[1] This resulted in an overpayment of benefits.

[5] The Claimant filed a constitutional challenge to the General Division of the Tribunal. She argued that section 18(1) and section 25(1)(a) of the *Employment Insurance Act* (EI Act) violated section 15 of the *Canadian Charter of Rights and Freedoms* (Charter).

[6] The General Division heard and dismissed the Charter appeal. It found that she hadn't shown the two above sections in the EI Act violated section 15 of the Charter.[2] Specifically, she hadn't shown that either section created or contributed to a discriminatory distinction based on age.

[7] The Claimant is now asking for permission to appeal.[3] She argues that the General Division made several reviewable errors in its decision.

[8] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

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[1] See Commission's reconsideration decision at pages GD3-42 to GD3-43.
[2] See General Division "interlocutory decision" dated November 24, 2023, at pages AD1A-1 to AD1A-21.
[3] See Application to Appeal Division at pages AD1-1 to AD1-16.

Issues

[9] The issues in this appeal are:

a) Was the application to the Appeal Division late?

b) If so, should I extend the time for filing the application?

c) Is there an arguable case that the General Division made a reviewable error?

Analysis

The Claimant's application to the Appeal Division was late

[10] There were two decisions issued by the General Division.

[11] The General Division issued an "interlocutory decision" on the Charter appeal on November 24, 2023. It dismissed the Claimant's Charter appeal. So, the matter returned to the regular process (for non-Charter appeals) to be heard on the merits.

[12] The General Division followed by issuing a "final decision" on the merits on July 3, 2024, and allowed the Claimant's appeal. The Commission has already appealed that particular decision to the Appeal Division.[4]

[13] The deadline to apply to the Appeal Division is 30 days after the day on which the General Division decision was communicated to the Claimant in writing.[5] In this particular case, the deadline to apply counts from the date of the General Division's final decision.

[14] I have to decide when the General Division's final decision was communicated to the Claimant.

[4] See Tribunal file AD-24-474. The Appeal Division's decision on that file is still pending.
[5] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).

[15] The Claimant wrote that the General Division's final decision was communicated to her on July 4, 2024.[6]

[16] I accept that July 4, 2024, was the date that the General Division's final decision was communicated to her.

[17] The Claimant had 30 days to file her application to the Appeal Division. The deadline to file the application was August 4, 2024.

[18] The Tribunal got the application to the appeal Division on October 17, 2024.[7]

[19] I find that the Claimant filed her application to the Appeal Division late.

I am extending the time for filing the application

[20] When deciding whether to grant an extension of time, I have to consider whether the Claimant has a reasonable explanation for why the application is late.[8]

[21] The Claimant explained that the final decision issued by the General Division was in her favour, so she didn't feel it necessary to appeal the previous Charter decision.

[22] However, the Commission has now appealed the final decision, so she's decided to appeal the Charter decision. She didn't know that she had to file a separate appeal in order to challenge the Charter decision.

[23] I find that the Claimant has provided a reasonable explanation for the delay in filing her application to the Appeal Division. She appealed the Charter decision when she became aware that the Commission had filed an appeal of the final decision.

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[6] See page AD1-2.
[7] See pages AD1-1 to AD1-16.
[8] See section 27(2) of the *Social Security Tribunal Rules of Procedure.*

Analysis

[24] An appeal can only proceed if the Appeal Division gives permission to appeal.[9] I must be satisfied that the appeal has a reasonable chance of success.[10] This means that there must be some "arguable ground" that the appeal might succeed.[11]

[25] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:[12]

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error in law
- based its decision on an important error of fact.

[26] For the Claimant's appeal to proceed to next steps (a hearing), she has to show that there is an arguable ground that the appeal might succeed.

[27] In this case, the Claimant argues that the General Division made errors of jurisdiction, errors of law and errors of fact.[13] Some of her arguments are also about fairness, so I've considered whether there is an arguable case that the General Division failed to follow a fair process.

[28] I have summarized the Claimant's main arguments and will review them below.

I am not giving the Claimant permission to appeal

– There is no arguable case that the General Division made an error of jurisdiction or failed to follow a fair process

[29] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it didn't have the authority to decide.[14]

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[9] See section 56(1) of the DESD Act.
[10] See section 58(2) of the DESD Act. I must refuse leave to appeal if I find the "appeal has no reasonable chance of success."
[11] See *Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12.
[12] See section 58(1) of the DESD Act.
[13] See pages AD1-13 to AD1-14.
[14] See section 58(1)(a) of the DESD Act.

