



Citation: *LL v Canada Employment Insurance Commission*, 2023 SST 896

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: L. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 14, 2023
(GE-22-3719)

Tribunal member: Janet Lew

Decision date: July 10, 2023

File number: AD-23-357

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, L. L. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division determined that the Claimant was late when she asked the Respondent, the Canada Employment Insurance Commission (Commission), to reconsider its initial decision on her application for Employment Insurance benefits. The General Division also determined that the Commission made its decision fairly when it refused to give her more time to ask it to reconsider its decision. As a result, the General Division found that the Commission did not have to reconsider its initial decision.

[4] The Claimant argues that the General Division failed to follow principles of procedural fairness and also made an important factual error. In particular, she says that the General Division made an error when it determined whether she had shown a continuing intention to ask the Commission to reconsider its decision. She says that the General Division failed to appreciate what the evidence represented.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

¹ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) of the *Department of Employment Social Development (DESD) Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issues

[7] The issues are as follows:

- (a) Is there an arguable case that the General Division failed to follow the principles of procedural fairness?
- (b) Is there an arguable case that the General Division overlooked or misapprehended the evidence before it?

I am not giving the Claimant permission to appeal

[8] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or certain type of factual error.³

[9] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

General background

[10] The Claimant had applied for Employment Insurance benefits in November 2021. The Commission denied her claim on February 16, 2022.⁴

[11] The Claimant asked the Commission to reconsider a decision she said it verbally made on August 17, 2022.⁵ The Claimant filed her request on September 2, 2022.⁶

³ See section 58(1) of the DESD Act.

⁴ The Commission verbally communicated its decision to the Claimant on February 15, 2022.

⁵ See Request for Reconsideration filed September 2, 2022, at GD 3-20.

⁶ In her Application to the Appeal Division, the Claimant states that she filed a request for reconsideration on August 26, 2022 (see AD 1-5), but the Request is date stamped received September 2, 2022 (see GD 3-20).

[12] Under the *Employment Insurance Act*, a claimant can ask the Commission to reconsider its decision at any time within 30 days after the day on which a decision is communicated to them, or any further time that the Commission may allow.⁷

[13] When considering a claimant's request to reconsider its decision, the Commission may allow a longer period to make a request for reconsideration of a decision if the Commission is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.

[14] The Commission acknowledged the Claimant's request for reconsideration. The Claimant made her request on September 2, 2022. The Commission understood that the Claimant was asking it to reconsider its decision of February 16, 2022.

[15] As the Claimant filed her request on September 2, 2022, the Commission determined that more than 30 days had passed since it had communicated its decision of February 16, 2022. It had been more than six months since the Commission had denied her claim.

[16] The Commission wrote that it had reviewed her reasons for the delay in seeking a reconsideration. The Commission determined that her reasons for the delay "do not meet the requirements of the *Reconsideration Request Regulations*."⁸ As a result, it refused to reconsider its decision.

Is there an arguable case that the General Division failed to follow the principles of procedural fairness?

[17] The Claimant argues that the General Division failed to follow the principles of procedural fairness.

[18] However, the Claimant has not identified any procedural errors. For instance, she does not say that the General Division failed to give her sufficient notice of the hearing,

⁷ Section 112(1)(a) and (b) of the *Employment Insurance Act*.

⁸ See Notice of Decision dated October 4, 2022, at GD 3-25.

or that it failed to provide full disclosure of documents. More importantly, she does not suggest that the General Division deprived her of the chance to fairly present her case. There is no suggestion either that the General Division member was biased.

[19] If anything, the Claimant states that Service Canada misinformed and misled her by failing to advise her that she should ask the Commission for a reconsideration of its decision. Even if that should have been the case that Service Canada might have misinformed or misled her, that is not a reflection of any procedural error by the General Division member. For an arguable case to arise, the claim of a procedural error has to be against the General Division.

[20] I am not satisfied that the Claimant has an arguable case that the General Division failed to follow the principles of procedural fairness.

