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:	Janet Lew
Decision date:	May 3, 2024
File number:	AD-24-13

Decision

[1] I gave the Applicant, Joseph Hickey (Claimant), leave (permission) to appeal on April 30, 2024. Both the Claimant and the Respondent, the Canada Employment Insurance Commission have asked me to explain why I granted leave. These are the reasons for my decision.

Overview

[2] The General Division determined that the Claimant had not met the filing requirements under the *Social Security Tribunal Regulations*, 2022 (Regulations, 2022) to raise a constitutional issue before the Social Security Tribunal of Canada (Tribunal). In particular, the General Division found that the Claimant had not provided a legal argument that supported a constitutional challenge.

[3] As a result, the General Division decided that it would not consider the Claimant's constitutional challenge of sections 30(1) and 31 of the *Employment Insurance Act*. The General Division determined that the appeal before it would continue as a "regular appeal" without consideration for any of the constitutional issues that the Claimant had intended to raise.

[4] The Claimant argues that he met the notice requirements and that he should have been permitted to challenge the applicability or operability of sections 30(1) and 31 of the *Employment Insurance Act*.

[5] The Claimant argues that the General Division erred in law when it decided against considering the constitutionality of those provisions of the *Employment Insurance Act*. In particular, the Claimant argues that:

i. the General Division misinterpreted section 1(1)(c) of *the Social Security Tribunal Regulations,* 2022,

ii. in the alternative, failed to distinguish the case of *Toronto (City) v Ontario (Attorney General)*[1] from his own case and thereby misapplied the section, or

iii. in the further alternative, failed to recognize that any constitutional principles that emerged from that decision were made in *obiter* and therefore not binding.

[6] The Claimant says that if the General Division had not made these legal errors, it would have considered the constitutionality of sections 30(1) and 31 of the *Employment Insurance Act*. He also says that it would have then determined that those sections are unconstitutionally vague and therefore inoperable or inapplicable, particularly in the circumstances of his case.[2] And he says that the General Division would have then necessarily determined that there was no basis to consider whether he had committed any misconduct.

Issue

[7] Why did I give the Claimant permission to appeal?

Analysis

The test for getting permission to appeal is easy to meet

[8] I can give the Claimant permission to appeal if there is an arguable case that the General Division made a certain type of error. This includes not following a fair process, acting beyond, or refusing to exercise its powers, or making a legal or factual error.[3] This is an easy test to meet.

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[1] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.
[2] The Claimant distinguishes this from invalidating the sections. Under *Martin*, tribunals have jurisdiction to decline to apply unconstitutional laws, whereas only courts can make declarations of invalidity.
[3] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says that I have to give permission to appeal if the appeal has a reasonable chance of success. This is the same as having an "arguable case." See *O'Rourke v Canada (Attorney General)*, 2018 FC 498. See also section 58(1) of the DESD Act.

There is an arguable case that the General Division made a legal error

[9] The Claimant argues that the General Division misinterpreted section 1(1)(c) of the Regulations, 2022, by imposing more rigorous obligations for a party to meet than the section requires.

[10] Section 1(1)(c) of the Regulations, 2022, requires a party who wants to challenge the constitutional validity, applicability or operability of a provision of the *Canada Pension Plan,* the *Old Age Security Act*, *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the rules or regulations made under any of those Acts, to file a notice with the Tribunal that sets out "a summary of the legal argument to be made in support of the constitutional challenge."

[11] The Claimant argues the General Division interpreted the section to read that the summary of the legal argument to be made in support of the constitutional challenge must have a "reasonable chance of success." He says that this is a much higher threshold than the section requires and that there is no basis or justification in law for it.

[12] Prior to the Regulations, 2022 coming into force, section 20 of the *Social Security Tribunal Regulations*, 2013 (Regulations, 2013) applied. A party was required to file a notice with the Tribunal that set out the provision at issue and contained any submissions in support of the issue that was raised.

[13] The General Division determined that section 20 of the Regulations, 2013, did not impose an onerous burden on a party, and that it was sufficient to meet the filing requirements, as long as a party gave an explanation of their argument.

> Therefore, all that was needed was an explanation of the argument, in laymen's terms, of how the appellant understood his legal case to be. The Tribunal has said that this requirement was not a heavy burden to meet [citation omitted]. There was no evaluation of the strength of the legal arguments brought forward by the appellant at this stage—if the submissions were related to the claim, and not frivolous, it was sufficient to meet the requirements.[4]

[4] See General Division decision dated April 7, 2023, para 11, at GD 27-4.