[30] Procedural fairness is about the fairness of the process. It includes procedural protections including the right to an unbiased decision maker, the right of a party to be heard and to know the case against them and to be given an opportunity to respond. If the General Division didn't follow a fair process, then I can intervene.[15]

[31] The Claimant argues that the General Division lacked jurisdiction because it was unable to request statistical reports for the minor age group (14–18) from the Commission. She says this information wasn't available to the general public.[16]

[32] As well, the General Division was unable to request a written transcript of a telephone conversation she had with the Commission. In sum, she says that the above evidence was essential for her case.

[33] First, the General Division is an impartial decision maker and has no jurisdiction to order the Commission to provide evidence that would help the Claimant argue her case. It was the Claimant's appeal and she bears the burden of bringing forward any evidence she wants to rely on.

[34] Second, the General Division's decision shows that it was sensitive to the fact that the Claimant was represented by her mother who isn't legally trained. It acknowledged that she faced some challenges in preparing for the hearing, but found that she still had a full and fair opportunity to present her case.[17]

[35] There is no arguable case that the General Division made an error of jurisdiction. A disagreement with the General Division's jurisdiction amounts to a disagreement with the law, and that isn't a reviewable error. The General Division doesn't have the power to order the Commission to provide evidence for the Claimant's case.

[36] There is no arguable case that the General Division failed to follow a fair process. The Claimant says it was unfair that she couldn't get the evidence she wanted, but that

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[15] See section 58(1)(c) of the DESD Act.
[16] See page AD1-13, points 5–9.
[17] See paragraph 4 of the General Division decision.

doesn't mean the process was unfair in some way. I've found no other indication that the General Division failed to follow a fair process.

[37] As the General Division pointed out, presenting sufficient evidence is one of the most fundamental requirements in a constitutional challenge and there is no way around it, even if it might be difficult for an unrepresented party to obtain it.[18]

– **There is no arguable case that the General Division made an error of law**

[38] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[19]

[39] The Claimant argues that the General Division made an error of law by relying on a *Supreme Court of Canada* decision called "*Sharma*" because it wasn't applicable.[20] She explains that the *Sharma* decision was about someone who broke the law and challenged section 15 of the Charter based on race.[21]

[40] The Claimant submits that the Federal Court of Appeal's (FCA) decision called "*Page*" is more factually similar to her own case.[22] However, she acknowledges that the *Page* decision wasn't a Charter challenge.

[41] She says that the General Division made an error of law with the legal test.[23] She explains that the General Division agreed there was a distinction based on age in paragraph 51 of its decision. Later, she says it contradicted itself when it concluded that she failed at the first step of the test in paragraph 85 of its decision.

[42] Respectfully, I disagree with the Claimant.

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[18] See paragraph 84 of the General Division decision.
[19] See section 58(1)(b) of the DESD Act.
[20] See *R v Sharma*, 2022 SCC 39.
[21] See page AD1-13, points 1–4.
[22] See *Page v Canada (Attorney General)*, 2023 FCA 169.
[23] See page AD1-14, point 10.

[43] The General Division has to follow Supreme Court of Canada (SCC) decisions, so it had to follow the *Sharma* decision because it also dealt with a section 15 Charter Challenge.

[44] The General Division correctly relied on the *Sharma* case because it's a recent SCC decision dealing with section 15 of the Charter and the applicable legal test.[24] While the facts in Sharma are different, the legal principles and test remain applicable.[25]

[45] The Claimant is correct when she says that the *Page* decision from the FCA is more factually similar to her own case. The *Page* decision involved another person who was attending school and collecting benefits.

[46] However, the Claimant in this case advanced a section 15 Charter Challenge before the General Division. The *Page* decision wasn't a Charter Challenge, so it wasn't helpful in addressing whether section 18(1) or section 25(1)(a) violated section 15 of the Charter.

[47] The General Division didn't make an error with legal test or contradict itself in its decision. It listed and explained the steps involved in its decision: [26] It stated that the Claimant had the initial burden of proving her allegations are more likely than not.[27]

[48] The General Division agreed that there was a distinction based on age for "secondary school students aged 14 to 18" in relation to section 18(1) of the Act.[28]

[49] But that doesn't mean that the Claimant had proven her case in its entirety, the General Division simply agreed there was a distinction (or some differential treatment) for that particular group. The Claimant still had to prove that the law had a disproportionate impact on the members of that group—and this is where she failed.

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[24] See paragraph 15 of the General Division decision.
[25] I also want to add that there is another recent SCC decision called *Dickson v Vuntut Gwitchin First Nation,* 2024 SCC 10. That case also dealt with a section 15 Charter claim, but in the context of Aboriginal and treaty rights. The Court reiterates the test laid out in *Sharma*.
[26] See paragraph 49 of the General Division decision.
[27] See paragraph 48 of the General Division decision.
[28] See paragraphs 51 and 56 of the General Division decision.

