



Citation: *WM v Canada Employment Insurance Commission*, 2023 SST 351

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: W. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 19, 2022
(GE-22-2274)

Tribunal member: Melanie Petrunia

Decision date: March 28, 2023

File number: AD-23-126

Decision

[1] An extension of time to apply to the Appeal Division is granted. However, leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, W. M. (Claimant), was placed on an unpaid leave of absence (suspended) from her job. Her employer introduced a mandatory COVID-19 vaccination policy. The Claimant did not comply with the policy.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was suspended because of her misconduct. It disentitled the Claimant from receiving employment insurance (EI) benefits. The Claimant made a request for reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Claimant was suspended from her job because she did not comply with the employer's vaccination policy. It found that her actions were deliberate and she knew that she could be suspended.

[5] The Claimant now wants to appeal the General Division decision to the Appeal Division, but she needs permission for her appeal to move forward. She argues that the General Division made an error of jurisdiction.

[6] I must decide whether I will grant the Claimant an extension of time to file her application for leave to appeal, and if so, whether she has raised some reviewable error of the General Division upon which the appeal might succeed

[7] I am granting the Claimant an extension of time to file her application. However, I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[8] The issues are:

- a) Was the application to the Appeal Division late?
- b) Should I extend the time for filing the application?
- c) If I grant the extension, does the Claimant's appeal have a reasonable chance of success?

Analysis

The application was late

[9] An application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the applicant.¹

[10] The General Division decision was sent to the Claimant by email and regular mail on December 19, 2022. Her application for leave to appeal was not received by the Appeal Division until January 31, 2023, which was after the filing deadline.

[11] I find that the Claimant's application for leave to appeal was late.

I am extending the time for filing the application

[12] 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.²

[13] The Claimant's former representative sent the application for leave to the Tribunal by email. In her email, she states that she sent it previously but did not receive an acknowledgment of receipt.³

¹ See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).

² It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure*.

³ AD1-1

[14] The application form was signed by the Claimant and the date beside her signature is January 18, 2023, which was before the filing deadline.⁴ The Claimant was asked about her reasons for filing late and stated that she thought it was sent in within the time frame for appealing.

[15] I find that the Claimant believed that her representative had sent the application for leave to appeal within 30 days after the decision was communicated. I find that she has a reasonable explanation for why the application was late.

I am not giving the Claimant permission to appeal

[16] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?⁵

[17] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the *Department of Employment and Social Development Act* (DESD Act).⁶

[18] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;⁷ or

⁴ AD1-7

⁵ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

⁶ DESD Act, s 58(2).

⁷ The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as “willfully going contrary to the evidence” and defined capricious as “marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent” *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

d) made an error in law.⁸

[19] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁹

The General Division did not make any reviewable errors

[20] In her application for leave to appeal, the Claimant argues that the General Division made an error of jurisdiction.¹⁰ She states that she would like another review to exhaust all avenues.

[21] The Claimant argues that her employer's policy was an abuse of power and the vaccine was an experimental procedure. She says that she did not intend to lose her job but she had to protect her bodily autonomy. The Claimant's arguments do not point to an error of jurisdiction by the General Division.

[22] In a letter submitted after the application was filed, the Claimant also added that she did not feel that the General Division considered all of the facts.¹¹ She says that the decision was made in only two days. The Claimant restates her arguments about the employer's policy, the experimental nature of the vaccine and her right to make personal medical choices.

[23] The Claimant made these arguments at the hearing before the General Division and they were taken into account in its decision.¹² The General Division found that it is not the Tribunal's role to decide if the employer's policy was reasonable.¹³ It found that

⁸ This paraphrases the grounds of appeal.

⁹ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

¹⁰ AD1-9

¹¹ AD1A-1

¹² General Division decision at paras 24 and 35.

¹³ General Division decision at para 26.

the Claimant made a personal decision not to comply with the policy and that she was aware that she could be suspended.¹⁴

[24] The Claimant did specify which facts she thinks that the General Division failed to take into consideration. I find that it considered all of the arguments and relevant facts referred to by the Claimant in her application for leave to appeal. I have not found any relevant facts that the General Division did not consider in its decision.

[25] The General Division properly stated the law concerning misconduct. It found that the Claimant was suspended because she did not comply with her employer's vaccination policy.¹⁵ It found that she was aware of the policy and the consequences of not complying.¹⁶ The General Division considered all relevant facts and found that the Commission had proven that the Claimant was suspended from her job because of misconduct.

[26] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made any errors of law.

[27] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[28] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

¹⁴ General Division decision at para 30.

¹⁵ General Division decision at para 16.

¹⁶ General Division decision at para 29.