Citation: *PM v Canada Employment Insurance Commission*, 2023 SST 803

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	P. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 13, 2022 (GE-22-1201)

Tribunal member:	Neil Nawaz
Decision date:	June 19, 2023
File number:	AD-23-304

Decision

[1] I am refusing the Claimant permission to appeal because she does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant, P. M., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as a clerk for a hospital in the Greater Toronto Area. On September 29, 2021, the hospital placed the Claimant on an unpaid leave of absence after she refused to get vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her employer's vaccination policy amounted to misconduct. The Commission also found that the Claimant failed to prove that she was available for work from November 1, 2021.

[4] The Claimant appealed the Commission's decision to this Tribunal's General Division. It agreed with the Commission and found that the Claimant had not shown herself capable and willing to work after the hospital let her go.

[5] The Claimant is now requesting leave or permission to appeal the General Division's decision. She alleges that the General Division ignored evidence that she was wrongfully dismissed from her job. She maintains that she was fired before she could seek medical advice ruling out a possible adverse reaction to the COVID-19 vaccine.

Issues

[6] After reviewing the Claimant's request for permission to appeal, I had to decide these questions:

[1] After determining that she remained unvaccinated, the hospital dismissed the Claimant on October 15, 2021.

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

[7] I have concluded that the Claimant's application for leave to appeal was not late. However, I am refusing the Claimant permission to proceed, because her appeal does not have a reasonable chance of success.

Analysis

– The Claimant's request for leave to appeal was late

[8] 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.[2] 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.

[9] In this case, the General Division issued its decision on July 13, 2022, and the Tribunal sent the decision to the Claimant by regular mail three days later. The Appeal Division did not receive the Claimant's application for leave to appeal until March 28, 2023 — approximately seven months past the filing deadline.

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

– The Claimant had reasonable explanation for the delay

[11] 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.[3] In deciding whether to grant an extension, the interests of justice must be served.[4]

---

[2] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).
[3] See section 27 of the *Social Security Tribunal Rules of Procedure*.
[4] See *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[12] In her application requesting permission to appeal, the Claimant explained that, in addition to losing her job, she lost her mother and her home at around the same time. She said that these traumatizing events left her emotionally, psychologically, and mentally exhausted.

[13] Under the circumstances, I find this explanation reasonable. That's why I'm considering the Claimant's application even though it was late.

– The Claimant's appeal does not have a reasonable chance of success

[14] 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.[5]

[15] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[6] Having a reasonable chance of success is the same thing as having an arguable case.[7] If the Claimant doesn't have an arguable case, this matter ends now.

[16] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

---

[5] See DESDA, section 58(1).
[6] See DESDA, section 58(2).
[7] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

There is no case that the General Division made an error of law

[17] Under section 18(1)(a) of the EI Act, claimants are not entitled to benefits unless they are capable of and available for work. The Federal Court of Appeal says that this requires decision-makers to consider whether a claimant:

- wanted to return to work as soon as a suitable job was available;
- tried to do so by making efforts to find a suitable job; and
- set unreasonable conditions that limited their chances of finding a job.[8]

[18] I am satisfied that the General Division accurately summarized the law around availability.

There is no case that the General Division ignored or mischaracterized relevant evidence

[19] The General Division reviewed the Claimant's written and oral submissions and, after applying the law to the available evidence, came to the following findings:

- The Claimant only wanted to return to her old job – she was waiting to get her hospital position back;
- The Claimant did not try to get another suitable job – she didn't make efforts to find another job in healthcare or in any other sector; and
- The Claimant set unreasonable personal conditions – she was only willing to consider potential jobs where her vaccination status wouldn't matter.

[20] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. I see no reason to interfere with the General Division's conclusion that the Claimant was capable of work but unavailable for work.

Claimants cannot succeed by rearguing their case

[21] The Claimant's arguments at the Appeal Division mirror the arguments that she made at the General Division. She says that she was wrongfully dismissed from her job.

---

[8] See *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA).

She maintains that she did not disobey the hospital's COVID-19 vaccination policy but was only taking time to seek medical advice.

[22] However, the General Division heard these arguments and found that they were not relevant to the issue of her availability and whether she was entitled to EI.

[23] To succeed at the Appeal Division, claimants must do more than simply disagree with the General Division. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. A hearing at the Appeal Division is not meant to be a "redo" of the hearing at the General Division.

[24] In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.[9] In this case, the General Division examined what the Claimant did after losing her job and concluded that, based on the law, she was unavailable for work. In the absence of a significant legal or factual error, I see no reason to second-guess this finding.[10]

Conclusion

[25] I decided to consider the Claimant's appeal even though it was late. However, the appeal will not be proceeding because it has no reasonable chance of success.

[26] Permission to appeal is refused.

Neil Nawaz
Member, Appeal Division

[9] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[10] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.