



Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 342

Social Security Tribunal of Canada Appeal Division

Extension of Time Decision

Applicant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 5, 2022
(GE-22-2868)

Tribunal member: Neil Nawaz

Decision date: March 24, 2023

File number: AD-23-92

Decision

[1] I am refusing the Claimant an extension of time in which to apply for leave to appeal. This appeal will not be going forward.

Overview

[2] The Claimant, M. S., is a former employee of the X (X). In April 2022, the X dismissed the Claimant after he confiscated a disruptive customer's fare card. The X said that the Claimant acted outside his authority as a station janitor. It said that he had been previously warned against breaking the rules.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was guilty of misconduct, so it didn't have to pay him Employment Insurance (EI) benefits.

[4] The Claimant said the incident that led to his dismissal wasn't misconduct. He said that he didn't act inappropriately, because his job title was station collector, not janitor. He said that, as a station collector, he had the authority to intervene when he saw a customer doing something wrong.

[5] The Claimant appealed the Commission's decision to the Social Security Tribunal. After holding a hearing, this Tribunal's General Division agreed with the Claimant. It found the Claimant was not guilty of misconduct for EI purposes because there wasn't enough evidence to show that he acted outside his authority. For that reason, said the General Division, the Claimant probably didn't appreciate that his attempt to deal with the disruptive customer would cost him his job.

[6] The Claimant is now seeking permission to appeal the General Division's decision. Although the Claimant succeeded at the General Division, he still takes issue with some of its findings. He argues that the General Division made errors in the way it described his transition from station collector to janitor and back again.

Issues

[7] After reviewing the Claimant's request for leave to appeal, I had to decide the following questions:

- Was the Claimant's application for leave to appeal filed late?
- If the appeal was filed late, should I grant the Claimant an extension of time?
- If I grant the extension, does the Claimant's appeal have a reasonable chance of success?

[8] I have concluded that the Claimant submitted his application for leave to appeal late and did not have reasonable explanation for doing so. Although I didn't have to decide the third question, I also found that the Claimant's appeal would not have a reasonable chance of success. This means that the Claimant's appeal will not be proceeding a full hearing.

Analysis

The Claimant's request for leave to appeal 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 The Appeal Division may allow further time to make an application for leave to appeal, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[10] In this case, the General Division issued its decision on December 5, 2022, and the Tribunal sent the decision to the Claimant by email and regular mail on the same day. However, the Appeal Division did not receive the Claimant's application for leave to appeal until January 20, 2023 — more than two weeks past the filing deadline.

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

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

The Claimant did not have a reasonable explanation for the delay

[12] When an application for leave to appeal is submitted late, the Tribunal may grant the applicant an extension of time if they have a reasonable explanation for the delay.² In deciding whether to grant an extension, the interests of justice must be served.³

[13] In its application form, the Tribunal asks parties requesting leave to appeal past the deadline to explain why they are late.⁴ In this case, the Claimant wrote, “It was due to minor important facts on the Decision which led to this Application for Appeal.” On the face of it, this explanation did not address the question and, moreover, made little sense: how can a fact be important and minor at the same time?

[14] For that reason, the Appeal Division sent the Claimant a letter specifically asking him to elaborate on his reasons for the delay.⁵ However, the Claimant did not respond to the letter or otherwise offer any further explanation for his late application.⁶

[15] I then scheduled a settlement conference in the hope that the parties might resolve this matter quickly. I had also hoped to give the Claimant a final opportunity to explain his late application. However, the Claimant did not join the conference at the appointed time and date.⁷

[16] The rules require applicants to provide a reasonable explanation when they submit their applications late. Despite several opportunities, the Claimant has not done so. Under the circumstances, I am not willing to allow this matter to proceed any further.

² See section 27 of the *Social Security Tribunal Rules of Procedure*.

³ See *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁴ See section 8 of the Claimant’s application to the Appeal Division – Employment Insurance dated January 20, 2023, AD1.

⁵ See Tribunal’s letter to Claimant dated February 15, 2023.

⁶ The Claimant subsequently did submit a request to expedite his appeal (AD1E), as well as a copy of his original leave to appeal application (AD1F). However, nothing in this correspondence addressed the Appeal Division’s request to explain his late appeal.

⁷ See the Appeal Division’s settlement conference summary letter dated March 23, 2023. The Claimant had asked for the settlement conference to be held in person, but I thought that a videoconference was the more appropriate format for a proceeding that is meant to be relatively informal. Section 37(2) of the *Social Security Tribunal Rules of Procedure* permit Tribunal members to choose the way in which a case or settlement conference takes place.

