



Citation: *XN v Canada Employment Insurance Commission*, 2023 SST 103

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: X. N.
Representative: R. Z.

Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision at issue: Appeal Division decision dated November 10, 2022
(AD-22-686)

Tribunal member: Jude Samson

Type of hearing: In Writing

Decision date: February 1, 2023

File number: AD-22-895

Decision

[1] I am rescinding (cancelling) the Appeal Division's decision dated November 10, 2022 (November Decision)¹. However, I am also refusing the Claimant's request for leave (permission) to appeal. As a result, her appeal will not go forward.

Overview

[2] X. N. is the Claimant in this case. The Canada Employment Insurance Commission (Commission) decided that she needed to repay some of the Employment Insurance (EI) regular benefits that she received. Specifically, the Commission found that the Claimant's cancer and related treatments meant that she wasn't capable of or available for work from January 10, 2021, to November 1, 2021.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed her appeal. The Claimant then tried to appeal the General Division decision to the Tribunal's Appeal Division. However, in the November Decision, the Appeal Division decided that the appeal was late and refused to give the Claimant more time to appeal.

[4] The Claimant is now asking me to cancel or amend (change) the November Decision.² I've decided to cancel the November Decision because it was made based on a mistake about an important fact. Instead, I've concluded that the Claimant's appeal was on time.

[5] However, even if the Claimant's appeal was filed on time, I still find that it has no reasonable chance of success. As a result, I cannot give her permission to appeal. This means that the appeal will not go forward.

¹ This decision was made in file AD-22-686. In this file, it is document RA1A.

² Section 66 of the *Department of Employment and Social Development Act* (DESD Act) gives me the power to rescind or amend one of the Appeal Division's earlier decisions. I can consider the Claimant's application, since the Tribunal received it before section 66 was deleted from the DESD Act.

Issues

[6] This decision focuses on the following issues:

- a) Has the Claimant shown that the November Decision was based on a mistake about an important fact?
- b) Should I give the Claimant permission to appeal?

Analysis

The November Decision was based on a mistake about an important fact

- **The Appeal Division concluded that the Claimant's appeal was about four months late**

[7] The General Division decision is dated April 11, 2022. The law gave the Claimant 30 days from when she received the General Division decision to appeal it to the Appeal Division.³ These are the key dates that the Appeal Division found in the November Decision:

- The Claimant received the General Division decision on April 12, 2022;
- So, the Claimant's appeal was due on May 12, 2022; and
- The Appeal Division received the Claimant's appeal on September 13, 2022, about four months late.

[8] Importantly, the Appeal Division found that the Tribunal received no correspondence from the Claimant between April 28, 2022, and September 13, 2022.

³ See section 52(1)(a) of the DESD Act.

– **The Claimant has shown that she submitted an appeal on May 9, 2022**

[9] The Claimant has now shown that she appealed to the Appeal Division on May 9, 2022. Specifically, she has provided the following evidence:

- an email to the Tribunal dated May 9, 2022, with an attachment labelled “Application to the Appeal Division”;⁴
- an email from the Tribunal, with the same date and time, acknowledging receipt of an email from the Claimant;⁵
- a completed Application to the Appeal Division, also dated May 9, 2022.

[10] The Tribunal investigated whether it had received this email from the Claimant. However, it had already deleted emails from May 2022.⁶ So, the Tribunal couldn’t confirm or deny receiving the Claimant’s email.

[11] I’m satisfied that the November Decision was based on a mistake about an important fact. In the November Decision, the Appeal Division concluded that the Tribunal received no correspondence from the Claimant between April 28, 2022, and September 13, 2022. So, the Appeal Division was clearly unaware of the Claimant’s email and Application to the Appeal Division dated May 9, 2022.

[12] The Commission argues that the Claimant’s application should be dismissed because she hasn’t met the legal test for “new facts.”⁷ I disagree. New facts are not required here. Since this is an EI appeal, the Claimant’s application can succeed because the November Decision “was made without knowledge of, or was based on a mistake as to, some material fact.”⁸

[13] So, I’m cancelling the November Decision. The Claimant’s appeal was on time.

⁴ See page RA1-15 of the appeal record.

⁵ See page RA1-14.

⁶ See document RA4.