Is there an arguable case that the General Division overlooked or misapprehended the evidence before it?

[21] The Claimant also argues that the General Division made a factual error. She says that the General Division overlooked or misapprehended some of the evidence.

[22] The Claimant says that she contacted Service Canada ten times from late March 2022 to August 18, 2022. She called to discuss her Employment Insurance claim. Some of her conversations lasted more than an hour.⁹

[23] The Claimant states that during each of these calls, Service Canada advised her that her claim was under review. She states that it was only in August 2022 that she learned that Service Canada had yet to review her claim. She learned that she had to ask Service Canada (the Commission) to reconsider its decision of February 15, 2022. Only then would it begin to review her claim.

⁹ See Claimant's Application to the Appeal Division – Employment Insurance, at AD 1-5.

[24] The Claimant further states that she always intended to pursue her claim for benefits. The Claimant questions why she would have continued to contact Service Canada if she did not have a continuing intention to pursue her claim.

[25] The Claimant argues the General Division should have interpreted her series of phone calls to Service Canada as evidence of her continuing intention to pursue her claim.

[26] However, the General Division's role was to firstly determine whether the Commission had acted fairly when it decided whether to give the Claimant more time to make her reconsideration request.

[27] If the General Division determined that the Commission had not acted fairly, then it could have stepped into the Commission's role and decided whether the Claimant should have been given more time to ask the Commission to reconsider its decision. Otherwise, if the General Division determined that the Commission had acted fairly, that would have ended any further role for the General Division.

[28] Unless the Commission was seen to have acted unfairly, the General Division simply did not have any authority to re-assess the facts and come to its own determination.

[29] The General Division properly outlined its role and identified the law.¹⁰ It recognized that the Commission has some discretion in deciding whether to grant an extension of time. But, as the General Division noted, in exercising its discretion, the Commission has to make its decision fairly.

[30] When it comes to making a decision fairly, the General Division has to consider certain factors. It cannot consider irrelevant ones. It has to act in good faith and act in a manner that is not discriminatory.

¹⁰ See General Division at paras 20 and 21, citing *Canada (Attorney General) v Purcell*, A-694-94.

[31] The General Division found that the Commission considered all of the relevant information that the Claimant had provided. The General Division found that this was documented in the Commission's Record of Decision.¹¹ The Commission wrote:

The requestor [the Claimant] delayed until September 2, 2022 to request a reconsideration, 169 days after being aware of the decision. The Commission considered the reasons for the delay as outlined in the claimant's statement obtained on September 29, 2022. The requestor has not provided a reasonable explanation for the delay in requesting the reconsideration because **she states her reason for delay was because she did not wish to reconsider the decision at that time and as such, it is due to her negligence and disinterest.**

The requestor has also not demonstrated a continuing intention to request said reconsideration.¹²

[32] On September 29, 2022, the Claimant reportedly told the Commission that she did not require a reconsideration before she received an amended Record of Employment.¹³ This is consistent with what the Claimant wrote in her Application to the Appeal Division. She wrote, "I have every intention to claim my [Employment Insurance] benefits when amended [Record of Employment] was issued in March."¹⁴

[33] In other words, her intention to seek a reconsideration arose after her employer amended the Record of Employment in March 2022.

[34] The Claimant says the fact that she contacted Service Canada from March to August 2022 was relevant to determining whether she held a continuing intention. So, if the Commission did not consider this fact, then she says it did not make its decision fairly. So, she suggests that the General Division should have stepped in at that point and decided whether it should have given her more time to ask the Commission to reconsider its decision.

¹¹ See General Division decision at paras 41.

¹² Record of Decision dated October 4, 2022, at GD 3-23.

¹³ Supplementary Record of Claim dated September 29, 2022, at GD 3-22.

¹⁴ Application to the Appeal Division, at AD 1-4.

[35] However, there is no indication that the Commission was aware of this evidence when it decided whether to give more time to the Claimant. The Commission decided the issue based on the documented evidence before it. So, if it did not have this evidence, it could not have possibly considered it.

