



[TRANSLATION]

Citation: *RP v Canada Employment Insurance Commission*, 2023 SST 703

## **Social Security Tribunal of Canada Appeal Division**

# **Extension of Time and Leave to Appeal Decision**

<b>Applicant:</b>	R. P.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	General Division decision dated December 21, 2022 (GE-22-2886)
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<b>Tribunal member:</b>	Pierre Lafontaine
<b>Decision date:</b>	June 5, 2023
<b>File number:</b>	AD-23-328

## **Decision**

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

## **Overview**

[2] The Applicant (Claimant) lost his job. His employer said that he was let go because he had smoked in the mine, near explosives, when doing so was contrary to the employer's policy.

[3] The Canada Employment Insurance Commission (Commission) decided that it could not pay him Employment Insurance benefits, since he had lost his job because of misconduct. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant lost his job because he had smoked in the mine when the employer's policy prohibited it. It found that the Claimant knew that smoking was prohibited in the mine. The General Division found that the Claimant knew or should have known that, by doing so, he could be let go. It found that the Claimant lost his job because of misconduct.

[5] The Claimant is now asking the Appeal Division for permission to appeal the General Division's decision. He argues that the General Division did not question his employer to verify his credibility. He says that the General Division could not fault him for having forgotten a detail, since the file dates back five years. He argues that he never smoked a cigarette near explosives. He says that smoking in an underground mine is permitted in areas with continuous ventilation.

## **Issues**

[6] The issues are as follows:

- a) Was the application to the Appeal Division late?

- b) If so, should I extend the time for filing the application?
- c) Is there an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success?

## **Analysis**

### **The application was late**

[7] The General Division decision was communicated to the Claimant on December 21, 2022. He filed his application for permission to appeal on March 30, 2023. His application was late.

### **I am extending the time for filing the application**

[8] When deciding whether to extend the time for filing the application, I have to consider whether the Claimant has a reasonable explanation for why his application was late.<sup>1</sup>

[9] The Claimant argues that he did not receive the General Division decision until March 2, 2023, when he got it from his representative at the General Division.

[10] In the circumstances, the Claimant has given a reasonable explanation for the delay. I should extend the time for filing the application.

### **I am not giving the Claimant permission to appeal**

[11] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are the following:

1. The General Division hearing process was not fair in some way.

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<sup>1</sup> See section 27(2) of the *Social Security Tribunal Rules of Procedure*.

2. The General Division did not decide an issue it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[12] An application for permission to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met at the hearing of the appeal on the merits. At the permission to appeal stage, the Claimant does not have to prove his case; he must instead establish that his appeal has a reasonable chance of success—in other words, that there is arguably a reviewable error based on which the appeal might succeed.

[13] I will give permission to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

[14] The Claimant says that the General Division did not question his employer to verify his credibility. He says that the General Division could not fault him for having forgotten a detail, since the file dates back five years. He argues that he never smoked a cigarette near explosives. He says that smoking in an underground mine is permitted in areas with continuous ventilation.

[15] The General Division had to decide whether the Claimant lost his job because of misconduct.

[16] The General Division's role is not to rule on the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by letting the Claimant go in such a way that his dismissal was unjustified. Its role is to decide whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.<sup>2</sup>

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<sup>2</sup> *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[17] The mere fact that one party is present and the other is absent is not a determining factor. The General Division is free to prefer the credibility of either party.

[18] The General Division found that the Claimant lost his job because he had smoked in the mine when the employer's policy prohibited it. It found that the Claimant knew that smoking was not permitted in the mine. It found that the Claimant knew or should have known that, by doing so, he could be let go. It found that the Claimant lost his job because of misconduct.

[19] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[20] In an initial statement, only seven months after the dismissal, the Claimant told the Commission that no one could say that he had smoked because he had not done so.<sup>3</sup>

[21] The employer told the Commission that the Claimant's supervisor had caught him smoking underground in the mine near explosives.<sup>4</sup> The supervisor confirmed the employer's version in writing.<sup>5</sup> The employer later produced a photo of the sign at the entrance to the mine that indicates a ban on smoking underground.<sup>6</sup>

[22] In a subsequent statement, the Claimant testified that he had smoked in the mine and not in an approved area. He admitted that he was aware of the regulations prohibiting it. He testified that he was not the only one smoking in the mine and that he

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<sup>3</sup> See GD3-57.

<sup>4</sup> See GD3-87.

<sup>5</sup> See GD3-91.

<sup>6</sup> See GD3-102.

was far from the explosives at the time of the incident.<sup>7</sup> In a written statement, the Claimant reiterated that he had smoked a cigarette on the day of his dismissal.<sup>8</sup>

[23] The Claimant's supervisor told the Commission that he had personally caught the Claimant smoking while sitting in a moving wagon in the mine.<sup>9</sup> He gave disciplinary notice to every employee caught smoking in the mine.<sup>10</sup>

[24] After initially saying after he was let go that he had not smoked, the Claimant changed his version to say that he had smoked in the mine far from explosives. But the employer's version has not changed over time. I can find no reason to intervene on the issue of the Claimant's credibility, as assessed by the General Division.

[25] The evidence before the General Division shows that the Claimant was let go because he had smoked in the mine when he knew it was prohibited. The Claimant knew or should have known that he was acting contrary to the employer's policy and that, as a result, he could be let go. He was let go for this reason. So, he lost his job because of misconduct.

[26] The General Division's decision is based on the evidence presented and the applicable legislation, as interpreted in the case law.

[27] An appeal to the Appeal Division is not a new hearing where a party can present their evidence again and hope for a different decision.

[28] After reviewing the appeal file, the General Division decision, and the Claimant's arguments in support of the application for permission to appeal, I find that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

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<sup>7</sup> See GD3-95.

<sup>8</sup> See GD2-19 and GD2-20.

<sup>9</sup> See GD3-121.

<sup>10</sup> See GD3-122.

## **Conclusion**

[29] An extension of time to apply to the Appeal Division is granted. However, permission to appeal is refused. This means that the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division