Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	Joseph Hickey
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 7, 2023 (GE-22-2365)

Tribunal member:	Jude Samson
Decision date:	July 18, 2023
File number:	AD-23-565

Decision

[1] The Claimant, Joseph Hickey, has filed an application to the Appeal Division. I'm dismissing his application as premature. The application will not proceed.

Overview

[2] The Claimant's employer suspended him from his job, saying that he hadn't complied with its COVID-19 vaccination policy. The Claimant applied for Employment Insurance (EI) regular benefits, but the Canada Employment Insurance Commission (Commission) denied his application. According to the Commission, the Claimant wasn't entitled to benefits because he had been suspended for "misconduct."[1]

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. He also launched a constitutional challenge. The Claimant argues that sections of the *Employment Insurance Act* (EI Act) should not apply in his case because the word "misconduct" is so vague that it offends constitutional principles.

[4] The General Division concluded that the Claimant's constitutional arguments had no chance of success, so his appeal should continue as a regular appeal.[2]

[5] Specifically, the General Division concluded that the Claimant's Amended Notice of Constitutional Question was flawed because it alleged a breach of unwritten constitutional principles, but no breach of the *Canadian Charter of Rights and Freedoms* (Charter).[3]

[6] The Claimant now wants to appeal the General Division decision about his Amended Notice of Constitutional Question.

[7] I'm dismissing the Claimant's application as premature.

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[1] Section 31 of the EI Act says that a person isn't entitled to receive EI benefits if they've been suspended from work because of their misconduct.
[2] See the General Division decision starting at page AD1-26.
[3] The Claimant's Amended Notice of Constitutional Question starts on page GD18-12.

Issues

[8] This decision focuses on the following issues:

a) Should the Appeal Division consider appeals of interlocutory decisions before the end of the General Division's process?

b) Are there exceptional circumstances in this case that justify allowing the Claimant's application to proceed?

Analysis

[9] The Tribunal can make interlocutory (or interim) decisions throughout a proceeding. For example, someone might ask for their hearing to be rescheduled or for documents to be kept confidential. Interlocutory decisions are often procedural in nature. They're different from final decisions that bring an appeal to its end.

The Appeal Division should hear appeals from interlocutory decisions only in exceptional circumstances

[10] The Claimant wants to appeal an interlocutory decision. He recognizes, however, that there are two lines of cases at the Appeal Division:

- most cases, including more recent ones, say that the Appeal Division should only hear appeals from interlocutory decisions in exceptional circumstances;[4]
- other cases say that the laws governing the Tribunal don't allow it to apply the exceptional circumstances requirement.[5]

[11] The Claimant relies on the second line of cases. He argues that any General Division decision can be appealed to the Appeal Division, and that the Appeal Division can only refuse leave (permission) to appeal when an appeal has no reasonable chance

[4] See, for example, *RP* v *Minister of Employment and Social Development*, 2022 SST 242, *MW* v *Canada Employment Insurance Commission*, 2022 SST 338, and *WF v Canada Employment Insurance Commission*, 2016 SSTADEI 53.
[5] See, for example, *Minister of Employment and Social Development v PF,* 2017 SSTADIS 321 and *RP v Minister of Employment and Social Development*, 2020 SST 1002.

of success.[6] According to the Claimant, the Appeal Division exceeds its powers if it refuses permission to appeal for any other reason.

[12] The Appeal Division considered arguments like the ones the Claimant is making in two recent decisions: *RP* and *MW*.[7] I don't have to follow those decisions, but they're persuasive and I choose to follow them.

[13] Briefly, I recognize that the Appeal Division has the power to hear appeals from interlocutory decisions. However, the Tribunal also has the power to control its own procedures, including the ability to decline hearing appeals that are premature.[8]

[14] The Federal Courts also have broad powers, but they have been very reluctant to hear challenges from interlocutory decisions.[9] The Court has said that it wants to avoid fragmented proceedings, along with the associated costs and delays that can be incurred.[10] Plus, proceedings can become moot (irrelevant) if the person trying to challenge the interlocutory decision wins their case in the end.

[15] Many of those concerns exist in this case too:

- hearing the appeal would fragment the proceedings and result in more delay; and
- the appeal could become moot if the Claimant succeeds at the General Division level.

[16] Given the Tribunal's power to control its own procedures, I will allow the application to proceed only if there are exceptional circumstances. It is normally best for the Appeal Division to consider all the issues at the same time, based on a complete record.

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[6] See sections 55 and 58(2) of the *Department of Employment and Social Development Act*.
[7] See *MW v Canada Employment Insurance Commission*, 2022 SST 338 and *RP v Minister of Employment and Social Development*, 2022 SST 242.
[8] *Prassad v Canada (Minister of Employment and Immigration)*, 1989 CanLII 131
[9] See *Dugré v Canada (Attorney General)*, 2021 FCA 8 and *Herbert v Canada (Attorney General)*, 2022 FCA 11.
[10] See *Canada (Border Services Agency)* v *CB Powell Limited*, 2010 FCA 61 at paragraphs 32-33.

– **There are no exceptional circumstances in this case**

[17] The Claimant argues that there are exceptional circumstances here because:

- state benefits have never previously been denied to people for refusing a medical injection with known risks; and
- the case raises important Constitutional issues, is of broad importance, and could help to resolve other Tribunal cases;

[18] I disagree. An important legal or constitutional issue is not an exceptional circumstance that justifies interfering with an ongoing proceeding at the General Division.[11] Plus, as the Claimant has highlighted, the Appeal Division does not have the power to declare, in a general way, that parts of the EI Act are invalid, nor can it make decisions that bind other Tribunal members.

Conclusion

[19] I'm dismissing the Claimant's application to the Appeal Division as premature. This means that the appeal will not proceed. However, the Claimant can bring these issues to the Appeal Division in the future, after the General Division has completed its work.

Jude Samson
Member, Appeal Division

[11] See *Canada (Border Services Agency)* v *CB Powell Limited*, 2010 FCA 61 at paragraph 33.