[36] Even so, it is clear that the General Division determined that the Claimant had to demonstrate to the Commission that she had a continuing intention throughout—from the time that she received the Commission’s initial decision, to the time that she asked the Commission to reconsider its decision. Hence, the Claimant had to show that she had a continuing intention even before her employer amended the Record of Employment.

[37] The Claimant reportedly told the Commission that she did not require a reconsideration before she got the amended Record of Employment.¹⁵ The Commission understood from this that the Claimant did not have a continuing intention between February 16, 2022 and March 24, 2022. From this perspective then, it was irrelevant that the Claimant had contacted the Commission several times after March 24, 2022 before she filed her reconsideration request.

[38] It may be that the Claimant intended to ask the Commission to reconsider its request since it made its initial decision. She may have been waiting to confirm that her employer would amend the Record of Employment before asking for the reconsideration. In other words, the Claimant may have had a continuing intention from the outset.

[39] But, if this had been the case, there is nothing in the evidence that reasonably explains the Claimant’s delay from February 16, 2022 to March 24, 2022 in asking the Commission to reconsider its decision. The fact that the Claimant might have been waiting for an amended Record of Employment does not explain why she could not have asked for a reconsideration in the meantime.

¹⁵ Supplementary Record of Claim dated September 29, 2022, at GD 3-22.

[40] In summary, as long as the General Division satisfied itself that the Commission had made its decision fairly—by acting in good faith, by examining all the relevant factors and not considering irrelevant ones—then it could not second guess how the Commission exercised its discretion. It did so in this case.

[41] I am not satisfied that there is an arguable case that the General Division overlooked or misapprehended the evidence about her multiple phone calls with the Commission between March and August 2022. This evidence was not relevant once it became apparent that the Claimant had not shown a continuing intention even before March 2022.

Other issues: the amended Record of Employment

[42] Setting aside the issue of the Claimant's delay in seeking a reconsideration, the Claimant argues that she is entitled to Employment Insurance benefits because she was no longer working due to a shortage of work. She relies on the amended Record of Employment.

[43] Initially the Claimant's employer stated that it had placed the Claimant on a leave of absence.¹⁶ In the amended Record of Employment, the employer stated that there was a shortage of work, or that the end of the contract or season had been reached.¹⁷

[44] I am not making any determination as to the circumstances that led to the Claimant's separation from her employment, but a record of employment is not determinative of a claimant's entitlement to benefits. The Commission would have to examine all of the facts. This would include contacting a claimant's employer.

[45] In her initial discussions with the Commission, the Claimant suggested that her employer was no longer working because she had not complied with her employer's mandatory vaccination policy.¹⁸ In her Request for Reconsideration filed on September 2, 2022, the Claimant stated that her employment contract ended due to a

¹⁶ See Record of Employment dated October 26, 2021, at GD 3-14.

¹⁷ See Record of Employment dated March 24, 2022, at GD 3-18.

¹⁸ Supplementary Record of Claim dated February 15, 2022, at GD 3-16.

shortage of work.¹⁹ When the Claimant spoke with the Commission again on September 29, 2022, she referred to the amended Record of Employment. She noted that there had been a shortage of work. She also reportedly stated that the termination of her contract was employer initiated due to non-compliance with her employer's vaccination policy.²⁰

[46] The Commission would have to consider all of these factors, along with any other relevant facts. So, even if the Claimant had not been late and had been able to get an extension to request a reconsideration, the Commission would have had to investigate further. It would have had to confirm what led to the Claimant's separation from her employment.

[47] I raise this issue to let the parties know that the issues are not as straightforward as they may seem.

Conclusion

[48] I am not satisfied that the appeal has a reasonable chance of success. As a result, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

¹⁹ Request for Reconsideration, at GD 3-20.

²⁰ Supplementary Record of Claim dated September 29, 2022, at GD 3-22.