

FEDERAL COURT OF APPEAL

Donald TASAKA

Applicant

and

Attorney General of Canada

Respondent



APPLICATION UNDER s. 28(1)(g.1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7

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**NOTICE OF APPLICATION**

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**TO THE RESPONDENT:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the applicant. The relief claimed by the applicant appears on the following page.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court of Appeal, 701 West Georgia Street, Vancouver, BC, V7Y 1B6.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

SEP 13 2024

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Pacific Centre P.O. Box 10065  
701 West Georgia Street  
Vancouver, British Columbia, V7Y 1B6

ORIGINAL SIGNED BY  
**FRANK FEDORAK**  
A SIGNÉ L'ORIGINAL  
Issued by: \_\_\_\_\_

**TO:**

Attorney General of Canada  
British Columbia Regional Office  
Department of Justice Canada  
900 - 840 Howe Street  
Vancouver, British Columbia V6Z 2S9

**AND TO:**

Social Security Tribunal  
235 Queen Street,  
Room S143  
Ottawa, Ontario K1A 0H5

I HEREBY CERTIFY that the above document is a true  
copy of the original issued out of / filed in the Court on the  
\_\_\_\_\_ day of SEP 13 2024 A.D. 20

Dated this \_\_\_\_\_ day of SEP 13 2024 20

\_\_\_\_\_  
**FRANK FEDORAK**  
REGISTRY OFFICER  
AGENT DU GREFFE

## APPLICATION

1. This is an application for judicial review in respect of the Social Security Tribunal (the "SST") - Appeal Division (the "Appeal Division") decision number AD-23-959 rendered by Member Melanie Petrunia (the "Member") on August 14, 2024 (the "Appeal Division Decision"). The Appeal Division Decision dismissed the applicant's appeal and determined that he did not qualify for Employment Insurance Fishing Benefits. The Appeal Division Decision was first communicated to the applicant on August 15, 2024.
  
2. The applicant makes application for:
  - a. An order setting aside the Appeal Division Decision;
  - b. An order referring this matter back to the Appeal Division for determination;
  - c. Costs; and
  - d. Any further order that this honourable Court deems just.
  
3. The grounds for the application are:

### A. Legislative and Regulatory Background

4. The *Employment Insurance (Fishing) Regulations*, SOR/96-445 (the "*Regulations*") provide Employment Insurance ("EI") benefits to self-employed fishers. Benefit periods for unemployed fishers are established under ss. 8(1) and (2) of the *Regulations*:

8 (1) Subject to any other provision of this section and regardless of whether the fisher has had an interruption of earnings, a benefit period shall be established for a fisher who makes an initial claim for benefits during a period beginning not earlier than the Sunday of the week in which October 1 falls and ending not later than the Saturday of the week in which the following June 15 falls.

- (2) In order to have a benefit period referred to in subsection (1) established in respect of a fisher, the fisher shall prove that they
- (a) are not qualified under section 7 of the Act to receive benefits; and
  - (b) have accumulated, since the beginning of the qualifying period, not

less than the amount of insurable earnings from employment as a fisher that is set out in the schedule for the unemployment rate applicable to the region where they reside.

5. Temporary changes were made to the *Employment Insurance Act*, S.C. 1996, c. 23 (the “Act”) in order to facilitate access to EI benefits in light of the Covid-19 pandemic. Fishers who would not ordinarily have enough earnings to qualify for EI for the current season could receive benefits if they had qualified for EI in the same fishing season in at least one of the preceding two years.

6. Temporary changes were also made to the method used to calculate the fisher’s weekly rate of benefits. Again, fishers could rely on earnings from previous fishing seasons. Sections 153.1922 and 153.1923(1)(a) (collectively, the “Temporary Measures”) state:

#### **Eligibility**

153.1922 A fisher who does not meet the conditions under paragraph 8(2)(b) or (7)(b) of the *Employment Insurance (Fishing) Regulations* may receive benefits under section 8.1 of those Regulations if the fisher has received such benefits during any of the periods referred to in subparagraph 153.1923(1)(a)(ii) or (iii) or (b)(ii) or (iii).

#### **Determined earnings**

153.1923 (1) The rate of weekly benefits under section 8.1 of the *Employment Insurance (Fishing) Regulations* shall be calculated using the highest of the following earnings:

- (a) in the case of an initial claim for benefits under subsection 8(1) of those Regulations,
  - (i) if applicable, the earnings that would be used to calculate the fisher’s rate of weekly benefits,
  - (ii) the earnings that were used to calculate the fisher’s rate of weekly benefits for the benefit period that was established for the fisher under subsection 8(1) of those Regulations during the period beginning on September 29, 2019 and ending on June 20, 2020, and
  - (iii) the earnings that were used to calculate the fisher’s rate of weekly benefits for the benefit period that was established for the fisher under subsection 8(1) of those Regulations during the period beginning on September 30, 2018 and ending on June 15, 2019; and

7. However, subsection 153.1923(2) confirms that a fisher can only establish a benefit period using the Temporary Measures once for each of the winter and summer fishing seasons:

- (2) A fisher may have a benefit period established once under paragraph (1)(a) and once under paragraph (1)(b).