The Claimant's appeal would have had no reasonable chance of success

[17] Because the Claimant had no reasonable explanation for missing the filing deadline, I don't have to decide whether the Claimant appeal would have a reasonable chance of success. However, I think it is only fair to explain to the Claimant that, even if he had filed his application on time, his appeal would have still failed.

– The Appeal Division focuses on errors

[18] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.⁸

– The Appeal Division grants leave only if there is an arguable case

[19] For an appeal to move ahead, the Appeal Division first has to decide whether it has a reasonable chance of success.⁹ Having a reasonable chance of success is the same thing as having an arguable case.¹⁰ Without an arguable case, the applicant's appeal goes no further.

– It's not clear why the Claimant is pursuing an appeal

[20] At the General Division, the Claimant argued that he did nothing to deserve dismissal. He maintained that he had the authority to intervene when he witnessed a passenger vandalizing an in-station retail store. He explained that, although he had previously been working as a janitor, he had resumed his previous position as a station collector by the time of the incident.

⁸ See DESDA, section 58(1).

⁹ See DESDA, section 58(2).

¹⁰ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[21] From what I can see, the General Division gave the Claimant essentially everything he wanted. It found that he was not guilty of misconduct. It found that he had reason to believe he was authorized to address disruptive customer behaviour. It found that he was not disqualified from receiving EI benefits.

[22] The Claimant is now disputing two of the General Division's factual findings. But I fail to see how those findings are inaccurate and, even if they are inaccurate, how they are material.

– **The General Division did not make factual errors**

[23] The Claimant takes issue with this sentence in the General Division's decision: "[The Claimant] agrees that he signed a 'last chance' agreement on March 22, 2021, which previously placed him into a janitor position due to health issues."¹¹ The Claimant insists that he was a station collector on that date.

[24] However, when I look at the evidence, I can see that the General Division had good reason to make its finding. There is a memorandum of agreement on file between the Claimant, his union, and the X that says:

Whereas on March 22, 2021, the Employee was reinstated to sick leave on a Last Chance Agreement;

[...]

And whereas the Employee's medical restrictions allow him to fulfill the Station Janitor role within the Stations Department...¹²

[25] This preamble, which the Claimant signed off on, appears to correspond to the General Division's finding.

[26] The Claimant also objects to this sentence: "The Claimant testified that, after the March 22, 2021, last chance agreement, his job title was changed back to station

¹¹ See General Division decision, paragraph 23.

¹² See memorandum of agreement dated October 27, 2021, GD3-69.

collector on June 28, 2021, when he submitted his updated medical report.¹³ The Claimant says this statement is incorrect.

[27] However, when I look at the evidence, I see the following documents: (i) a report from a doctor dated June 27, 2021, saying the Claimant was “medically suitable to resume his employment in the position of station collector in April 2021”;¹⁴ and (ii) a request from the Claimant dated June 28, 2021, approved by a foreperson, to cancel prior “pre-bid sheets” and remain on the “station collectors group schedule.”¹⁵

[28] In its role of finder of fact, the General Division is entitled to some leeway in how it chooses to weigh and assess the evidence before it. Based on the documents cited above, the General Division had reason to find that the Claimant was likely a station collector at the time of the customer incident.

– **Even if the General Division made factual errors, they were insignificant**

[29] At the Appeal Division, it is not enough to show that the General Division made a factual error. An appellant must also show that the General Division **based** its decision on that error. Put another way, the error must be significant or material.

[30] Even if the General Division did, in fact, make the errors that the Claimant alleges, I don’t see how they affected the result. As mentioned, the Claimant’s appeal was successful. The General Division believed him when he said that he was a station collector at the time of the incident and thus had the authority to intervene. The General Division agreed with him that, for EI purposes, his actions did not amount to misconduct.

[31] The Claimant appears to be quibbling about the precise date on which he moved from being a janitor to a station collector. But that ultimately has no bearing on the

¹³ See General Division decision, paragraph 27.

¹⁴ See letter by Dr. Tara Burra, general practitioner, dated June 27, 2021. The letter actually reads “June 27, **2022**” but, given the context, I am satisfied that this is a typographical error.

¹⁵ See X cancellation of pre-bid sheets form dated June 28, 2021, GD2-11.

General Division's finding that the Claimant did not know there was a real possibility of being dismissed because of his actions.

Conclusion

[32] I am refusing the Claimant an extension of time in which to apply for leave to appeal. This means that the appeal will not proceed.

Neil Nawaz
Member, Appeal Division