



Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 827

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 8, 2023
(GE-22-3646)

Tribunal member: Neil Nawaz

Decision date: June 21, 2023

File number: AD-23-307

Decision

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

Overview

[2] The Applicant lost her job and applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) approved her application effective October 4, 2020.

[3] In a letter dated September 29, 2021, the Commission informed the Applicant that it was retroactively disentitling her from receiving benefits. It found that, because she was taking a course, she had not been available for work since March 15, 2021. After concluding that the Applicant had been overpaid, the Commission issued her a notice of debt.

[4] Nine months later, on June 20, 2022, the Applicant asked the Commission to reconsider its disentanglement decision. The Commission refused to consider the request because it was late. The Commission found that the request came well after the 30-day deadline to request reconsideration. The Commission found that the Applicant's explanation for the delay did not justify granting her an extension of time in which to request reconsideration. It also found that the Applicant failed to show that she had a continuing intention to make a request.

[5] The Applicant appealed the Commission's refusal to this Tribunal's General Division. She said that she didn't know about the 30-day deadline and insisted that she had good reason for her late request — she was a working mother of two who was taking a demanding course while struggling with depression.

[6] The General Division held a hearing by teleconference and dismissed the appeal. It found that the Applicant's request for reconsideration was late, and it found that the Commission had properly used its discretionary powers to refuse the request.

[7] The Applicant is now asking for permission to appeal the General Division's decision. She argues that the General Division failed to consider how she was treated by a "rude and dismissive" Service Canada employee, who left her with the impression that she had no way to challenge the Commission's initial decision to disentitle her from EI benefits.

Issue

[8] 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 use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.¹

[9] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.² At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.³ This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.⁴

[10] I had to decide whether the Applicant's reason for appealing fell within one or more of the above-mentioned grounds of appeal and, if so, whether it raised an arguable case.

Analysis

[11] 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 Applicant does not have an arguable case.

¹ See *Department of Employment and Social Development Act* (DESDA), section 58(1).

² See DESDA, sections 56(1) and 58(3).

³ See DESDA, section 58(2).

⁴ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

– **There is no case that the General Division misinterpreted the law**

[12] According to the *Employment Insurance Act*, a person who disagrees with the Commission's initial decision about their application has 30 days to ask the Commission to reconsider that decision.⁵

[13] The Commission may allow a longer period to request reconsideration if it is satisfied that (i) the person has a reasonable explanation for requesting a longer period and (ii) the person has demonstrated a continuing intention to request a reconsideration. The Commission must consider both criteria and be satisfied that they have been met.⁶

[14] If the request for reconsideration is made more than 365 days after the person was notified of the decision, the Commission must also be satisfied that (iii) the request has a reasonable chance of success and (iv) no prejudice would be caused to any party by allowing a longer period to make the request. The Commission must consider all four criteria and be satisfied that all of them have been met.⁷

[15] These restrictions aside, the Commission retains some degree of discretion in deciding whether to grant an extension. However, case law requires the Commission to exercise its discretion judicially.⁸ The Federal Court has held that a discretionary power is not exercised judicially if the decision-maker

- (i) acted in bad faith;
- (ii) acted for an improper purpose or motive;
- (iii) took into account an irrelevant factor;
- (iv) ignored a relevant factor; or
- (v) acted in a discriminatory manner.⁹

⁵ See section 112(1) of the *Employment Insurance Act*.

⁶ See section 1(1) of the *Reconsideration Request Regulations*.

⁷ See section 1(2) of the *Reconsideration Request Regulations*. See also *Lazure v Canada (Attorney General)*, 2018 FC 467. This case is about a similar four-part test contained in the *Canada Pension Plan* and its associated regulations, but its principle applies just as well to the EI Act and the *Reconsideration Request Regulations*.

⁸ See *Canada (Attorney General) v Uppal*, 2008 FCA 388.

⁹ See *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.

[16] In this case, the General Division found that, since the Applicant's request for reconsideration was submitted after the 30-day "soft" deadline (but before the one-year year "hard" deadline), the Commission was only required to consider (i) whether the Applicant had a reasonable explanation for requesting a longer period and (ii) whether she demonstrated a continuing intention to request a reconsideration. The General Division went on to find that, in refusing the Applicant an extension of time, the Commission exercised its discretion in a judicial manner.

[17] From my review of the file, I don't see how the General Division erred in its understanding or application of the relevant law.

– There is no case that the General Division ignored significant evidence

[18] The Applicant alleges that the General Division ignored evidence that a Service Canada agent treated her rudely and misled her about her rights.

[19] I don't see an argument here.

[20] In its role as finder of fact, the General Division is entitled to some leeway in how it considers the information on file.¹⁰ In this case, the General Division looked at how the Commission assessed the Applicant's explanation for her delay. It noted the Applicant's account that a Service Canada agent made it sound like there was nothing she could do to change the outcome, which she says caused her to drop the matter until a friend later suggested that she make a request.¹¹

[21] However, the General Division noted that, although the Applicant claimed to have no knowledge of the 30-day request deadline, she had in fact been informed of it by way of the Commission's September 29, 2021, letter. For that reason, the General Division concluded that the Commission did not: (i) act in bad faith; (ii) act for an improper purpose or motive; (iii) take into account an irrelevant factor; (iv) ignore a relevant factor; or (v) act in a discriminatory manner.

¹⁰ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

¹¹ See General Division decision, paragraph 37.

[22] Similarly, the General Division found that the Commission acted in a judicial manner when it decided that the Applicant's other explanation for being late — she said she was busy with school — did not justify an extension. As the General Division noted, this explanation also suggested that the Applicant showed no continuing intention to request a reconsideration.

[23] The Applicant plainly disagrees with the General Division's decision, but that by itself is not enough to succeed here. That's because the Appeal Division is not meant to be a forum for EI claimants to reargue the merits of their case while hoping for a different outcome. Here, the General Division considered the evidence, made findings supported by that evidence, and then subjected those findings to the appropriate law. In the absence of a significant factual or legal error, I see no reason to second-guess the General Division's decision to ratify the Commission's refusal to extend the deadline.¹²

Conclusion

[24] For the above reasons, I am not satisfied that this appeal has a reasonable chance of success. Permission to appeal is therefore refused. That means the appeal will not proceed.

Neil Nawaz
Member, Appeal Division

¹² 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 the DESDA.