⁷ In this context, “new facts” have a specific meaning, as described in cases like *Canada (Attorney General) v Chan*, [1994] FCJ No 1916 (CA) and *Canada v Hines*, 2011 FCA 252.

⁸ See section 66(1)(a) of the DESD Act.

I cannot give the Claimant permission to appeal

[14] Even if the Claimant's appeal was filed on time, she still has to follow the Appeal Division's two-step process. This appeal is at step one: permission to appeal.

[15] The legal test the Claimant needs to meet at this step is low: Is there any arguable ground on which the appeal might succeed?⁹ If the appeal has no reasonable chance of success, then I must refuse permission to appeal.¹⁰

[16] To decide this question, I focused on whether the General Division could have made an error that the law recognizes.¹¹

– The General Division concluded that the Claimant wasn't available for work

[17] In its decision dated April 11, 2022, the General Division had to decide whether the Claimant was capable of and available for work from January 10 to August 7, 2021, while she was receiving EI benefits.¹²

[18] When assessing the Claimant's availability, the General Division focused on three factors. It concluded as follows:

- The Claimant wanted to return to the job market as soon as a suitable job was available.
- The Claimant didn't make enough efforts to find a suitable job during the relevant period.
- The Claimant's illness unduly (overly) limited her chances of going back to work.

⁹ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.

¹⁰ This is the legal test described in section 58(2) of the DESD Act.

¹¹ Section 58(1) of the DESD Act lists the relevant errors, formally known as "grounds of appeal."

¹² To get EI benefits, a person has to be "capable of and available for work": see section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[19] As part of its decision, the General Division recognized that the Claimant had made some efforts to return to work. It wrote the following in paragraphs 30 and 31 of its decision:

The Claimant admits that she didn't apply for any jobs since January 10, 2021. She says she wanted to apply at Kikuko for a day shift job. She spoke with someone who worked there but they didn't have any job vacancies.

The Claimant says that she also spoke with her counsellor in France. She didn't state the date of this conversation but noted that she asked her counsellor to let her know of any jobs, but there were no results. She also updated her resume (curriculum vitae).

[20] Nevertheless, the General Division concluded that the Claimant didn't meet the requirements for getting EI benefits. Specifically, it gave a lot of weight to the fact that the Claimant was undergoing cancer treatment during the relevant time, had surgery on May 8, 2021, and her doctor said she was unable to return to work before November 1, 2021.

– **The Claimant's appeal has no reasonable chance of success**

[21] In her appeal, the Claimant is now arguing that the General Division based its decision on an important mistake about the facts of the case.¹³ Specifically, she says that paragraphs 30 and 31 quoted above contain important errors because:

- the Claimant never applied to work at Kikuko;
- instead, Kikuko is a social worker in British Columbia who was supporting the Claimant to look for work and update her résumé.

[22] This argument has no reasonable chance of success. The Appeal Division can only intervene in a case because of a mistake about the facts if the General Division based its decision on that mistake.

¹³ See page RA1-9.

[23] Here, the General Division would have come to the same conclusion, even if it had made the mistakes above. That's because the General Division reached its conclusion despite recognizing that the Claimant made some efforts to look for work and update her résumé. Plus, the General Division decision is based on the Claimant's modest efforts to find work **and** her inability to work, as confirmed by her doctor.

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

[24] Aside from the Claimant's arguments, I also reviewed the file and examined the General Division decision.¹⁴ The General Division summarized the law and used evidence to support its decision. I didn't find evidence that the General Division might have ignored or misinterpreted.

Conclusion

[25] I've decided to cancel the November Decision and that the Claimant's appeal was on time.

[26] However, I've also decided that the Claimant's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal. This means that the appeal will not proceed.

[27] This leaves the Claimant with a substantial debt. If she hasn't already done so, the Claimant might be able to contact Service Canada or the Canada Revenue Agency to discuss ways of reducing her debt or of making payments more manageable.¹⁵

Jude Samson
Member, Appeal Division

¹⁴ The Federal Court has said that I must do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

¹⁵ For example, section 56 of the *Employment Insurance Regulations* says that a person's debt can sometimes be written-off (cancelled) if it is causing serious financial hardship. The Canada Revenue Agency's Debt Management Call Centre can be reached at 1-866-864-5823.