### **B. Background to the Applicant's Claim**

8. The applicant applied for EI summer fishing benefits on November 16, 2021 (the "2021 Claim"). This is the claim at issue in the present application.

9. The applicant did not have the earnings that would ordinarily be necessary to establish a benefit period under s. 8(2) of the *Regulations*. He therefore sought to rely on the Temporary Measures because he had qualified for EI in 2020 (the "2020 Claim").

10. The Canada Employment Insurance Commission (the "Commission") denied the applicant's 2021 Claim. The Commission determined that the applicant had already used the Temporary Measures to establish the 2020 Claim.

11. Although the applicant had sufficient earnings in 2020 to establish the 2020 Claim using the usual requirements in s. 8(2) of the *Regulations*, the Commission determined that he had still used the Temporary Measures.

12. The decision denying the applicant's claim was upheld on reconsideration and on appeal to the SST General Division.

### **C. The Appeal Division Decision Under Review**

13. The applicant obtained leave and appealed to the Appeal Division.

14. The Appeal Division dismissed the applicant's appeal. The Appeal Division determined that, because the applicant's weekly benefit rate for the 2020 Claim was

assessed using the Temporary Measures, that meant his benefit period for the 2020 Claim was also established using the Temporary Measures. The Appeal Division concluded that the applicant had already used the Temporary Measures for the 2020 Claim, and he therefore could not establish a benefit period for the 2021 Claim using the Temporary Measures.

#### D. Grounds for Review

##### a. The Member erred in law by concluding that the benefit period for the applicant's 2020 Claim was established under the Temporary Measures.

15. Subsection 153.1922 of the *Act* states that the Temporary Measures are only used to establish a benefit period if the claimant does not meet the usual conditions in s. 8(2)(b) of the *Regulations*:

A fisher who does not meet the conditions under paragraph 8(2)(b) or (7)(b) of the *Employment Insurance (Fishing) Regulations* may receive benefits under section 8.1 of those Regulations if the fisher has received such benefits during any of the periods referred to in subparagraph 153.1923(1)(a)(ii) or (iii) or (b)(ii) or (iii) (underlining added)

16. The applicant did meet the conditions in s. 8(2)(b) of the *Regulations* for the 2020 Claim. His benefit period was therefore established under s. 8(2)(b) of the *Regulations*. It was not established under the Temporary Measures.

##### b. The Member erred in law by concluding that the applicant's 2021 Claim was precluded by s. 153.1923(2)

17. Subsection 153.1923(2) states that a claimant can only establish a benefit period using the Temporary Measures once for each fishing season:

(2) A fisher may have a benefit period established once under paragraph (1)(a) and once under paragraph (1)(b) (underlining added).

18. As the applicant's benefit period for the 2020 Claim was established under s. 8(2)(b), and not the Temporary Measures, he had not yet used the Temporary Measures to establish a benefit period. He was therefore not precluded from

establishing a benefit period for the 2021 Claim using the Temporary Measures.

**c. The Member erred in law by conflating the establishment of a benefit period and the calculation of the weekly benefit rate.**

19. Subsection 153.1923(2) states that a claimant cannot establish a benefit period more than once using the Temporary Measures. It does not say that a claimant cannot have their benefit rate set more than once using the Temporary Measures.

20. Benefit periods and the rate of weekly benefits are two separate concepts. The benefit period is the period of time during which a claimant who has qualified for EI can receive benefits. The benefit rate is the amount of money the claimant can receive for each week they are entitled to EI benefits.

21. The fact that the applicant's benefit rate was set using the Temporary Measures does not mean the applicant's benefit period was also established using the Temporary Measures.

**d. The Appeal Division Decision is unreasonable in all the circumstances.**

22. There is no reasonable basis for the Appeal Division's conclusion that the applicant did not qualify for EI benefits.

**e. Such other grounds advanced by the applicant that this honourable Court permit.**

23. This application will be supported by: The Appeal Division's record of proceedings.

24. The applicant requests the S to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Social Security Tribunal to the applicant and to the Registry:

- a. A list of all material in the applicant's SST file; and
- b. Copies of all material in the applicant's SST file that were not distributed to the parties in the course of the appeal.

September 13, 2024



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