[50] Put another way, showing a distinction (or some level of differential treatment) doesn't automatically mean that either section of the *EI Act* created a disproportionate impact.

[51] The Claimant also argued that the law had an adverse impact on minors or young adults attending post-secondary education.[29] However, the General Division rejected that there was a distinction based on age for "young adults pursuing higher education."[30] It relied on a Federal Court decision that found a "student" can't be considered an analogous ground under section 15 of the Charter.[31]

[52] The General Division concluded that the Claimant had provided little evidence to explain the full context of students aged 14 to 18 in the labour market and their relationship to the EI system.[32] It found that most of the facts she relied on were either too general or not supported by evidence.[33] It said she hadn't provided any evidence to explain the impact of the contested sections of the EI Act on the Claimant or members of the protected group.[34]

[53] The General Division correctly outlined and applied the legal test and steps involved.[35] It concluded that she had failed the first step of the section 15 test and not proven that either section of the EI Act created a discriminatory distinction based on age (for secondary school students aged 14 to 18).[36] She had failed to provide evidence to support her claim, so her appeal was dismissed.

[54] There is no arguable case that the General Division made an error of law.[37] It had to rely on the SCC's decision in *Sharma*, the *Page* decision wasn't applicable because it wasn't a Charter challenge and it applied the correct legal test.

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[29] See paragraph 45 of the General Division decision.
[30] See paragraphs, 57, 63, and 64 of the General Division decision.
[31] See paragraph 64 of the General Division decision and *Lessard-Gauvin* v *Canada (Attorney General)*, 2018 FC 808, at paragraph 17.
[32] See paragraph 67 of the General Division decision.
[33] See paragraphs 71, 82 and 83 of the General Division decision.
[34] See paragraph 79 of the General Division decision.
[35] See paragraphs 16, 42, 49 of the General Division decision.
[36] See paragraphs 12, 13 and 85 of the General Division decision.
[37] See section 58(1)(b) of the DESD Act.

– **There is no arguable case that the General Division based its decision on an important error of fact**

[55] The Claimant argues that when she cross-examined the Commission's expert witness, it revealed that there was ambiguity, inadequacy, flaws and discrepancies in the EI Act when it comes to the treatment of minors.

[56] She reiterates that she couldn't get statistical information to support her case. And she says a lack of evidence doesn't mean that the law doesn't have a disproportionate adverse impact.

[57] She submits that the denial of benefits in her case imposed financial and mental health burdens, which have disadvantaged her studies and life.

[58] The Claimant advanced a Charter challenge to the General Division and as noted above, she has the burden of building and proving her own case.

[59] The General Division correctly stated in its decision that no specific form of evidence was required, but statistics, expert evidence, judicial note, and inferences can, among other things, be used to show a disproportionate impact.[38] It concluded that she had provided little evidence about the situation for minors aged 14 to 18.[39] So, she failed to prove her case.

[60] The Claimant's arguments under this ground amount to a disagreement with the General Division's findings and outcome. The Appeal Division has a limited mandate and a disagreement with the decision isn't a reviewable error.[40]

[61] The General Division is the fact finder and it was free to weigh the evidence before it. I can't intervene in the General Division's conclusion where it applies settled law to the facts.[41] Put another way, I can't reweigh the evidence in order to get a different conclusion that is more favourable for the Claimant.

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[38] See paragraphs 49(g) and 72 of the General Division decision.
[39] See paragraph 82 of the General Division decision.
[40] See section 58(1) of the DESD Act.
[41] See *Garvey v Canada (Attorney General),* 2018 FCA 118, at paragraphs 9–11.

[62] There is no arguable case that the General Division based its decision on an important error of fact. Its key findings were consistent with the evidence.[42] The General Division and the Appeal Division have to follow the law, even in compassionate cases where the result might feel unfair to a party.

– **There are no other reasons for giving the Claimant permission to appeal**

[63] I reviewed the file record, and examined the General Division decision. I found no other reason for giving the Claimant permission to appeal.[43]

Conclusion

[64] An extension of time is granted.

[65] Permission to appeal is refused. The Claimant's appeal won't proceed. It has no reasonable chance of success.

Solange Losier
Member, Appeal Division

[42] See section 58(1)(c) of the DESD Act.
[43] The Federal Court has recommended such a review in *Griffin* v *Canada (Attorney General),* 2016 FC 874 and *Karadeolian* v *Canada (Attorney General),* 2016 FC 615.