[14] The General Division determined that, in interpreting section 20(1)(1)(c) of the Regulations, 2022, consideration had to be given to the fact that parties before the Tribunal are often unrepresented.

[15] The General Division determined that a party's legal arguments had to be relevant to the constitutional challenge and "presents at least a sliver of hope being argued successfully."[5] The General Division found that parties would be able to meet this requirement in most cases.

[16] The General Division wrote:

> Courts have said that they will not dismiss a notice unless "it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success." [citation to *FU2 Productions Ltd. v The King*, 2022 TCC 148 at para 34; *Director of Public Prosecutions c Jetté*, 2022 QCCQ 8113 at paras 15, 29 and 30] But it does mean that it is necessary to evaluate if the argument brought forward has **at least a minimal chance of success**.[6]
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> (My emphasis)

[17] The General Division relied on *FU2 Productions* and the *Director of Public Prosecutions* decisions in concluding that a claimant had to show that their constitutional arguments had at least a minimal chance of success.

[18] In the *FU2 Productions* case, upon which the General Division relied, the respondent sought an order striking out parts of the appellant's notice of appeal, pursuant to paragraphs 53(1)(a) and (d) of the *Tax Court of Canada Rules (General Procedure)*. Under paragraph 53(1)(d) of the Rules, the Tax Court was permitted to strike out all or part of a pleading with or without leave to amend on the ground that it "discloses no reasonable grounds for appeal or opposing the appeal."

[19] The Tax Court set out five principles that it would consider when disposing of a motion under subrule 53(1) of the Rules. The first was that, in order to strike out a

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[5] See General Division decision at para 13.
[6] See General Division decision at para 13.

pleading, it had to be plain and obvious that the position had no reasonable prospect of success.

[20] In the *Director of Public Prosecutions* case, another decision upon which the General Division relied, the Attorney General of Quebec filed a motion for summary dismissal of the defendant's Notice to have an order in council declared in part inoperative.

[21] The Attorney General argued that the defendant's Notice failed to identify the precise nature of the constitutional and legal arguments at play. It argued that these were mandatory thresholds under sections 76 and 77 of the *Civil Code of Procedure*.

[22] Section 77 of the *Civil Code of Procedure* reads in part, "To be validly given, the notice to the Attorney General of Quebec must clearly state the contentions the person intends to assert and the grounds on which they are based…" The Court noted that it had to exercise prudence in order to avoid putting an end prematurely to the argument sought in the Notice and in the event of doubt, noted that it had to continue to a full hearing.[7]

[23] The Cour du Québec determined that if a Notice had no basis upon which it could reasonably succeed, then it was the trial judge's duty to dismiss applications when it became apparent that they were frivolous. The Cour du Québec also determined that summary dismissals were to be used only in cases where the constitutional challenge was, at its face value, frivolous.

[24] In the *FU2 Productions* case, the Rules specifically provided that the pleadings had to disclose a reasonable ground for appeal, which the Tax Court defined as having a reasonable chance of success. In the *Director of Public Prosecutions* case, section 77 of the *Civil Code of Procedure* did not include specific language that there had to be a reasonable ground for appeal. At most, it said that the notice had to state the grounds

[7] See *Director of Public Prosecutions*, at para 18.

on which the applicant's arguments were based. The Cour du Québec determined that this meant that the Notice had to have a basis upon which it could reasonably succeed.

[25] Both *FU2 Productions* and *Director of Public Prosecutions* dealt with constitutional notices in the context of summary dismissal applications. So, this raises the question: to what extent do these two decisions and the principles set out therein apply to the Claimant's case, if at all, in light of section 1(1)(c) of the Regulations, 2022, that calls for a legal argument that supports a constitutional challenge?

Next Steps

[26] Since I have identified a possible error on which the appeal might succeed, I do not have to consider any other errors at this point.

[27] The parties can now make arguments about any errors that the General Division may have made. They can also make arguments about the best way to fix any errors, and the outcome they want. The main options for fixing errors are either to send the appeal back to the General Division for reconsideration or to give the decision that the General Division should have given.

[28] This appeal now goes to the next step. This step involves a more detailed review, and the test that applies is harder to meet. The Claimant will have to prove that the General Division made an error that the law recognizes.[8] This means that getting permission to appeal does not guarantee a successful appeal.

Janet Lew
Member, Appeal Division

[8] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.